

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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DOCKET NUMBER 18-1029

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OMAR DAVIS,

Appellant,

v.

THE ADMINISTRATOR OF THE NEW JERSEY  
STATE PRISON; THE ATTORNEY GENERAL OF  
THE STATE OF NEW JERSEY,

Appellees.

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On Appeal from the United District  
Court for the District of New Jersey  
(District Court No. 3-14-cv-07797

Sat Below: Honorable Judge  
Anne E. Thompson, U.S. District Judge

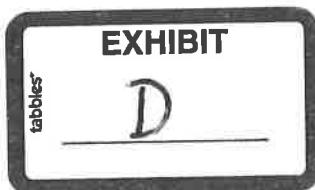
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APPELLANT'S APPENDIX

VOLUME TWO

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East Brunswick, NJ 08816  
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Attorney for Appellant  
#000731991



INDEX TO APPENDIX

VOLUME ONE

Notice of Appeal..... 1a to 21  
Opinion ..... 3a to 38a

VOLUME TWO

U.S. District Court Docket Sheets..... 39a to 43a  
Third Circuit Docket Sheets..... 44a to 45a  
Habeas Corpus Petition..... 46a to 140a  
Amended Habeas Corpus Petition..... 141a to 158a  
Brief Appealing the Denial of the PCR..... 159a to 181a

VOLUME THREE

Appendix for PCR Brief..... 182a to 502a

VOLUME FOUR

State v. Kemal Albut file ..... 503a to 580a  
Status Conference and Bail Reduction Hearing..... 581a to 589a  
PCR Oral Arguments ..... 590a to 645a

APPEAL,CLOSED,HABEAS,PLO

**U.S. District Court**  
**District of New Jersey [LIVE] (Trenton)**  
**CIVIL DOCKET FOR CASE #: 3:14-cv-07797-AET**  
**Internal Use Only**

DAVIS v. D'ILIO et al  
Assigned to: Judge Anne E. Thompson  
Case in other court: 3rd Circuit, 18-01029  
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 12/09/2014  
Date Terminated: 11/30/2017  
Jury Demand: Plaintiff  
Nature of Suit: 530 Habeas Corpus (General)  
Jurisdiction: Federal Question

**Petitioner****OMAR N. DAVIS**

represented by **OMAR N. DAVIS**  
448264/935494B  
NEW JERSEY STATE PRISON  
PO BOX 861  
TRENTON, NJ 08625  
PRO SE

V.

**Respondent****STEPHEN D'ILIO***Administrator of the New Jersey State  
Prison*

represented by **MARIO C. FORMICA**  
ATLANTIC COUNTY  
PROSECUTOR'S OFFICE  
4997 UNAMI BOULEVARD  
MAYS LANDING, NJ 08201  
609-909-7862  
Email: formica\_m@acpo.org  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Respondent****THE ATTORNEY GENERAL OF  
THE STATE OF NEW JERSEY**

represented by **MARIO C. FORMICA**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

Date Filed	#	Docket Text
12/09/2014	1	PETITION for Writ of Habeas Corpus ( Filing fee \$ 5 receipt number NEW022099.), filed by OMAR N. DAVIS. (Attachments: # 1 Cover Letter,

39 a

		# <u>2</u> Application IFP, # <u>3</u> Envelope)(eaj) (Entered: 12/15/2014)
03/05/2015	<u>2</u>	ORDER that Plaintiff's request to proceed in forma pauperis is DENIED; Ordering the Clerk of Court to Administratively Terminate this case; if Plaintiff wishes to reopen this case, he shall so notify the Court, in writing within 30 days of the date of entry of this Order with a complete, signed habeas petition.. Signed by Judge Anne E. Thompson on 2/3/2015. (eaj) (Entered: 03/05/2015)
03/05/2015		***Civil Case Terminated. (eaj, ) (Entered: 03/05/2015)
04/29/2015	<u>3</u>	Amended PETITION for Writ of Habeas Corpus, filed by OMAR N. DAVIS. (Attachments: # <u>1</u> Cover Letter, # <u>2</u> Certificate of Service, # <u>3</u> ENVELOPE)(eaj) (Entered: 04/29/2015)
04/29/2015	<u>4</u>	MOTION to Reopen Case by OMAR N. DAVIS. (Attachments: # <u>1</u> Certification, # <u>2</u> Text of Proposed Order)(eaj) (Entered: 04/29/2015)
04/29/2015		Set Deadlines as to <u>4</u> MOTION to Reopen Case. Motion set for 6/1/2015 before Judge Anne E. Thompson. The motion will be decided on the papers. No appearances required unless notified by the court. (eaj) (Entered: 04/29/2015)
04/30/2015		REOPENING CASE: The Clerk is in receipt of the re <u>3</u> Petition for Writ of Habeas Corpus filed on 04/29/2015 and hereby reopens the case for review by a Judicial Officer. (djm) (Entered: 04/30/2015)
05/05/2015	<u>5</u>	NOTICE AND ORDER advising petitioner of rights under US V. MASON and directing petitioner to advise the Court in 45 days; Granting Petitioners <u>4</u> MOTION to Reopen Case. Signed by Judge Anne E. Thompson on 5/5/2015. (eaj) Modified on 5/12/2015 (eaj, ). (Entered: 05/05/2015)
05/05/2016	<u>6</u>	ORDER TO ANSWER: Ordering the Clerk of Court to serve this Petition in accordance with the Memorandum of Understanding between this Court and the Bureau; Ordering Respondent to file a response within 45 days. Signed by Judge Anne E. Thompson on 5/4/2016. (eaj) (Entered: 05/05/2016)
05/10/2016	<u>7</u>	Letter from DAG Daniel I. Bornstein. (BORNSTEIN, DANIEL) (Entered: 05/10/2016)
05/20/2016	<u>8</u>	MOTION for Extension of Time to File Answer by STEPHEN D'ILIO, THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY. (FORMICA, MARIO) (Entered: 05/20/2016)
05/20/2016		Set Deadlines as to <u>8</u> MOTION for Extension of Time to File Answer . Motion set for 6/20/2016 before Judge Anne E. Thompson. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk's Office and does not supersede any previous or subsequent orders from the Court. (eaj) (Entered: 05/20/2016)
05/24/2016	<u>9</u>	ORDER granting <u>8</u> Respondents' Motion for Extension of Time to Answer until 8/3/2016. Signed by Judge Anne E. Thompson on 5/23/2016. (eaj)

40a

		(Entered: 05/24/2016)
07/11/2016	<u>10</u>	RESPONSE to Petition for Writ of Habeas Corpus by STEPHEN D'ILIO, THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit, # <u>6</u> Exhibit, # <u>7</u> Exhibit, # <u>8</u> Exhibit, # <u>9</u> Exhibit, # <u>10</u> Exhibit, # <u>11</u> Exhibit, # <u>12</u> Exhibit, # <u>13</u> Exhibit, # <u>14</u> Exhibit, # <u>15</u> Exhibit, # <u>16</u> Exhibit, # <u>17</u> Exhibit, # <u>18</u> Exhibit, # <u>19</u> Exhibit, # <u>20</u> Exhibit, # <u>21</u> Exhibit, # <u>22</u> Exhibit, # <u>23</u> Exhibit, # <u>24</u> Exhibit, # <u>25</u> Exhibit, # <u>26</u> Exhibit, # <u>27</u> Exhibit, # <u>28</u> Exhibit, # <u>29</u> Exhibit, # <u>30</u> Exhibit, # <u>31</u> Exhibit, # <u>32</u> Exhibit, # <u>33</u> Exhibit, # <u>34</u> Exhibit, # <u>35</u> Exhibit, # <u>36</u> Appendix, # <u>37</u> Certificate of Service) (FORMICA, MARIO) (Entered: 07/11/2016)
09/01/2016	<u>11</u>	MOTION for Extension of Time to File Pro Se Traverse by OMAR N. DAVIS. (eaj) (Entered: 09/02/2016)
09/02/2016		Set Deadlines as to <u>11</u> MOTION for Extension of Time to File Response/Reply. Motion set for 10/3/2016 before Judge Anne E. Thompson. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk's Office and does not supersede any previous or subsequent orders from the Court. (eaj) (Entered: 09/02/2016)
09/12/2016	<u>12</u>	ORDER granting <u>11</u> Motion for Extension of Time to File his Traverse by 10/21/2016. Signed by Judge Anne E. Thompson on 9/12/2016. (eaj) (Entered: 09/12/2016)
10/11/2016	<u>13</u>	Traverse by STEPHEN D'ILIO. (eaj) (Entered: 10/11/2016)
08/18/2017	<u>14</u>	Letter from OMAR N. DAVIS regarding the status of Petition. (Attachments: # <u>1</u> Envelope)(mps) (Entered: 08/24/2017)
11/30/2017	<u>15</u>	OPINION filed. Signed by Judge Anne E. Thompson on 11/30/2017. (mps) (Entered: 11/30/2017)
11/30/2017	<u>16</u>	ORDER that Grounds One, Two, Three, Four, Five, Six, and Ten of the amended petition for writ of habeas corpus are denied with prejudice. Grounds Seven, Eight, and Nine of the amended petition are denied as procedurally defaulted. The Clerk of the Court shall serve a copy of this Order and Opinion on Petitioner by regular mail and mark this matter closed. Signed by Judge Anne E. Thompson on 11/30/2017. (mps) (Entered: 11/30/2017)
01/03/2018	<u>17</u>	MOTION for Leave to Appeal in forma pauperis by OMAR N. DAVIS. (mmh) (Entered: 01/04/2018)
01/03/2018	<u>18</u>	NOTICE OF APPEAL as to <u>16</u> Order of Dismissal, <u>15</u> Opinion by OMAR N. DAVIS. Filing fee: IFP Motion pending before District Court. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (Attachments: # <u>1</u> Opinion, # <u>2</u> Order, # <u>3</u> Cover Letter, # <u>4</u> Certificate of Service)(mmh) (Entered: 01/04/2018)

41a

01/04/2018		Set Deadlines as to <u>17</u> MOTION for Leave to Appeal in forma pauperis. Motion set for 2/5/2018 before Judge Anne E. Thompson. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk's Office and does not supersede any previous or subsequent orders from the Court. (mmh) (Entered: 01/04/2018)
01/10/2018	<u>19</u>	USCA Case Number 18-1029 for <u>18</u> Notice of Appeal (USCA), filed by OMAR N. DAVIS. USCA Case Manager slc (Document Restricted - Court Only) (slc) (Entered: 01/10/2018)
01/10/2018	<u>20</u>	ORDER denying <u>17</u> Motion for Leave to Appeal in forma pauperis without prejudice. Petitioner may file an amended, signed application, including a certified six-month statement within 30 days of this Order. The Clerk shall serve a copy of this Order on Petitioner by regular mail. Signed by Judge Anne E. Thompson on 1/9/2018. (mps) (Entered: 01/10/2018)
01/24/2018	<u>21</u>	Letter from OMAR N. DAVIS requesting clarification of the <u>20</u> Order. (mps) (Entered: 01/24/2018)
01/25/2018	<u>22</u>	ORDER that the Clerk of the Court shall send Petitioner a blank in forma pauperis application for habeas cases, DNJ-Pro-Se-007-B-(Rev. 09/09). Petitioner may have an additional 30 days to submit his in forma pauperis application to the Court. The Clerk shall serve a copy of this Order and in forma pauperis form on Petitioner by regular mail. Signed by Judge Anne E. Thompson on 1/25/2018. (mps) (Entered: 01/25/2018)
01/29/2018	<u>23</u>	AMENDED MOTION for Leave to Proceed in forma pauperis on Appeal to the Third Circuit Court of Appeals by OMAR N. DAVIS. (Attachments: # <u>1</u> Affidavit, # <u>2</u> Certificate of Service, # <u>3</u> Cover Letter and Envelope)(mps) (Entered: 01/29/2018)
01/29/2018		Set Deadlines as to <u>23</u> AMENDED MOTION for Leave to Proceed in forma pauperis on Appeal to the Third Circuit Court of Appeals. Motion set for 3/5/2018 before Judge Anne E. Thompson. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk's Office and does not supersede any previous or subsequent orders from the Court. (mps) (Entered: 01/29/2018)
02/13/2018	<u>24</u>	APPLICATION to proceed IN FORMA PAUPERIS by OMAR N. DAVIS. (mps) (Entered: 02/13/2018)
02/16/2018	<u>25</u>	ORDER that Petitioner's applications to proceed in forma pauperis (ECF Nos. <u>23</u> & <u>24</u> ) are granted. The Clerk of the Court shall send a copy of this Order to the Clerk of the Court, United States Court of Appeals for the Third Circuit in reference to Civil Action No. 18-1029. The Clerk of the Court shall send a copy of this Order to Petitioner by regular U.S. mail. Signed by Judge Anne E. Thompson on 2/15/2018. (mps) (Entered: 02/16/2018)
02/16/2018		Notice to Court of Appeals re <u>25</u> Order (mps) (Entered: 02/16/2018)

92a

43a

**General Docket**  
**Third Circuit Court of Appeals**

**Court of Appeals Docket #:** 18-1029

**Docketed:** 01/10/2018

**Nature of Suit:** 3530 Habeas Corpus

Omar Davis v. Administrator New Jersey State, et al

**Appeal From:** United States District Court for the District of New Jersey

**Fee Status:** IFP

**Case Type Information:**

- 1) civil
- 2) private
- 3) civil rights

**Originating Court Information:**

**District:** 0312-3 : 3-14-cv-07797

**Trial Judge:** Anne E. Thompson, U.S. District Judge

**Date Filed:** 12/09/2014

**Date Order/Judgment:**

11/30/2017

**Date Order/Judgment EOD:**

11/30/2017

**Date NOA Filed:**

01/03/2018

**Current Cases:**

None

OMAR N. DAVIS (448264/935494B)  
 Plaintiff - Appellant

Omar N. Davis  
 [NTC Pro Se]  
 New Jersey State Prison  
 P.O. Box 861  
 Trenton, NJ 08625

v.

ADMINISTRATOR NEW JERSEY STATE  
 PRISON  
 Defendant - Appellee

Mario C. Formica, Esq.  
 Direct: 609-909-7862  
 Email: formica\_m@acpo.org  
 Fax: 609-909-7899  
 [COR NTC city/county gov]  
 Atlantic County Office of Prosecutor  
 4997 Unami Boulevard  
 P.O. Box 2002  
 Mays Landing, NJ 08330

ATTORNEY GENERAL NEW JERSEY  
 Defendant - Appellee

Mario C. Formica, Esq.  
 Direct: 609-909-7862  
 [COR NTC city/county gov]  
 (see above)

449

OMAR N. DAVIS,

Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;  
THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

01/10/2018  CIVIL CASE DOCKETED. Notice filed by Appellant Omar N. Davis in District Court No. 3-14-cv-07797. (SLC) [Entered: 01/10/2018 09:36 AM]

01/10/2018 RECORD available on District Court CM/ECF. (SLC) [Entered: 01/10/2018 09:56 AM]

02/16/2018  Notice received from district court that ifp has been granted to Appellant Omar N. Davis, filed. (KR) [Entered: 02/16/2018 03:25 PM]

03/06/2018  FOLLOW UP LETTER to Mario C. Formica, Esq. for Attorney General New Jersey and Administrator New Jersey State Prison requesting the following document(s): Appearance Form on or before 03/20/2018. (SLC) [Entered: 03/06/2018 11:15 AM]

03/06/2018  ECF FILER: ENTRY OF APPEARANCE from Mario C. Formica, Esq. on behalf of Respondent(s) Administrator New Jersey State Prison; Attorney General of New Jersey. [18-1029] (MCF) [Entered: 03/06/2018 11:39 AM]

459

**Petition for Relief From a Conviction or Sentence  
By a Person in State Custody  
(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)**

**Instructions**

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.
2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.
3. Make sure the form is typed or neatly written.
4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.
6. You must pay a fee of \$5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed in forma pauperis (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds \$ 200.00, you must pay the filing fee.
7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.
8. When you have completed the form, send the original and 1 copies to the Clerk of the United States District Court at this address:  
Clerk, United States District Court for  
Address  
City, State Zip Code
9. **CAUTION:** You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
10. **CAPITAL CASES:** If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.

46a

AO 241 (Rev. 06/13)

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

United States District Court	District: New Jersey
Name (Under which you were Convicted) Omar N. Davis	
Place of Confinement: New Jersey State Prison - P.O. Box 861 Trenton, New Jersey 08625	
Petitioner (include the name under which you were convicted)      Respondent (authorized person having custody of petitioner) Omar N. Davis      v.      Stephen M. D'Ilio, et al	
The Attorney General of the State of New Jersey	

**PETITION**

1. (a) Name and location of court which entered the judgment of conviction you are challenging:  
 Superior Court of New Jersey - Law Division - Mercer County, 209 S. Broad Street, Trenton, New Jersey 08650-0068
1. (b) Criminal docket or case number (if you know): 00-06-192
2. (a) Date of judgment of conviction (if you know): March 28, 2003  
 (b) Date of sentencing: March 28, 2003
3. Length of sentence: Life w/ 30 parole ineligibility
4. In this case, were you convicted on more than one count or of more than one crime?      Yes  No
5. Identify all crimes of which you were convicted and sentenced in this case:  
Murder and possession of a weapon for an unlawful purpose
6. (a) What was your plea? (Check one)
 

(1) Not guilty     (3) Nolo contendere (no contest)  
 (2) Guilty     (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have?  
 Jury     Judge only

47a

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes  No

8. Did you appeal from the judgment of conviction?

Yes  No

9. If you did appeal, answer the following:

(a) Name of court: Superior Court of New Jersey - Appellate Division

(b) Docket or case number (if you know): A-0058-03T4

(c) Result: Affirmed

(d) Date of result (if you know): March 30, 2004

(e) Citation to the case (if you know): Unpublished

(f) Grounds raised: (1) The Prosecutor's Improper Comments in His Opening and Summation Deprived Defendant of a Fair Trial (Not Raised Below); (2) The Admission of Testimony About Defendant's House Having Been Raided for Drugs in the Past Created a Degree of Prejudice not Curable by the Court's Limiting Instructions, and Requires Reversal; (3) The Life Sentence imposed upon Defendant for Murder was Manifestly Excessive Under all of the Applicable Circumstances; (4) The Sentence must be Vacated Because in Imposing it, the Trial Court Violated Constitutional Principles Set Forth in Blakely v. Washington, and State v. Natale; (5) The Court Erred in Failing to Merge the Charge of Possession of a Weapon for an Unlawful Purpose into the Murder Charge (Not Raised Below).

(g) Did you seek further review by a higher state court?  Yes  No

If yes, answer the following:

(1) Name of court: Supreme Court of New Jersey

(2) Docket or case number (if you know): 59,759

(3) Result: Denied

(4) Date of result (if you know): September 8, 2006

(5) Citation to the case (if you know): 180 N.J. 454; 852 A.2d 191

(6) Grounds raised: See 9(f)

(h) Did you file a petition for certiorari in the United States Supreme Court?

Yes  No

If yes, answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A

(3) Date of result (if you know): N/A

(4) Citation to the case (if you know): N/A

48a

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?  Yes  No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Superior Court of New Jersey - Mercer County, Law Division  
(2) Docket or case number (if you know): 99-07-0665  
(3) Date of filing (if you know): September 20, 2007  
(4) Nature of proceeding: Post-Conviction Relief  
(5) Grounds raised: (1) The Indictment Should Have Been Dismissed In Its Entirety (2) Defendant Was Denied The Effective Assistance Of Trial Counsel In Violation Of The United States And New Jersey Constitutions (3) The Defendant Was Deprived His Constitutional Right To Present A Defense (4) The Defendant Was Deprived His Constitutional Right To Cross-Examination (5) Defendant Was Denied The Effective Assistance Of Appellate Counsel (6) An Evidentiary Hearing Is Required With Regard To The Allegations Of Defendant's Petition For Post Conviction Relief.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?  
 Yes  No

(7) Result: Denied.

(8) Date of result (if you know): September 10, 2010.

(b) If you filed any second petition, application or motion, give the same information: N/A

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?  
 Yes  No

(7) Result: N/A

(8) Date of result (if you know): N/A

(c) If you filed any third petition, application, or motion, give the same information: N/A

(1) Name of court: N/A

49 a

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?  
 Yes  No

(7) Result: N/A

(8) Date of result (if you know): N/A

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition:  Yes  No

(2) Second petition:  Yes  No

(3) Third petition:  Yes  No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:  
Petition for Certification to New Jersey Supreme Court.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

**CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

**GROUND ONE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
 Yes  No

50 a

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

## **GROUND TWO: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

### **PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

519

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

**GROUND THREE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

52a

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

**GROUND FOUR: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Four, explain why:

**(c) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

**(d) PLEASE SEE ATTACHED**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
 Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available):

53a

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  
Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: \_\_\_\_\_

**GROUND FIVE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Five, explain why:

(c) Direct Appeal of Ground Five:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
 Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

54 a

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  
Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A.

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five:

**GROUND SIX: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Six, explain why: N/A

(c) Direct Appeal of Ground Six:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

55a

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Six:

**GROUND SEVEN: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Seven, explain why: N/A

(c) Direct Appeal of Ground Seven:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

56 a

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Seven:

**GROUND EIGHT: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Eight, explain why: N/A

(c) Direct Appeal of Ground Eight:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

57a

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_

Date of the court's decision: \_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_

Docket or case number (if you know): \_\_\_\_

Date of the court's decision: \_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Eight:

**GROUND NINE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Nine, explain why: N/A

(c) Direct Appeal of Ground Nine:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

58a

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Nine:

**GROUND TEN: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Ten, explain why: N/A

(c) Direct Appeal of Ground Ten:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

59a

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Ten:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes  No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: N/A.

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which

60a

ground or grounds have not been presented, and state your reasons for not presenting them: \_\_\_\_\_

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. N/A.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: UNKNOWN

(b) At arraignment and plea: UNKNOWN

(c) At trial: Holly J. Ford, 126 White Horse Pike, Haddon Heights, New Jersey 08035

(d) At sentencing: SAME AS 16(C)

(e) On appeal: Susan Brody, 31 Clinton Street, P.O. Box 46003, Newark New Jersey 07101

(f) In any post-conviction proceeding: A. Harold Kokes, 728 West Avenue, Suites S201-202 New Jersey 08553

(g) On appeal from any ruling against you in a post-conviction proceeding: A. Harold Kokes, 728 West Avenue, Suites S201-202 New Jersey 08553

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes  No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes  No

18. TIMELINESS OF PETITION: PLEASE SEE ATTACHED

6/9

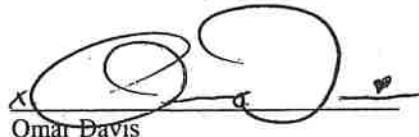
If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.<sup>1</sup>

Therefore, petitioner asks that the Court grant the following relief: or any other relief to which petitioner may be entitled.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on DECEMBER 4TH 2014

Executed on DECEMBER 4TH 2014

  
Omar Davis

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition N/A

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<sup>1</sup> The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:
  - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
  - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
  - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
  - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.



Omar N. Davis v. Stephen D'Ilio, et. al.  
Case No. \_\_\_\_\_

Attachments

**9.(f) Grounds Raised:** (1) The Prosecutor's Improper Comments in His Opening and Summation Deprived Defendant of a Fair Trial (Not Raised Below); (2) The Admission of Testimony About Defendant's House Having Been Raided for Drugs in the Past Created a Degree of Prejudice not Curable by the Court's Limiting Instructions, and Requires Reversal; (3) The Life Sentence imposed upon Defendant for Murder was Manifestly Excessive Under all of the Applicable Circumstances; (4) The Sentence must be Vacated Because in Imposing it, the Trial Court Violated Constitutional Principles Set Forth in Blakely v. Washington, and State v. Natale; (5) The Court Erred in Failing to Merge the Charge of Possession of a Weapon for an Unlawful Purpose into the Murder Charge (Not Raised Below).

**11.(a)(5) Grounds Raised:** (1) Trial Counsel did not Retain nor have Petitioner Evaluated by a Psychiatrist or Psychologist for Potential Defense of Voluntary Intoxication or Passion/Provocation; (2) Trial Counsel did not Retain an Expert for Defense of Voluntary Intoxication; (3) Trial Counsel did not Retain any Expert for defense of Passion/Provocation; (4) Trial Counsel did not Object to the State's Request for a Flight Charge; (5) Petitioner was Never Advised of the Sentence He was Facing, if He went to Trial and was Convicted. If Petitioner had been so Advised, He Would have Entered into Meaningful Plea Discussion with the State; (6) Petitioner was Denied Effective Assistance of Counsel when His Attorney Failed to Object to the Admission of Evidence Obtained in Violation of Petitioner's Fifth Amendment Right to Remain Silent; (7) Petitioner argues that the State Purposely Created the Initial Mistrial Because Petitioner Believes the State Knew the Contents of Detective Hires' Improper Testimony Before Same Improper Testimony was Elicited; (8) Petitioner Argues that Detective Hires' Inability to Testify at the Second Trial was not Supported by sufficient Medical Documentation. The Trial Court's Determination that Detective Hires' was Medically Excused from Testifying at the Second Trial Violated Petitioner's Right to Confront and Cross-Examine His Accuser (Detective Hires); (9) (a) Even if the Court Finds that Each of the Above Points, Individually, is not Sufficient Evidence of a "Prima Facie" Finding that Requires that Petitioner is Entitled to an Evidentiary Hearing, the Cumulative Effect of same Errors Should Compel the Court to Grant same Evidentiary Hearing, (b) Petitioner was Denied Effective Assistance of Counsel when His Attorney Failed to have Petitioner Evaluated, Retain an Expert for Voluntary Intoxication, Retain any Expert, whatsoever, for Passion/Provocation and Object to the Flight Charge; (10) The Inadequate Representation the Petitioner Received at Trial Fell Below an Objective Reasonable Standard thus Violating His Rights to Effective Assistance of Counsel Under the United States and New Jersey Constitutions, (a) Trial Counsel's Failure to Investigate Whether a Psychologist or Psychiatrist would have Offered a Opinion of Petitioner's Legal Insanity Served to Deny Petitioner of Effective Assistance of Counsel, (b) Trial Counsel was Ineffective in Her Assistance Through Her Failure to Thoroughly Pursue and Present an Passion Provocation Defense, (c) The Ineffective Assistance Offered by Trial

1 63a

Counsel Plagued Petitioner's Trial with Prejudice; (11) Trial Counsel was Ineffective for Her Failure to Object to the Trial Court's "Flight" Charge which was Incorrect and not Supported by any Evidence, Thereby Denying Petitioner's Due Process of Law and a Fair Trial.

**GROUND ONE:** The Prosecutor's Improper Comments in His Opening and Summation Violated the Petitioner's Right to a fair Trial.

In his opening statement, the prosecutor not only announced to the jury that he would not be presenting fingerprints evidence or bloody clothes, but gave a dissertation as to why the jury should forget about wanting to see such evidence:

You'll hear about some evidence connecting the Petitioner and his family to the gun. And you're also going to hear from some experts from the State Police Lab and the DNA expert from a private lab, but I just want you to forget - maybe what you heard on t.v. and all about fingerprints evidence and things like that because you're not going to be hearing that. You're not going to be hearing that the Petitioner's fingerprints were all over everything, the gun and the car because you're going to hear that that's really a rarity in cases that you do have that at a crime scene, and you're going to be hearing from a fingerprint expert who will tell you that.

So, you know, don't be looking for all kinds of prints over everything because we're just not going to have it.

And don't be looking for, well, his fingerprints were on the clothes, all these bloody clothes the defendant had on and the victim's blood would be on those clothes because you're not going to have that either. And you're going to have that either. And you're going to hear testimony about that, and bear in mind also that any clothes that the defendant did turn over to the police wasn't done for almost two days till after the homicide. Because as I said, the homicide took place in the early morning hours of Saturday about ten-of-three. And the first time the police have any contact with the defendant is Sunday night. (4T 252 to 26-2).

It is one thing for a prosecutor to alert the jury to a lack of forensic evidence in the case he is about to present, and quite frankly another thing for him to disparage the importance of such evidence and tell the jury to forget about its absence because the introduction of such evidence only occurs on television shows, not in the real world.

The prosecutor's misconduct did not stop there. At the end of the trial, he concluded his summation with a flourish: you find him guilty of murder because the facts supports it, and justice demands it, and it's a verdict you won't regret. (14T 149-1 to 3).

This improper remark was the prosecutor's indirect way of advising the jury that, in his own personal opinion, a guilty verdict would be the correct resolution of the case.

64a

The prosecutor's comments in his opening statements strongly suggested to the jury that he was in the position to advise them, based on his own professional experience and/or personal knowledge, that the public has been misled by television crime shows into believing that fingerprints evidence is important, whereas in reality such evidence is by and large irrelevant to criminal cases.

Although, trial counsel did not object to either the prosecutor's opening remarks or his summation, the court's permitting those remarks to stand, without any effort at judicial corrections, constituted plain error.

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

**GROUND TWO:** The Admission of Testimony About The Petitioner's House Having been Raided for Drugs in the Past Created a Degree of Prejudice not Curable by the Court's Limiting Instructions.

An Atlantic City Police Officer, Madeline Barefield, testified about her interviews of the Petitioner's parents and brother on the morning of April 8. During cross-examination by trial counsel about statements made by Hatie Davis, the following dialogue took place:

**Q:** So she told you she had a bunch of guns?

**A:** She - there were other weapons that belonged to one [of] the other sons. She said the house was raided by the police for drugs, and they seized whatever handguns they had there. (6T 108-8 to 12).

Trial counsel objected and moved for a mistrial. (6T 108-17 to 24). The Court denied the motion (6T 110-6 to 10), but gave the jury a preliminary curative instruction to disregard that portion of the testimony at this point. . . . until you hear further argument, the court instructed the jury more definitively to disregard the testimony about a drug raid. (6T 120-20 to 121-9). In its final instructions, the Court again reminded the jury that any remarks stricken from the record during trial were to be disregarded during deliberations. (15T 4-19 to 24).

Despite the limiting instructions, the testimony about the Petitioner's house having been raided for drugs was so powerfully prejudicial that it had the clear capacity to affect the outcome of the trial.

Although, most of the testimony at trial regarding drug dealing at the Petitioner's house were focused on the Petitioner's brother Jamal. But Brian Sleister testified that, although Jamal Davis was his regular supplier of cocaine, he had on occasion bought cocaine from the Petitioner instead. (11T 63-2 to 10). This testimony could only have reinforced the idea in the juror's minds that the Petitioner was a cocaine dealer whose activities were so notorious that the police had been able to obtain a search warrant for his house.

Of course, there was no dispute that the testimony in question was inadmissible; it was not deliberately elicited by the prosecutor, but was volunteered by a State's witness in answer unresponsive to the question being asked of her on cross-examination.

The testimony was potentially devastating because it not only had negative connotations with regards to the petitioner himself, but also indirectly corroborated Brian Sleister's testimony about Jamal's having been his cocaine supplier. Because Jamal denied having ever sold cocaine to Sleister (13T 31-7 to 33-16), his credibility was pitted against Sleister's in this regard. The inadmissible 404(b) testimony tipped the credibility balance toward Sleister and, thus, detracted from Jamal's credibility with regard to not only this issue, but all others about which he offered testimony and, because Jamal was the Petitioner's brother, the testimony would have reflected adversely (though indirectly) on the Petitioner's credibility as well.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

679

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

**GROUND THREE:** Trial Counsel's Failure to Investigate Whether a Psychologist or a Psychiatrist Would have Offered an Opinion of Petitioner's Legal Insanity Served to Deny Petitioner of Effective Assistance of Counsel.

Trial counsel had ample evidence that the Petitioner, at the time of the alleged offense, was intoxicated due to his consumption of both alcohol and Marijuana. The State witness Jackie Davis testified to the following:

**Q.** Now, when he came over then 2:30, what was his mood like? How was he acting?

**A.** He was, like, nervous. (ST 32-11 to 13).

**Q.** When he first came to see you at 2:3, what did --

**A.** He was -- when he first came he wanted some Marijuana (ST 32-16 to 17).

**Q.** And does that refresh your recollection as to why the defendant told you he shot the guy?

**A.** He said he was at the bar and he had a drink (ST 44-14).

**Q.** Okay, was Mr. Davis intoxicated at the time he came to your house the second time?

**A.** Yes.

**Q.** How do you know that?

**A.** Because I could smell it on his breath.

**Q.** Had you ever seen him intoxicated before?

**A.** Yes.

**Q.** Was he acting the same way?

**A.** Uhm. . . . not that night he came over. (ST 72-6 to 24).

**Q.** Yes, what's your testimony? You want to change your testimony?

**A.** He told me he shot three times, then he said he blacked out, and he said the next thing he knew five shot went off. (ST 85, 22 to 24) (ST 125, 16 to 18).

In spite of this evidence, trial counsel failed to produce witness testimony, expert or otherwise, with which to present an intoxication defense.

Trial counsel had the option, to simply obtain the opinion of a psychiatrist, medical doctor or a pharmacologist to testify as to the effects of marijuana and alcohol. Despite trial counsel's decision to present, in any meaningful manner, an intoxication defense in lieu of an insanity defense, she failed to obtain any such expert opinion. This failure was a serious omission by trial counsel; aside from the obvious nature of the option to consult an illegal drug expert, trial counsel was also informed through testimony of Donna Lyons, the Petitioner's demeanor appeared to be a bit nervous, while pacing back and forth. (5T 152, 1 to 8).

Trial counsel's failure to pursue the testimony of an illegal drug expert in light of these facts constitutes ineffective assistance of counsel. Although trial counsel made a cursory exploration into the Petitioner's insanity defense. (10T 23-23 to 10T 24-1 to 9), she nonetheless failed to take an "obvious and readily available investigatory steps which would have made the defense viable" by pursuing any meaningful investigation into an intoxication defense or by raising any other plausible defense.

The Petitioner's jury was only given a scant indication that the defense was claiming intoxication. As the Petitioner testified in his defense that he had consumed several shots of alcohol (13T 57-1 to 2; 13T 5-16 to 20), and smoked large cigars type blunts filled with marijuana (13T 67-6 to 13T 68-2). Yet, no information was provided with regards to marijuana or its effects. Furthermore, jurors learned nothing on the effects of alcohol on the Petitioner's mental condition, and were afforded no evidence of the number of large cigar filled with marijuana he had consumed; in fact, none of the evidence proffered served to confirm the number consumed. Aside from a brief assertion in trial counsel's closing arguments, where she stated:

"He just lost his mind." Omar was intoxicated (14T 117-7 to 8). Finally, trial counsel summed up her intoxication argument by stating "[J]ackie Davis. A subsequent conviction for selling drugs, marijuana. Not a surprise, Omar told you that he brought it from him." (14T 121-13 to 15).

The stipulation comprised the entire basis for defense counsel's partial defense of voluntary intoxication. The Petitioner also testified that he had been abusing marijuana for some time and had consumed almost an half ounce of the drug the night in question (13T 77-7 to 8; 13T 93-3 to 5).

Mid-way through the Petitioner's testimony, trial counsel decided to request an intoxication and diminished capacity as to the trial court's final charge to the jury (13T 137-4 to 13T 139-15), the trial judge requested an explanation (13T 139-16 to 18), to which counsel could not explain (13T 139-19 to 13T 140-25). The request was exceedingly vague, and could hardly have been considered reliable evidence. This weak presentation, coupled with the lack of a testifying expert witness, amounted to a trial in which counsel failed to present even a partial defense.

This approach hardly qualifies as a reasonable tactical decision, especially in light of counsel's knowledge far in advance of trial that there was evidence indicating the Petitioner's ingestion of a large quantity of marijuana.

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

**GROUND FOUR:** Trial Counsel was Ineffective in Her Assistance Through Her Failure to Thoroughly Pursue and Present an Passion/Provocation Defense.

The focal point of the State's case was the testimony of Tutis, Jackie Davis, Donna and Calief Lyons. In their testimony each witness indicated that the Petitioner was robbed of a radio and some money (5T 44-12 to 5T 45-11; 5T 155-22 to 156-1; 6T 12-2 to 25), was being bullied by the "Big Guy" Rhama (5T 114-2 to 9; 5T 155-13 to 16; 6T 13-1 to 13) and had scratches on his face (5T 81-18 to 82-21; 5T 159-23 to 160-17; 6T 24-2 to 24).

Because the state relied on this testimony in proving that the Petitioner possessed the requisite mental state for a conviction of an intentional murder, effective cross-examination of these witnesses was crucial to the petitioner's defense. Given the more than curious disparity between the testimony, trial counsel had a duty to demonstrate to the trial court and jury, that a rational basis existed to support a crime of passion/provocation manslaughter, but she did not.

The Petitioner was severely beaten and robbed of a radio and some money by the over 300 pound deceased. At the time of the Petitioner's first interview, the detective observed the scars on Petitioner's face (10T 36-16 to 19). The severity of the beating coupled with the petitioner committing the crime at least ten minutes later, which was revealed through the testimony of Juanita Tutis, "that the Petitioner and the deceased was last seen at the bar at a Quarter to three, 2:45 (4T 82-10 to 15). Also, through the testimony of Officer Bevenese who testified on direct examination by the State consisted with his report that a call was placed of shots fired at 2:52 (4T 115-8 to 25)." The strong support for the contention that this was a crime resulting from passion/provocation and therefore was manslaughter and not murder. Therefore, trial counsel failure to secure the Petitioner a jury instruction on manslaughter was ineffective.

Trial counsel was also faced with the testimony of expert Sharon Freck-Tootell, whom indicated that Petitioner's blood stains were found on his jeans (6T 159-14 to 18). This testimony could have been used to show that the Petitioner bleed as result of the battery. This report was given to trial counsel as early as June 21, 2001 (6T 151-3 to

6). It reasonable that trial counsel should have taken the opportunity to cross-examine the State's witness to complement that of expert Tootell, or at a minimum, the glaring opportunity to request a charge of passion/provocation.

Furthermore, there was ample evidence that should have flagged the possibility of an passion/provocation defense. Officer Bevenese testified on direct examination that when he arrived on the scene, the deceased pants were pulled down and shirt had started to roll over his head (4T 120-20 to 25), thus suggesting a sign of a continuous struggle.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No  
(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No  
(4) Did you appeal from the denial of your motion or petition?  Yes  No  
(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No  
(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

**GROUND FIVE:** Trial Counsel was Ineffective for Failing to Object to the Trial Court's "Flight" Charge Which was Incorrect and Not Supported by Any Evidence, Thereby Denying Petitioner His Due Process of Law and a Fair Trial.

Before the end of trial testimony, a preliminary charge conference was held during which the trial judge informed both counsels that he intended to charge "Flight" (14T 7-4 to 8). Trial counsel requested to reserve in order to take a look at the model charge on flight (14T 8-4 to 7). The trial judge offered and read the model jury charge on flight into the record (14T 8-8 to 10-6), trial counsel did not object (14T 10-7 to 8) and the charge regarding flight was later read to the jury (15T 28-4 to 25).

There was no evidence that the Petitioner fled, much less fled to "avoid apprehension." The arresting, Detective Dooley, specifically acknowledged that the Petitioner voluntarily came in and consented to be interviewed on two separate occasions (10T 21-11 to 24), was very cooperative and provided a twenty-nine page statement (10T 23-9 to 23), and offered to make himself available in the future if needed (10T 24-6 to 21). Moreover, the fact that the petitioner left the area after the homicide were complete cannot constitute "Flight," since that would men that flight would be present in virtually every case.

The prejudice of the unsupported instruction was twofold. First, the trial court wrongly told the jurors that there "has been some testimony in this case from which you may infer that the [Petitioner] fled the area shortly after the alleged commission of the crime (15T 28-4 to 6). As indicated, the evidence essentially showed the opposite - that the Petitioner made himself available to the authorities whenever requested. Secondly, the instruction was prejudicial because it improperly focused the jury's attention on "consciousness of guilty" which was not a legitimate issue in the case and which unduly distracted the jury from full consideration of the defense.

(b) If you did not exhaust your state remedies on Ground Five, explain why:

(c) **Direct Appeal of Ground Five:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five:

**GROUND SIX:** The Petitioner Was Never Advised of the Sentence He was Facing; If He went to Trial, which Violated His Due Process.

The State could not locate any of the records of the Petitioner being advised of the sentence he was facing, if he chose to go to trial and the Court never held a hearing to afford the Petitioner the same protections afforded to Him under the 14th Amendment of the U.S. Constitution and under the New Jersey Constitution.

(b) If you did not exhaust your state remedies on Ground Six, explain why:

(c) **Direct Appeal of Ground Six:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Six:

**GROUND SEVEN:** Petitioner as Denied Effective Assistance of Counsel when Trial Counsel Failed to Object to the Admission of Evidence Obtained in Violation of the Petitioner's Fifth Amendment Right to Remain Silent.

After being arrested, the Petitioner was interrogated on numerous occasions after saying he wanted to remain silent. The police continued to interrogate Him and the information obtained during the second interrogation was improperly obtained. Yet, trial counsel failed to object to its admittance into the Petitioner's trial.

(b) If you did not exhaust your state remedies on Ground Seven, explain why:

(c) **Direct Appeal of Ground Seven:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Seven:

**GROUND EIGHT:** The State Purposely Created the Initial Mistrial Because the State Knew the Content of Detective Hires' Improper Testimony Before Same Improper Testimony was Elicited, Which Violated the Petitioner's Right to a Fair Trial and His Rights to Due Process under the 14th Amendment of the U.S. Constitution.

The Petitioner argues that the State created the initial mistrial because Petitioner believes the State knew the content of Det. Hires' improper testimony before the same improper testimony was elicited. (Trial transcript, September 26, 2002, P. 78, L. 1 to P. 168, L. 17).

(b) If you did not exhaust your state remedies on Ground Eight, explain why:

(c) **Direct Appeal of Ground Eight:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Eight

**GROUND NINE:** Petitioner's Right to Confront and Cross-Examine His Accuser was Violated when Detective Hires was Medically Excused from testifying at the Petitioner's Second Trial and His Absence was not Supported by Medical Documentation and Trial Counsel was Ineffective for Allowing to His Previous testimony read into the Record.

The Petitioner argues that Detective Hires inability to testify at the second trial was not supported by sufficient medical documentation and trial counsel's agreement to stipulate to portions of Detective Hires' prior testimony and letting the same be read into the record.

(b) If you did not exhaust your state remedies on Ground Nine, explain why:

(c) **Direct Appeal of Ground Nine:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Nine:

**GROUND TEN: Appellate Counsel Was Ineffective**

On direct appeal, appellate counsel did not present any of the grounds outlined above in this petition. The Supporting Facts to each of these grounds are adopted by reference herein.

(b) If you did not exhaust your state remedies on Ground Ten, explain why:

(c) **Direct Appeal of Ground Ten:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: This claim by definition could not be raised on direct appeal..

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014.

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Ten:

18. **TIMELINESS OF PETITION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitation as contained in 28 U.S.C. §2244(d) does not bar your petition.\*

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\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. §2254(d) in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:
  - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
  - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
  - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
  - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The Supreme Court of New Jersey denied petitioner's direct appeal petition for certification on September 8, 2006. No petition for a writ of certiorari was filed and petitioner's judgment became final on December 28, 2006. On January 7, 2007, petitioner filed a state petition for post-conviction relief. The PCR petition was denied on October 30, 2012. On October 23, 2013 the Appellate Division affirmed the denial of the PCR. A petition for

certification of the Appellate Division's judgment affirming the denial of post-conviction relief was denied on September 9, 2014. The federal 1-year time limit was thus tolled from January 7, 2007 until September 9, 2014. The present federal petition being filed on December 4<sup>th</sup>, 2014, is therefore timely.

SUPREME COURT OF NEW JERSEY  
C-60, September Term 2006  
59,759

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ON PETITION FOR CERTIFICATION

OMAR N. DAVIS,

Defendant-Petitioner.

*Brody*

FILED

SEP 08 2006

*Stephen W. Tamm*

*MEB*

To the Appellate Division, Superior Court:

A petition for certification of the judgment in

A-58-03 having been submitted to this Court, and the Court having  
considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at  
Trenton, this 6th day of September, 2006.

The foregoing is a true copy  
of the original on file in my office.

*Stephen W. Tamm*  
CLERK OF THE SUPREME COURT

*Stephen W. Tamm*  
CLERK OF THE SUPREME COURT  
OF NEW JERSEY

82a

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1511-12T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OMAR N. DAVIS,

Defendant-Appellant.

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Argued October 8, 2013 – Decided October 23, 2013

Before Judges Fisher, Koblitz and O'Connor.

On appeal from Superior Court of New Jersey,  
Law Division, Atlantic County, Indictment  
No. 00-06-1292.

A. Harold Kokes argued the cause for  
appellant.

Mario C. Formica, Special Deputy Attorney  
General/Acting Assistant Prosecutor, argued  
the cause for respondent (James P. McClain,  
Acting Atlantic County Prosecutor, attorney;  
Mr. Formica, on the brief).

PER CURIAM

Defendant Omar N. Davis appeals from the October 30, 2012  
denial of his petition for post-conviction relief (PCR) without  
an evidentiary hearing. We affirm.

83a

RECEIVED OCT 23 2013

After an initial mistrial due to the improper testimony of a police witness, a jury convicted defendant of first-degree murder of Raamah Huggins-El, N.J.S.A. 2C:11-3a(1)(2), and possession of a shotgun for an unlawful purpose, N.J.S.A. 2C:39-4a. Defendant was sentenced to life imprisonment with thirty years parole ineligibility for the murder conviction and a concurrent ten-year term for the weapons conviction. We affirmed on direct appeal. State v. Davis, Docket No. A-0058-03 (App. Div. April 19, 2006). As we indicated in that opinion, defendant shot the victim several times with a shotgun. He was convicted largely on the basis of circumstantial evidence and his incriminating statements to others. Defendant testified on his own behalf, denying his guilt and indicating his whereabouts away from the crime scene on the night of the shooting.

On appeal defendant raises the following issues:

POINT I: THE LOWER COURT ERRED IN DENYING PETITIONER'S POST-CONVICTION RELIEF APPLICATION WITHOUT SCHEDULING AN EVIDENTIARY HEARING.

POINT II: THE LOWER COURT ERRED IN DENYING PETITIONER'S REQUEST THAT THE RECORD REMAIN OPEN PENDING THE STATE'S SUPPLYING AN OFFICIAL TRANSCRIPT OF THE NOVEMBER 7, 2001 PROCEEDINGS.

POINT III: THE LOWER COURT ERRED IN REFUSING TO SHIFT THE BURDEN TO THE STATE IN LIGHT OF PETITIONER'S UNREBUTTED SUBMISSIONS

THAT NO MEANINGFUL PRETRIAL CONFERENCE, WHATSOEVER, OCCURRED.

POINT IV: THE LOWER COURT ERRED IN FAILING TO REQUIRE THE STATE TO COMPEL THE PRESENCE OF PETITIONER'S FORMER TRIAL COUNSEL, NOW PENNSYLVANIA TRIAL JUDGE HOLLY FORD.

POINT V: THE LOWER COURT ERRED IN ITS FAILURE TO FIND ANY INEFFECTIVE ASSISTANCE OF COUNSEL, WHATSOEVER; INCLUDING, BUT NOT LIMITED TO, FORMER TRIAL COUNSEL'S (1) NOT HAVING PETITIONER EVALUATED; (2) NOT RETAINING ANY EXPERTS, WHATSOEVER, FOR EITHER VOLUNTARY INTOXICATION OR PASSION/PROVOCATION "AND" (3) FAILURE TO OBJECT TO THE FLIGHT CHARGE.

POINT VI: PETITIONER ARGUES THAT THE STATE PURPOSELY CREATED THE INITIAL MISTRIAL BECAUSE PETITIONER BELIEVES THE STATE KNEW THE CONTENT OF DET. HIRES' IMPROPER TESTIMONY BEFORE SAME IMPROPER TESTIMONY WAS ELICITED.

POINT VII: PETITIONER ARGUES THAT DET. HIRES' INABILITY TO TESTIFY AT THE SECOND TRIAL WAS NOT SUPPORTED BY SUFFICIENT MEDICAL DOCUMENTATION. THE TRIAL COURT'S DETERMINATION THAT DET. HIRES WAS MEDICALLY EXCUSED FROM TESTIFYING AT THE SECOND TRIAL VIOLATED PETITIONER'S RIGHT TO CONFRONT HIS ACCUSER (DET. HIRES), AND PETITIONER'S TRIAL COUNSEL'S STIPULATION THAT CERTAIN PORTIONS OF DET. HIRES' TESTIMONY BE READ INTO THE RECORD IS FURTHER EVIDENCE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

POINT VIII: EVEN IF THE COURT FINDS THAT EACH OF THE ABOVE POINTS, INDIVIDUALLY, IS NOT SUFFICIENT EVIDENCE OF A "PRIMA FACIE" FINDING THAT REQUIRES THAT PETITIONER IS ENTITITLED TO AN EVIDENTIARY HEARING, THE CUMULATIVE EFFECT OF SAME ERRORS SHOULD COMPEL THE COURT TO GRANT SAME EVIDENTIARY HEARING.

A deprivation of the constitutional right to effective assistance occurs when: (1) an attorney provides inadequate representation and (2) that deficient performance causes the defendant prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42, 57-58 (1987).

In cases brought by a defendant who has entered a guilty plea, the first prong is met where the defendant can show that counsel's representation fell short of the guarantees established by the Sixth Amendment. State v. Parker, 212 N.J. 269, 279 (2012) (citing Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). The second component is shown by establishing a reasonable probability that the defendant would not have pled guilty, but for his counsel's errors. Id. at 279-80 (citations omitted).

In order to prevail on a claim of ineffective assistance of counsel, a petitioner may need to rely on facts outside of the trial record to prove constitutionally deficient representation. The trial court is vested with discretion under Rule 3:22-10 to conduct an evidentiary hearing to determine additional facts surrounding counsel's trial representation as well as to elicit the attorney's testimony. State v. Preciose, 129 N.J. 451, 462 (1992). However, the trial court should hold an evidentiary

hearing only "if a defendant has presented a prima facie claim in support of [PCR]." Ibid. In order to establish a prima facie case, defendant must demonstrate "the reasonable likelihood of succeeding under the test set forth in Strickland v. Washington. . . ." Id. at 463. When determining whether defendant has set forth a prima facie case, the court will view the factors in a light most favorable to the defendant. Id. at 462. See also State v. Cummings, 321 N.J. Super. 154, 169-71 (App. Div.), certif. denied, 162 N.J. 199 (1999).

Defendant's central contention is that his defense counsel did not communicate the State's plea offer to him, nor inform him of his sentence exposure if he were convicted at trial. In support of this position he offers only his own sworn statement. Defendant did not supply a certification from defense counsel, who he indicates is now a judge in Pennsylvania, nor a certification from the assistant prosecutor. Defendant's claim is not supported in any way by the record.

The transcript of the November 7, 2001 pre-trial status conference, provided for the first time by defendant on appeal, references the fact that the State made an initial offer to defense counsel.<sup>1</sup> During the status conference, the assistant

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<sup>1</sup> This transcript was not submitted to the PCR court and we would therefore not ordinarily consider it. R. 2:5-4(a). We have (continued)

prosecutor explained that "the State has made a proffered - a tentative offer in this case which we discussed with counsel, and my understanding is that there really isn't a meeting of the minds [] close to resolving along the terms proposed by the State." Defendant argues that he may not have been present at that conference, and that the State has the burden of producing proof that he was informed of a plea offer. To the contrary, the burden rests on defendant. State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Preciose, supra, 129 N.J. at 459).

On appeal, defendant relies primarily on State v. Taccetta, 200 N.J. 183 (2009). In Taccetta, the trial court granted the defendant's PCR based on a judicial finding of ineffective assistance of counsel due to trial counsel's failure to inform the defendant of the sentencing consequences. Id. at 185. Our Supreme Court determined as a matter of law that the defendant was "legally disabled from taking a plea offer" because he maintained his innocence. Id. at 195. Similarly, here defendant maintained his innocence throughout the trial and sentencing and cannot now argue he would have taken a favorable plea.

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(continued)

read the transcript because the State does not object to our consideration and the transcript sheds some light on defendant's likely awareness of a plea offer.

Defendant's remaining arguments are without sufficient merit to require discussion in a written opinion. R. 2:11-3(e)(2). We add only the following comments. Defendant supplied only selected portions of the trial transcript. A defendant must do more than make "bald assertions" that he was denied effective assistance of counsel; he must allege specific facts sufficient to demonstrate counsel's alleged substandard performance. Cummings, supra, 321 N.J. Super. at 170. Here, defendant failed to set forth any facts whatsoever that indicate trial counsel's failure to hire an expert to demonstrate intoxication or the passion/provocation defense was substandard. Defendant's asserted defense at trial, that he did not shoot the victim, makes intoxication and passion/provocation irrelevant.

Defendant also raises in Points VI and VII that trial errors were made. These claims of trial error will not be considered because they were not raised before the PCR judge. R. 2:10-2 (we will disregard claims of error by the trial court that were not properly preserved for appeal or brought to the attention of the trial court unless the error is capable of producing an unjust result). More importantly, these arguments should have been raised on direct appeal and thus cannot be raised in a PCR petition. R. 3:22-4(a)(1).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

A-1511-12T2

89a<sup>7</sup>

SUPREME COURT OF NEW JERSEY  
C-16 September Term 2014  
073632

STATE OF NEW JERSEY,

PLAINTIFF-RESPONDENT,

v.

ON PETITION FOR CERTIFICATION

OMAR N. DAVIS,

DEFENDANT-PETITIONER.

FILED

SEP - 9 2014

*Mark Neary*  
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-001511-12 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 3rd day of September, 2014.

*Mark Neary*  
CLERK OF THE SUPREME COURT

The foregoing is a true copy  
of the original on file in my office.

*Mark Neary*  
CLERK OF THE SUPREME COURT  
OF NEW JERSEY

90a

TRUST ACCOUNT STATEMENT

STATEMENT DATE: 05/14/2014 - 06/13/2014

SBI #: 000935494B Name: DAVIS, OMAR N DOB: 02/04/1976  
LOCATION: NJSP-WEST-2 LEFT-2 TIER-CELL 104 INM# 448264

TRANSACTION DESCRIPTIONS 2101 SPENDABLE SUB ACCOUNT

DATE	LOCATION	TYPE	TRANSACTION DESCRIPTION	BEGINNING BALANCE:	TRANSACTION AMT	BALANCE
05/14/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 30 @2.00 04/30/2014	04/01/2014-	60.00	60.44
05/14/2014	NJSP	DED	\$15 DEDUCTION-DISCRETIONARY SPENDING RESERVE PER 10A.		(15.00)	45.44
05/14/2014	NJSP	ADD	\$15 DEDUCTION-DISCRETIONARY SPENDING RETURN PER 10A.		15.00	60.44
05/15/2014	NJSP	POS	POSTAGE 5/13/14		(1.61)	58.83
05/15/2014	NJSP	POS	POSTAGE 5/13/14		(5.32)	53.51
05/16/2014	NJSP	LC	LEGAL COPIES 5/14/14		(11.60)	41.91
05/19/2014	NJSP	CRS	COMMISSARY SALE - ORD #7350214		(41.89)	0.02
06/12/2014	NJSP	JPAY	AUTOPAYMENT: JPAY SETOFF_CODE:35701105		50.00	50.02
06/12/2014	NJSP	DED	\$15 DEDUCTION-DISCRETIONARY SPENDING RESERVE PER 10A.		(15.00)	35.02
06/12/2014	NJSP	ADD	\$15 DEDUCTION-DISCRETIONARY SPENDING RETURN PER 10A.		15.00	50.02
06/12/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 31 @2.00 05/31/2014	05/01/2014-	62.00	112.02

9/9

COIMOCK

DEPARTMENT OF CORRECTIONS  
NEW JERSEY STATE PRISON

OTRTASTA

## TRUST ACCOUNT STATEMENT

STATEMENT DATE: 06/12/2014 - 07/14/2014

SBI #: 000935494B

Name: DAVIS, OMAR N

DOB: 02/04/1976

LOCATION: NJSP-WEST-2 LEFT-2 TIER-CELL 104

INM# 448264

## TRANSACTION DESCRIPTIONS 2101 SPENDABLE SUB ACCOUNT

DATE	LOCATION	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
			BEGINNING BALANCE:		0.02
06/12/2014	NJSP	JPAY	AUTOPAYMENT: JPAY SETOFF_CODE:35701105	50.00	50.02
06/12/2014	NJSP	DED	\$15 DEDUCTION-DISCRETIONARY SPENDING RESERVE PER 10A.	(15.00)	35.02
06/12/2014	NJSP	ADD	\$15 DEDUCTION-DISCRETIONARY SPENDING RETURN PER 10A.	15.00	50.02
06/12/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 31 @2.00 05/01/2014-05/31/2014	62.00	112.02
06/19/2014	NJSP	CRS	COMMISSARY SALE - ORD #7390394	(68.72)	43.30
06/20/2014	NJSP	CRS	COMMISSARY SALE - ORD #7394488	(40.51)	2.79
06/23/2014	NJSP	COPL	LEGAL COPIES LOAN	20.01	22.80
06/23/2014	NJSP	LC	LEGAL COPIES 6/19/14	(22.80)	0.00
06/25/2014	NJSP	LGLML	LEGAL MAIL LOAN	2.87	2.87
06/25/2014	NJSP	POS	POSTAGE 6/19/14	(2.87)	0.00
06/25/2014	NJSP	LGLML	LEGAL MAIL LOAN	2.87	2.87
06/25/2014	NJSP	POS	POSTAGE 6/19/14	(2.87)	0.00
06/25/2014	NJSP	LGLML	LEGAL MAIL LOAN	2.87	2.87
06/25/2014	NJSP	POS	POSTAGE 6/19/14	(2.87)	0.00
06/25/2014	NJSP	LGLML	LEGAL MAIL LOAN	3.08	3.08
06/25/2014	NJSP	POS	POSTAGE 6/19/14	(3.08)	0.00
07/05/2014	NJSP	JPAY	AUTOPAYMENT: JPAY SETOFF_CODE:36355029	50.00	50.00
07/05/2014	NJSP	DED	\$15 DEDUCTION-DISCRETIONARY SPENDING RESERVE PER 10A.	(15.00)	35.00
07/05/2014	NJSP	ADD	\$15 DEDUCTION-DISCRETIONARY SPENDING RETURN PER 10A.	15.00	50.00
07/05/2014	NJSP	DED	DEDUCTION-COPL-11252013 D	(20.01)	29.99
07/05/2014	NJSP	DED	DEDUCTION-LGLML-11212013 D	(11.69)	18.30
07/07/2014	NJSP	CRS	COMMISSARY SALE - ORD #7411625	(17.75)	0.55
07/08/2014	NJSP	CEC	COMMISSARY RETURN - ORD #7394488	40.51	41.06
07/14/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 30 @2.00 06/01/2014-06/30/2014	60.00	101.06

92a

TRUST ACCOUNT STATEMENT

STATEMENT DATE: 07/14/2014 - 08/13/2014

SBI #: 000935494B Name: DAVIS, OMAR N DOB: 02/04/1976  
 LOCATION: NJSP-WEST-2 LEFT-2 TIER-CELL 104 INM# 448264  
 PED: 04/11/2030 As of Date: 04/11/2030 Max Date: LIFE

LOCATION SUB ACCOUNT	BEGINNING BALANCE	ENDING BALANCE	HOLD
NJSP 2101 SPENDABLE	41.06	63.14	
NJSP 2102 WORK RELEASE SAVINGS	0.00	0.00	
NJSP 2103 RELEASE SAVINGS	0.00	0.00	

DEBTS AND LOANS SUMMARY

TYPE PAYABLE	DATE CREATED/INSTITUTION	ORIGINAL AMOUNT	AMOUNT PAID	AMOUNT OWING	STATUS
LGLML LEGAL MAIL LOAN	04/11/2003 @ CRAF	17.53	17.53	0.00	ACTIVE
LGLML LEGAL MAIL LOAN	11/21/2013 @ NJSP	18.01	18.01	0.00	ACTIVE
COPL LEGAL COPY LOAN	11/25/2013 @ NJSP	31.01	31.01	0.00	ACTIVE
MEDL MEDICAL LOAN	08/17/2004 @ NJSP	9.92	9.92	0.00	ACTIVE
RXL PHARMACY LOAN	08/17/2004 @ NJSP	6.00	6.00	0.00	ACTIVE
DDL DENTAL LOAN	01/16/2012 @ NJSP	10.00	10.00	0.00	ACTIVE

OBLIGATIONS SUMMARY

TYPE PAYABLE	INFO / INDICTMENT #	ORIGINAL AMOUNT	AMOUNT PAID	AMOUNT OWING	STATUS
50VCCB \$50 VICTIMS OF CRIME COMPENSATION BOARD	00-06-01291-I	117.00	117.00	0.00	ACTIVE
50CDRC \$50 CRIMINAL DISP. AND REV. COLLECTION	00-06-01291-I	9.00	9.00	0.00	ACTIVE
50VWAF \$50 VICTIMS AND WITNESS ADVOCACY FUND	00-06-01291-I	24.00	24.00	0.00	ACTIVE
LEOTEF LAW ENFOR. OFR. TRAIN. & EQUIP. FUND	00-06-01291-I	30.00	30.00	0.00	ACTIVE
SNSF SAFE NEIGHBOURHOOD	00-06-01291-I	150.00	150.00	0.00	ACTIVE
TCF TRANSACTION COLLECTION FEE	04162003 @NJSP	22.51		UNLIMITED	ACTIVE

TRANSACTION DESCRIPTIONS 2101 SPENDABLE SUB ACCOUNT

DATE	LOCATION	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
			BEGINNING BALANCE:		41.06
07/14/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 30 @2.00 06/30/2014	06/01/2014-	60.00
07/21/2014	NJSP	CRS	COMMISSARY SALE - ORD #7430565		(99.92)
08/08/2014	NJSP	CRS	COMMISSARY SALE - ORD #7455306		0.00
08/13/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 31 @2.00 07/31/2014	07/01/2014-	62.00
08/13/2014	NJSP	DED	\$15 DEDUCTION-DISCRETIONARY SPENDING RESERVE PER 10A.		(15.00)
08/13/2014	NJSP	ADD	\$15 DEDUCTION-DISCRETIONARY SPENDING RETURN PER 10A.		15.00
					63.14

939

## TRUST ACCOUNT STATEMENT

STATEMENT DATE: 08/13/2014 - 09/12/2014

SBI #: 000935494B

Name: DAVIS, OMAR N

DOB: 02/04/1976

LOCATION: NJSP-WEST-2 LEFT-2 TIER-CELL 104

INM# 448264

## TRANSACTION DESCRIPTIONS 2101 SPENDABLE SUB ACCOUNT

DATE	LOCATION	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
				BEGINNING BALANCE:	1.14
08/13/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 31 @2.00 07/31/2014	07/01/2014-	62.00
08/13/2014	NJSP	DED	\$15 DEDUCTION-DISCRETIONARY SPENDING RESERVE PER 10A.	(15.00)	48.14
08/13/2014	NJSP	ADD	\$15 DEDUCTION-DISCRETIONARY SPENDING RETURN PER 10A.	15.00	63.14
08/18/2014	NJSP	CRS	COMMISSARY SALE - ORD #7466473	(19.37)	43.77
09/08/2014	NJSP	CRS	COMMISSARY SALE - ORD #7492702	(43.47)	0.30
09/12/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 31 @2.00 08/31/2014	08/01/2014-	62.00
09/12/2014	NJSP	DED	\$15 DEDUCTION-DISCRETIONARY SPENDING RESERVE PER 10A.	(15.00)	47.30
09/12/2014	NJSP	ADD	\$15 DEDUCTION-DISCRETIONARY SPENDING RETURN PER 10A.	15.00	62.30

949

TRUST ACCOUNT STATEMENT

STATEMENT DATE: 10/10/2014 - 11/14/2014

SBI #: 000935494B Name: DAVIS, OMAR N DOB: 02/04/1976  
LOCATION: NJSP-WEST-2 LEFT-2 TIER-CELL 104 INM# 448264

TRANSACTION DESCRIPTIONS 2101 SPENDABLE SUB ACCOUNT

DATE	LOCATION	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
			BEGINNING BALANCE:		2.91
10/10/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 30 02.00 09/30/2014	09/01/2014- 60.00	62.91
10/10/2014	NJSP	DED	\$15 DEDUCTION-DISCRETIONARY SPENDING RESERVE PER 10A.	(15.00)	47.91
10/10/2014	NJSP	ADD	\$15 DEDUCTION-DISCRETIONARY SPENDING RETURN PER 10A.	15.00	62.91
10/14/2014	NJSP	CRS	COMMISSARY SALE - ORD #7536340	(23.89)	39.02
10/20/2014	NJSP	CRS	COMMISSARY SALE - ORD #7545601	(25.71)	13.31
11/03/2014	NJSP	CRS	COMMISSARY SALE - ORD #7564382	(13.20)	0.11
11/05/2014	NJSP	JPAY	AUTOPAYMENT: JPAY SETOFF_CODE:39900715	30.00	30.11
11/05/2014	NJSP	DED	\$15 DEDUCTION-DISCRETIONARY SPENDING RESERVE PER 10A.	(15.00)	15.11
11/05/2014	NJSP	ADD	\$15 DEDUCTION-DISCRETIONARY SPENDING RETURN PER 10A.	15.00	30.11
11/14/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 31 02.00 10/31/2014	10/01/2014- 62.00	92.11

95a

**Petition for Relief From a Conviction or Sentence  
By a Person in State Custody  
(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)**

**Instructions**

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.
2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.
3. Make sure the form is typed or neatly written.
4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.
6. You must pay a fee of \$5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed in forma pauperis (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds \$ 200.00, you must pay the filing fee.
7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.
8. When you have completed the form, send the original and 1 copies to the Clerk of the United States District Court at this address:  
Clerk, United States District Court for  
Address  
City, State Zip Code
9. **CAUTION:** You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
10. **CAPITAL CASES:** If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.

96 a

AO 241 (Rev. 06/13)

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

United States District Court	District: New Jersey
Name (Under which you were Convicted) Omar N. Davis	
Place of Confinement: New Jersey State Prison - P.O. Box 861 Trenton, New Jersey 08625	
Petitioner (include the name under which you were convicted) Omar N. Davis	
Respondent (authorized person having custody of petitioner) v. Stephen M. D'Ilio, et al	
The Attorney General of the State of New Jersey	

**PETITION**

1. (a) Name and location of court which entered the judgment of conviction you are challenging:  
Superior Court of New Jersey - Law Division - Mercer County, 209 S. Broad Street, Trenton, New Jersey 08650-0068
1. (b) Criminal docket or case number (if you know): 00-06-192
2. (a) Date of judgment of conviction (if you know): March 28, 2003
2. (b) Date of sentencing: March 28, 2003
3. Length of sentence: Life w/ 30 parole ineligibility
4. In this case, were you convicted on more than one count or of more than one crime? Yes  No
5. Identify all crimes of which you were convicted and sentenced in this case:  
Murder and possession of a weapon for an unlawful purpose
6. (a) What was your plea? (Check one)
 

(1) Not guilty    (3) Nolo contendere (no contest)  
 (2) Guilty    (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have?  
 Jury    Judge only

97a

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes  No

8. Did you appeal from the judgment of conviction?

Yes  No

9. If you did appeal, answer the following:

(a) Name of court: Superior Court of New Jersey - Appellate Division

(b) Docket or case number (if you know): A-0058-03T4

(c) Result: Affirmed

(d) Date of result (if you know): March 30, 2004

(e) Citation to the case (if you know): Unpublished

(f) Grounds raised: (1) The Prosecutor's Improper Comments in His Opening and Summation Deprived Defendant of a Fair Trial (Not Raised Below); (2) The Admission of Testimony About Defendant's House Having Been Raided for Drugs in the Past Created a Degree of Prejudice not Curable by the Court's Limiting Instructions, and Requires Reversal; (3) The Life Sentence imposed upon Defendant for Murder was Manifestly Excessive Under all of the Applicable Circumstances; (4) The Sentence must be Vacated Because in Imposing it, the Trial Court Violated Constitutional Principles Set Forth in Blakely v. Washington, and State v. Natale; (5) The Court Erred in Failing to Merge the Charge of Possession of a Weapon for an Unlawful Purpose into the Murder Charge (Not Raised Below).

(g) Did you seek further review by a higher state court?  Yes  No

If yes, answer the following:

(1) Name of court: Supreme Court of New Jersey

(2) Docket or case number (if you know): 59,759

(3) Result: Denied

(4) Date of result (if you know): September 8, 2006

(5) Citation to the case (if you know): 180 N.J. 454; 852 A.2d 191

(6) Grounds raised: See 9(f)

(h) Did you file a petition for certiorari in the United States Supreme Court?  Yes  No

If yes, answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A

(3) Date of result (if you know): N/A

(4) Citation to the case (if you know): N/A

98a

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?  Yes  No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Superior Court of New Jersey - Mercer County, Law Division  
(2) Docket or case number (if you know): 99-07-0665  
(3) Date of filing (if you know): September 20, 2007  
(4) Nature of proceeding: Post-Conviction Relief  
(5) Grounds raised: (1) The Indictment Should Have Been Dismissed In Its Entirety (2) Defendant Was Denied The Effective Assistance Of Trial Counsel In Violation Of The United States And New Jersey Constitutions (3) The Defendant Was Deprived His Constitutional Right To Present A Defense (4) The Defendant Was Deprived His Constitutional Right To Cross-Examination (5) Defendant Was Denied The Effective Assistance Of Appellate Counsel (6) An Evidentiary Hearing Is Required With Regard To The Allegations Of Defendant's Petition For Post Conviction Relief  
(6) Did you receive a hearing where evidence was given on your petition, application, or motion?  Yes  No  
(7) Result: Denied.  
(8) Date of result (if you know): September 10, 2010.

(b) If you filed any second petition, application or motion, give the same information: N/A

(1) Name of court: N/A  
(2) Docket or case number (if you know): N/A  
(3) Date of filing (if you know): N/A  
(4) Nature of proceeding: N/A  
(5) Grounds raised: N/A  
(6) Did you receive a hearing where evidence was given on your petition, application, or motion?  Yes  No  
(7) Result: N/A  
(8) Date of result (if you know): N/A

(c) If you filed any third petition, application, or motion, give the same information: N/A

(1) Name of court: N/A

99 a

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?  
 Yes  No

(7) Result: N/A

(8) Date of result (if you know): N/A

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition:  Yes  No

(2) Second petition:  Yes  No

(3) Third petition:  Yes  No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

Petition for Certification to New Jersey Supreme Court

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

**CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

**GROUND ONE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
 Yes  No

100 a

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition?

Yes  No

(4) Did you appeal from the denial of your motion or petition?

Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

## **GROUND TWO: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

### **PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

1019

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

### **GROUND THREE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

### **PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

102 a

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

**GROUND FOUR: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

(d) **PLEASE SEE ATTACHED**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
 Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available):

103a

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  
Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: \_\_\_\_\_

**GROUND FIVE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Five, explain why:

(c) Direct Appeal of Ground Five:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
 Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

104a

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  
Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five:

**GROUND SIX: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Six, explain why: N/A

(c) Direct Appeal of Ground Six:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

105a

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Six:

**GROUND SEVEN: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Seven, explain why: N/A

(c) Direct Appeal of Ground Seven:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

106 a

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Seven:

**GROUND EIGHT: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Eight, explain why: N/A

(c) Direct Appeal of Ground Eight:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

107a

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Eight:

**GROUND NINE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Nine, explain why: N/A

(c) Direct Appeal of Ground Nine:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

108a

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Nine:

**GROUND TEN: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Ten, explain why: N/A

(c) Direct Appeal of Ground Ten:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

109 a

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_

Date of the court's decision: \_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_

Docket or case number (if you know): \_\_\_\_

Date of the court's decision: \_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Ten:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes  No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: N/A.

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which

1109

ground or grounds have not been presented, and state your reasons for not presenting them: \_\_\_\_\_

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. N/A.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

- (a) At preliminary hearing: UNKNOWN
- (b) At arraignment and plea: UNKNOWN
- (c) At trial: Holly J. Ford, 126 White Horse Pike, Haddon Heights, New Jersey 08035
- (d) At sentencing: SAME AS 16(C)
- (e) On appeal: Susan Brody, 31 Clinton Street, P.O. Box 46003, Newark New Jersey 07101
- (f) In any post-conviction proceeding: A. Harold Kokes, 728 West Avenue, Suites S201-202 New Jersey 08553
- (g) On appeal from any ruling against you in a post-conviction proceeding: A. Harold Kokes, 728 West Avenue, Suites S201-202 New Jersey 08553

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes  No

- (a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A.
- (b) Give the date the other sentence was imposed: N/A.
- (c) Give the length of the other sentence: N/A.
- (d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes  No

18. TIMELINESS OF PETITION: PLEASE SEE ATTACHED

111a

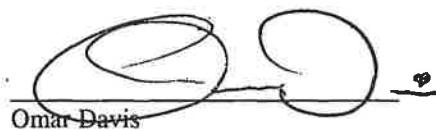
If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.<sup>1</sup>

Therefore, petitioner asks that the Court grant the following relief: or any other relief to which petitioner may be entitled.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on DECEMBER 4<sup>TH</sup> 2014

Executed on DECEMBER 4<sup>TH</sup> 2014

  
Omar Davis

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition N/A

<sup>1</sup> The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:
  - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
  - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
  - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
  - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

112a

Omar N. Davis v. Stephen D'Ilio, et. al.  
Case No. \_\_\_\_\_

Attachments

**9.(f) Grounds Raised:** (1) The Prosecutor's Improper Comments in His Opening and Summation Deprived Defendant of a Fair Trial (Not Raised Below); (2) The Admission of Testimony About Defendant's House Having Been Raided for Drugs in the Past Created a Degree of Prejudice not Curable by the Court's Limiting Instructions, and Requires Reversal; (3) The Life Sentence imposed upon Defendant for Murder was Manifestly Excessive Under all of the Applicable Circumstances; (4) The Sentence must be Vacated Because in Imposing it, the Trial Court Violated Constitutional Principles Set Forth in Blakely v. Washington, and State v. Natale; (5) The Court Erred in Failing to Merge the Charge of Possession of a Weapon for an Unlawful Purpose into the Murder Charge (Not Raised Below).

**11.(a)(5) Grounds Raised:** (1) Trial Counsel did not Retain nor have Petitioner Evaluated by a Psychiatrist or Psychologist for Potential Defense of Voluntary Intoxication or Passion/Provocation; (2) Trial Counsel did not Retain an Expert for Defense of Voluntary Intoxication; (3) Trial Counsel did not Retain any Expert for defense of Passion/Provocation; (4) Trial Counsel did not Object to the State's Request for a Flight Charge; (5) Petitioner was Never Advised of the Sentence He was Facing, if He went to Trial and was Convicted. If Petitioner had been so Advised, He Would have Entered into Meaningful Plea Discussion with the State; (6) Petitioner was Denied Effective Assistance of Counsel when His Attorney Failed to Object to the Admission of Evidence Obtained in Violation of Petitioner's Fifth Amendment Right to Remain Silent; (7) Petitioner argues that the State Purposely Created the Initial Mistrial Because Petitioner Believes the State Knew the Contents of Detective Hires' Improper Testimony Before Same Improper Testimony was Elicited; (8) Petitioner Argues that Detective Hires' Inability to Testify at the Second Trial was not Supported by sufficient Medical Documentation. The Trial Court's Determination that Detective Hires' was Medically Excused from Testifying at the Second Trial Violated Petitioner's Right to Confront and Cross-Examine His Accuser (Detective Hires); (9) (a) Even if the Court Finds that Each of the Above Points, Individually, is not Sufficient Evidence of a "Prima Facie" Finding that Requires that Petitioner is Entitled to an Evidentiary Hearing, the Cumulative Effect of same Errors Should Compel the Court to Grant same Evidentiary Hearing, (b) Petitioner was Denied Effective Assistance of Counsel when His Attorney Failed to have Petitioner Evaluated, Retain an Expert for Voluntary Intoxication, Retain any Expert, whatsoever, for Passion/Provocation and Object to the Flight Charge; (10) The Inadequate Representation the Petitioner Received at Trial Fell Below an Objective Reasonable Standard thus Violating His Rights to Effective Assistance of Counsel Under the United States and New Jersey Constitutions, (a) Trial Counsel's Failure to Investigate Whether a Psychologist or Psychiatrist would have Offered a Opinion of Petitioner's Legal Insanity Served to Deny Petitioner of Effective Assistance of Counsel, (b) Trial Counsel was Ineffective in Her Assistance Through Her Failure to Thoroughly Pursue and Present an Passion Provocation Defense, (c) The Ineffective Assistance Offered by Trial

1/13a

Counsel Plagued Petitioner's Trial with Prejudice; (11) Trial Counsel was Ineffective for Her Failure to Object to the Trial Court's "Flight" Charge which was Incorrect and not Supported by any Evidence, Thereby Denying Petitioner's Due Process of Law and a Fair Trial.

**GROUND ONE:** The Prosecutor's Improper Comments in His Opening and Summation Violated the Petitioner's Right to a fair Trial.

In his opening statement, the prosecutor not only announced to the jury that he would not be presenting fingerprints evidence or bloody clothes, but gave a dissertation as to why the jury should forget about wanting to see such evidence:

You'll hear about some evidence connecting the Petitioner and his family to the gun. And you're also going to hear from some experts from the State Police Lab and the DNA expert from a private lab, but I just want you to forget - maybe what you heard on t.v. and all about fingerprints evidence and things like that because you're not going to be hearing that. You're not going to be hearing that the Petitioner's fingerprints were all over everything, the gun and the car because you're going to hear that that's really a rarity in cases that you do have that at a crime scene, and you're going to be hearing from a fingerprint expert who will tell you that.

So, you know, don't be looking for all kinds of prints over everything because we're just not going to have it.

And don't be looking for, well, his fingerprints were on the clothes, all these bloody clothes the defendant had on and the victim's blood would be on those clothes because you're not going to have that either. And you're going to have that either. And you're going to hear testimony about that, and bear in mind also that any clothes that the defendant did turn over to the police wasn't done for almost two days till after the homicide. Because as I said, the homicide took place in the early morning hours of Saturday about ten-of-three. And the first time the police have any contact with the defendant is Sunday night. (4T 252 to 26-2).

It is one thing for a prosecutor to alert the jury to a lack of forensic evidence in the case he is about to present, and quite frankly another thing for him to disparage the importance of such evidence and tell the jury to forget about its absence because the introduction of such evidence only occurs on television shows, not in the real world.

The prosecutor's misconduct did not stop there. At the end of the trial, he concluded his summation with a flourish: you find him guilty of murder because the facts supports it, and justice demands it, and it's a verdict you won't regret. (14T 149-1 to 3).

This improper remark was the prosecutor's indirect way of advising the jury that, in his own personal opinion, a guilty verdict would be the correct resolution of the case.

The prosecutor's comments in his opening statements strongly suggested to the jury that he was in the position to advise them, based on his own professional experience and/or personal knowledge, that the public has been misled by television crime shows into believing that fingerprints evidence is important, whereas in reality such evidence is by and large irrelevant to criminal cases.

Although, trial counsel did not object to either the prosecutor's opening remarks or his summation, the court's permitting those remarks to stand, without any effort at judicial corrections, constituted plain error.

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

**GROUND TWO:** The Admission of Testimony About The Petitioner's House Having been Raided for Drugs in the Past Created a Degree of Prejudice not Curable by the Court's Limiting Instructions.

An Atlantic City Police Officer, Madeline Barefield, testified about her interviews of the Petitioner's parents and brother on the morning of April 8. During cross-examination by trial counsel about statements made by Hatie Davis, the following dialogue took place:

**Q:** So she told you she had a bunch of guns?

**A:** She - there were other weapons that belonged to one [of] the other sons. She said the house was raided by the police for drugs, and they seized whatever handguns they had there. (6T 108-8 to 12).

Trial counsel objected and moved for a mistrial. (6T 108-17 to 24). The Court denied the motion (6T 110-6 to 10), but gave the jury a preliminary curative instruction to disregard that portion of the testimony at this point. . . . until you hear further argument, the court instructed the jury more definitively to disregard the testimony about a drug raid. (6T 120-20 to 121-9). In its final instructions, the Court again reminded the jury that any remarks stricken from the record during trial were to be disregarded during deliberations. (15T 4-19 to 24).

Despite the limiting instructions, the testimony about the Petitioner's house having been raided for drugs was so powerfully prejudicial that it had the clear capacity to affect the outcome of the trial.

Although, most of the testimony at trial regarding drug dealing at the Petitioner's house were focused on the Petitioner's brother Jamal. But Brian Sleister testified that, although Jamal Davis was his regular supplier of cocaine, he had on occasion bought cocaine from the Petitioner instead. (11T 63-2 to 10). This testimony could only have reinforced the idea in the juror's minds that the Petitioner was a cocaine dealer whose activities were so notorious that the police had been able to obtain a search warrant for his house.

Of course, there was no dispute that the testimony in question was inadmissible; it was not deliberately elicited by the prosecutor, but was volunteered by a State's witness in answer unresponsive to the question being asked of her on cross-examination.

116 a

The testimony was potentially devastating because it not only had negative connotations with regards to the petitioner himself, but also indirectly corroborated Brian Sleister's testimony about Jamal's having been his cocaine supplier. Because Jamal denied having ever sold cocaine to Sleister (13T 31-7 to 33-16), his credibility was pitted against Sleister's in this regard. The inadmissible 404(b) testimony tipped the credibility balance toward Sleister and, thus, detracted from Jamal's credibility with regard to not only this issue, but all others about which he offered testimony and, because Jamal was the Petitioner's brother, the testimony would have reflected adversely (though indirectly) on the Petitioner's credibility as well.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

**GROUND THREE:** Trial Counsel's Failure to Investigate Whether a Psychologist or a Psychiatrist Would have Offered an Opinion of Petitioner's Legal Insanity Served to Deny Petitioner of Effective Assistance of Counsel.

Trial counsel had ample evidence that the Petitioner, at the time of the alleged offense, was intoxicated due to his consumption of both alcohol and Marijuana. The State witness Jackie Davis testified to the following:

**Q.** Now, when he came over then 2:30, what was his mood like? How was he acting?

**A.** He was, like, nervous. (5T 32-11 to 13).

**Q.** When he first came to see you at 2:3, what did --

**A.** He was -- when he first came he wanted some Marijuana (5T 32-16 to 17).

**Q.** And does that refresh your recollection as to why the defendant told you he shot the guy?

**A.** He said he was at the bar and he had a drink (5T 44-14).

**Q.** Okay, was Mr. Davis intoxicated at the time he came to your house the second time?

**A.** Yes.

**Q.** How do you know that?

**A.** Because I could smell it on his breath.

**Q.** Had you ever seen him intoxicated before?

**A.** Yes.

**Q.** Was he acting the same way?

**A.** Uhm. . . . not that night he came over. (5T 72-6 to 24).

**Q.** Yes, what's your testimony? You want to change your testimony?

**A.** He told me he shot three times, then he said he blacked out, and he said the next thing he knew five shot went off. (5T 85, 22 to 24) (5T 125, 16 to 18).

118a

In spite of this evidence, trial counsel failed to produce witness testimony, expert or otherwise, with which to present an intoxication defense.

Trial counsel had the option, to simply obtain the opinion of a psychiatrist, medical doctor or a pharmacologist to testify as to the effects of marijuana and alcohol. Despite trial counsel's decision to present, in any meaningful manner, an intoxication defense in lieu of an insanity defense, she failed to obtain any such expert opinion. This failure was a serious omission by trial counsel; aside from the obvious nature of the option to consult an illegal drug expert, trial counsel was also informed through testimony of Donna Lyons, the Petitioner's demeanor appeared to be a bit nervous, while pacing back and forth. (ST 152, 1 to 8).

Trial counsel's failure to pursue the testimony of an illegal drug expert in light of these facts constitutes ineffective assistance of counsel. Although trial counsel made a cursory exploration into the Petitioner's insanity defense. (10T 23-23 to 10T 24-1 to 9), she nonetheless failed to take an "obvious and readily available investigatory steps which would have made the defense viable" by pursuing any meaningful investigation into an intoxication defense or by raising any other plausible defense.

The Petitioner's jury was only given a scant indication that the defense was claiming intoxication. As the Petitioner testified in his defense that he had consumed several shots of alcohol (13T 57-1 to 2; 13T 5-16 to 20), and smoked large cigars type blunts filled with marijuana (13T 67-6 to 13T 68-2). Yet, no information was provided with regards to marijuana or its effects. Furthermore, jurors learned nothing on the effects of alcohol on the Petitioner's mental condition, and were afforded no evidence of the number of large cigar filled with marijuana he had consumed; in fact, none of the evidence proffered served to confirm the number consumed. Aside from a brief assertion in trial counsel's closing arguments, where she stated:

"He just lost his mind." Omar was intoxicated (14T 117-7 to 8). Finally, trial counsel summed up her intoxication argument by stating "[J]ackie Davis. A subsequent conviction for selling drugs, marijuana. Not a surprise, Omar told you that he brought it from him." (14T 121-13 to 15).

The stipulation comprised the entire basis for defense counsel's partial defense of voluntary intoxication. The Petitioner also testified that he had been abusing marijuana for some time and had consumed almost an half ounce of the drug the night in question (13T 77-7 to 8; 13T 93-3 to 5).

Mid-way through the Petitioner's testimony, trial counsel decided to request an intoxication and diminished capacity as to the trial court's final charge to the jury (13T 137-4 to 13T 139-15), the trial judge requested an explanation (13T 139-16 to 18), to which counsel could not explain (13T 139-19 to 13T 140-25). The request was exceedingly vague, and could hardly have been considered reliable evidence. This weak presentation, coupled with the lack of a testifying expert witness, amounted to a trial in which counsel failed to present even a partial defense.

This approach hardly qualifies as a reasonable tactical decision, especially in light of counsel's knowledge far in advance of trial that there was evidence indicating the Petitioner's ingestion of a large quantity of marijuana.

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

**GROUND FOUR:** Trial Counsel was Ineffective in Her Assistance Through Her Failure to Thoroughly Pursue and Present an Passion/Provocation Defense.

The focal point of the State's case was the testimony of Tutis, Jackie Davis, Donna and Calief Lyons. In their testimony each witness indicated that the Petitioner was robbed of a radio and some money (5T 44-12 to 5T 45-11; 5T 155-22 to 156-1; 6T 12-2 to 25), was being bullied by the "Big Guy" Rhama (5T 114-2 to 9; 5T 155-13 to 16; 6T 13-1 to 13) and had scratches on his face (5T 81-18 to 82-21; 5T 159-23 to 160-17; 6T 24-2 to 24).

Because the state relied on this testimony in proving that the Petitioner possessed the requisite mental state for a conviction of an intentional murder, effective cross-examination of these witnesses was crucial to the petitioner's defense. Given the more than curious disparity between the testimony, trial counsel had a duty to demonstrate to the trial court and jury, that a rational basis existed to support a crime of passion/provocation manslaughter, but she did not.

The Petitioner was severely beaten and robbed of a radio and some money by the over 300 pound deceased. At the time of the Petitioner's first interview, the detective observed the scars on Petitioner's face (10T 36-16 to 19). The severity of the beating coupled with the petitioner committing the crime at least ten minutes later, which was revealed through the testimony of Juanita Tutis, "that the Petitioner and the deceased was last seen at the bar at a Quarter to three, 2:45 (4T 82-10 to 15). Also, through the testimony of Officer Bevenese who testified on direct examination by the State consisted with his report that a call was placed of shots fired at 2:52 (4T 115-8 to 25)." The strong support for the contention that this was a crime resulting from passion/provocation and therefore was manslaughter and not murder. Therefore, trial counsel failure to secure the Petitioner a jury instruction on manslaughter was ineffective.

Trial counsel was also faced with the testimony of expert Sharon Freck-Tootell, whom indicated that Petitioner's blood stains were found on his jeans (6T 159-14 to 18). This testimony could have been used to show that the Petitioner bleed as result of the battery. This report was given to trial counsel as early as June 21, 2001 (6T 151-3 to

6). It reasonable that trial counsel should have taken the opportunity to cross-examine the State's witness to complement that of expert Tootell, or at a minimum, the glaring opportunity to request a charge of passion/provocation.

Furthermore, there was ample evidence that should have flagged the possibility of an passion/provocation defense. Officer Bevenese testified on direct examination that when he arrived on the scene, the deceased pants were pulled down and shirt had started to roll over his head (4T 120-20 to 25), thus suggesting a sign of a continuous struggle.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

**GROUND FIVE:** Trial Counsel was Ineffective for Failing to Object to the Trial Court's "Flight" Charge Which was Incorrect and Not Supported by Any Evidence, Thereby Denying Petitioner His Due Process of Law and a Fair Trial.

Before the end of trial testimony, a preliminary charge conference was held during which the trial judge informed both counsels that he intended to charge "Flight" (14T 7-4 to 8). Trial counsel requested to reserve in order to take a look at the model charge on flight (14T 8-4 to 7). The trial judge offered and read the model jury charge on flight into the record (14T 8-8 to 10-6), trial counsel did not object (14T 10-7 to 8) and the charge regarding flight was later read to the jury (15T 28-4 to 25).

There was no evidence that the Petitioner fled, much less fled to "avoid apprehension." The arresting, Detective Dooley, specifically acknowledged that the Petitioner voluntarily came in and consented to be interviewed on two separate occasions (10T 21-11 to 24), was very cooperative and provided a twenty-nine page statement (10T 23-9 to 23), and offered to make himself available in the future if needed (10T 24-6 to 21). Moreover, the fact that the petitioner left the area after the homicide were complete cannot constitute "Flight," since that would mean that flight would be present in virtually every case.

The prejudice of the unsupported instruction was twofold. First, the trial court wrongly told the jurors that there "has been some testimony in this case from which you may infer that the [Petitioner] fled the area shortly after the alleged commission of the crime (15T 28-4 to 6). As indicated, the evidence essentially showed the opposite - that the Petitioner made himself available to the authorities whenever requested. Secondly, the instruction was prejudicial because it improperly focused the jury's attention on "consciousness of guilty" which was not a legitimate issue in the case and which unduly distracted the jury from full consideration of the defense.

(b) If you did not exhaust your state remedies on Ground Five, explain why:

(c) **Direct Appeal of Ground Five:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five:

**GROUND SIX:** The Petitioner Was Never Advised of the Sentence He was Facing, If He went to Trial, which Violated His Due Process.

The State could not locate any of the records of the Petitioner being advised of the sentence he was facing, if he chose to go to trial and the Court never held a hearing to afford the Petitioner the same protections afforded to Him under the 14th Amendment of the U.S. Constitution and under the New Jersey Constitution.

(b) If you did not exhaust your state remedies on Ground Six, explain why:

(c) **Direct Appeal of Ground Six:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Six:

**GROUND SEVEN:** Petitioner as Denied Effective Assistance of Counsel when Trial Counsel Failed to Object to the Admission of Evidence Obtained in Violation of the Petitioner's Fifth Amendment Right to Remain Silent.

After being arrested, the Petitioner was interrogated on numerous occasions after saying he wanted to remain silent. The police continued to interrogate Him and the information obtained during the second interrogation was improperly obtained. Yet, trial counsel failed to object to its admittance into the Petitioner's trial.

(b) If you did not exhaust your state remedies on Ground Seven, explain why:

(c) **Direct Appeal of Ground Seven:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Seven:

**GROUND EIGHT:** The State Purposely Created the Initial Mistrial Because the State Knew the Content of Detective Hires' Improper Testimony Before Same Improper Testimony was Elicited, Which Violated the Petitioner's Right to a Fair Trial and His Rights to Due Process under the 14th Amendment of the U.S. Constitution.

The Petitioner argues that the State created the initial mistrial because Petitioner believes the State knew the content of Det. Hires' improper testimony before the same improper testimony was elicited. (Trial transcript, September 26, 2002, P. 78, L. 1 to P. 168, L. 17).

(b) If you did not exhaust your state remedies on Ground Eight, explain why:

(c) **Direct Appeal of Ground Eight:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Eight

**GROUND NINE:** Petitioner's Right to Confront and Cross-Examine His Accuser was Violated when Detective Hires was Medically Excused from testifying at the Petitioner's Second Trial and His Absence was not Supported by Medical Documentation and Trial Counsel was Ineffective for Allowing to His Previous testimony read into the Record.

The Petitioner argues that Detective Hires inability to testify at the second trial was not supported by sufficient medical documentation and trial counsel's agreement to stipulate to portions of Detective Hires' prior testimony and letting the same be read into the record.

(b) If you did not exhaust your state remedies on Ground Nine, explain why:

(c) **Direct Appeal of Ground Nine:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: Appellate Counsel Failed to raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Nine:

**GROUND TEN: Appellate Counsel Was Ineffective**

On direct appeal, appellate counsel did not present any of the grounds outlined above in this petition. The Supporting Facts to each of these grounds are adopted by reference herein.

(b) If you did not exhaust your state remedies on Ground Ten, explain why:

(c) **Direct Appeal of Ground Ten:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: This claim by definition could not be raised on direct appeal..

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Superior Court of New Jersey, Atlantic County-Law Division, Atlantic County Civil Courts Building, 1201 Bacharach Boulevard, Atlantic City, New Jersey 08401

Docket or case number (if you know): 00-06-1292

Date of the court's decision: October 30, 2012

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 W. Market Street, P.O. Box 006, Trenton, New Jersey 08625-0006

Docket or case number (if you know): A-1511-12T2

Date of the court's decision: October 23, 2014

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Ten:

18. **TIMELINESS OF PETITION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitation as contained in 28 U.S.C. §2244(d) does not bar your petition.\*

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\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. §2254(d) in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
  - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
  - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
  - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
  - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The Supreme Court of New Jersey denied petitioner's direct appeal petition for certification on September 8, 2006. No petition for a writ of certiorari was filed and petitioner's judgment became final on December 28, 2006. On January 7, 2007, petitioner filed a state petition for post-conviction relief. The PCR petition was denied on October 30, 2012. On October 23, 2013 the Appellate Division affirmed the denial of the PCR. A petition for

certification of the Appellate Division's judgment affirming the denial of post-conviction relief was denied on September 9, 2014. The federal 1-year time limit was thus tolled from January 7, 2007 until September 9, 2014. The present federal petition being filed on December 4<sup>th</sup>, 2014, is therefore timely.

131a

SUPREME COURT OF NEW JERSEY  
C-60. September Term 2006  
59,759

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ON PETITION FOR CERTIFICATION

OMAR N. DAVIS,

Defendant-Petitioner.

*Brody* FILED  
SEP 08 2006

*Stephen J. Zazzaro*

To the Appellate Division, Superior Court:

A petition for certification of the judgment in  
A-58-03 having been submitted to this Court, and the Court having  
considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at  
Trenton, this 6th day of September, 2006.

The foregoing is a true copy  
of the original on file in my office.

*Stephen J. Zazzaro*  
CLERK OF THE SUPREME COURT

*Stephen J. Zazzaro*  
CLERK OF THE SUPREME COURT  
OF NEW JERSEY

132a

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1511-12T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OMAR N. DAVIS,

Defendant-Appellant.

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Argued October 8, 2013 — Decided October 23, 2013

Before Judges Fisher, Koblitz and O'Connor.

On appeal from Superior Court of New Jersey,  
Law Division, Atlantic County, Indictment  
No. 00-06-1292.

A. Harold Kokes argued the cause for  
appellant.

Mario C. Formica, Special Deputy Attorney  
General/Acting Assistant Prosecutor, argued  
the cause for respondent (James P. McClain,  
Acting Atlantic County Prosecutor, attorney;  
Mr. Formica, on the brief).

PER CURIAM

Defendant Omar N. Davis appeals from the October 30, 2012  
denial of his petition for post-conviction relief (PCR) without  
an evidentiary hearing. We affirm.

133a

RECEIVED OCT 23 2013

After an initial mistrial due to the improper testimony of a police witness, a jury convicted defendant of first-degree murder of Raamah Huggins-El, N.J.S.A. 2C:11-3a(1)(2), and possession of a shotgun for an unlawful purpose, N.J.S.A. 2C:39-4a. Defendant was sentenced to life imprisonment with thirty years parole ineligibility for the murder conviction and a concurrent ten-year term for the weapons conviction. We affirmed on direct appeal. State v. Davis, Docket No. A-0058-03 (App. Div. April 19, 2006). As we indicated in that opinion, defendant shot the victim several times with a shotgun. He was convicted largely on the basis of circumstantial evidence and his incriminating statements to others. Defendant testified on his own behalf, denying his guilt and indicating his whereabouts away from the crime scene on the night of the shooting.

On appeal defendant raises the following issues:

POINT I: THE LOWER COURT ERRED IN DENYING PETITIONER'S POST-CONVICTION RELIEF APPLICATION WITHOUT SCHEDULING AN EVIDENTIARY HEARING.

POINT II: THE LOWER COURT ERRED IN DENYING PETITIONER'S REQUEST THAT THE RECORD REMAIN OPEN PENDING THE STATE'S SUPPLYING AN OFFICIAL TRANSCRIPT OF THE NOVEMBER 7, 2001 PROCEEDINGS.

POINT III: THE LOWER COURT ERRED IN REFUSING TO SHIFT THE BURDEN TO THE STATE IN LIGHT OF PETITIONER'S UNREBUTTED SUBMISSIONS

THAT NO MEANINGFUL PRETRIAL CONFERENCE, WHATSOEVER, OCCURRED.

POINT IV: THE LOWER COURT ERRED IN FAILING TO REQUIRE THE STATE TO COMPEL THE PRESENCE OF PETITIONER'S FORMER TRIAL COUNSEL, NOW PENNSYLVANIA TRIAL JUDGE HOLLY FORD.

POINT V: THE LOWER COURT ERRED IN ITS FAILURE TO FIND ANY INEFFECTIVE ASSISTANCE OF COUNSEL, WHATSOEVER; INCLUDING, BUT NOT LIMITED TO, FORMER TRIAL COUNSEL'S (1) NOT HAVING PETITIONER EVALUATED; (2) NOT RETAINING ANY EXPERTS, WHATSOEVER, FOR EITHER VOLUNTARY INTOXICATION OR PASSION/PROVOCATION AND (3) FAILURE TO OBJECT TO THE FLIGHT CHARGE.

POINT VI: PETITIONER ARGUES THAT THE STATE PURPOSELY CREATED THE INITIAL MISTRIAL BECAUSE PETITIONER BELIEVES THE STATE KNEW THE CONTENT OF DET. HIRES' IMPROPER TESTIMONY BEFORE SAME IMPROPER TESTIMONY WAS ELICITED.

POINT VII: PETITIONER ARGUES THAT DET. HIRES' INABILITY TO TESTIFY AT THE SECOND TRIAL WAS NOT SUPPORTED BY SUFFICIENT MEDICAL DOCUMENTATION. THE TRIAL COURT'S DETERMINATION THAT DET. HIRES WAS MEDICALLY EXCUSED FROM TESTIFYING AT THE SECOND TRIAL VIOLATED PETITIONER'S RIGHT TO CONFRONT HIS ACCUSER (DET. HIRES), AND PETITIONER'S TRIAL COUNSEL'S STIPULATION THAT CERTAIN PORTIONS OF DET. HIRES' TESTIMONY BE READ INTO THE RECORD IS FURTHER EVIDENCE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

POINT VIII: EVEN IF THE COURT FINDS THAT EACH OF THE ABOVE POINTS, INDIVIDUALLY, IS NOT SUFFICIENT EVIDENCE OF A "PRIMA FACIE" FINDING THAT REQUIRES THAT PETITIONER IS ENTITITLED TO AN EVIDENTIARY HEARING, THE CUMULATIVE EFFECT OF SAME ERRORS SHOULD COMPEL THE COURT TO GRANT SAME EVIDENTIARY HEARING.

A deprivation of the constitutional right to effective assistance occurs when: (1) an attorney provides inadequate representation and (2) that deficient performance causes the defendant prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42, 57-58 (1987).

In cases brought by a defendant who has entered a guilty plea, the first prong is met where the defendant can show that counsel's representation fell short of the guarantees established by the Sixth Amendment. State v. Parker, 212 N.J. 269, 279 (2012) (citing Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). The second component is shown by establishing a reasonable probability that the defendant would not have pled guilty, but for his counsel's errors. Id. at 279-80 (citations omitted).

In order to prevail on a claim of ineffective assistance of counsel, a petitioner may need to rely on facts outside of the trial record to prove constitutionally deficient representation. The trial court is vested with discretion under Rule 3:22-10 to conduct an evidentiary hearing to determine additional facts surrounding counsel's trial representation as well as to elicit the attorney's testimony. State v. Preciose, 129 N.J. 451, 462 (1992). However, the trial court should hold an evidentiary

hearing only "if a defendant has presented a prima facie claim in support of [PCR]." Ibid. In order to establish a prima facie case, defendant must demonstrate "the reasonable likelihood of succeeding under the test set forth in Strickland v. Washington . . ." Id. at 463. When determining whether defendant has set forth a prima facie case, the court will view the factors in a light most favorable to the defendant. Id. at 462. See also State v. Cummings, 321 N.J. Super. 154, 169-71 (App. Div.), certif. denied, 162 N.J. 199 (1999).

Defendant's central contention is that his defense counsel did not communicate the State's plea offer to him, nor inform him of his sentence exposure if he were convicted at trial. In support of this position he offers only his own sworn statement. Defendant did not supply a certification from defense counsel, who he indicates is now a judge in Pennsylvania, nor a certification from the assistant prosecutor. Defendant's claim is not supported in any way by the record.

The transcript of the November 7, 2001 pre-trial status conference, provided for the first time by defendant on appeal, references the fact that the State made an initial offer to defense counsel.<sup>1</sup> During the status conference, the assistant

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<sup>1</sup> This transcript was not submitted to the PCR court and we would therefore not ordinarily consider it. R. 2:5-4(a). We have (continued)

prosecutor explained that "the State has made a proffered – a tentative offer in this case which we discussed with counsel, and my understanding is that there really isn't a meeting of the minds [] close to resolving along the terms proposed by the State." Defendant argues that he may not have been present at that conference, and that the State has the burden of producing proof that he was informed of a plea offer. To the contrary, the burden rests on defendant. State v. Nash, 212 N.J. 518, 541 (2013) (quoting State v. Preciose, supra, 129 N.J. at 459).

On appeal, defendant relies primarily on State v. Taccetta, 200 N.J. 183 (2009). In Taccetta, the trial court granted the defendant's PCR based on a judicial finding of ineffective assistance of counsel due to trial counsel's failure to inform the defendant of the sentencing consequences. Id. at 185. Our Supreme Court determined as a matter of law that the defendant was "legally disabled from taking a plea offer" because he maintained his innocence. Id. at 195. Similarly, here defendant maintained his innocence throughout the trial and sentencing and cannot now argue he would have taken a favorable plea.

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(continued)

read the transcript because the State does not object to our consideration and the transcript sheds some light on defendant's likely awareness of a plea offer.

Defendant's remaining arguments are without sufficient merit to require discussion in a written opinion. R. 2:11-3(e)(2). We add only the following comments. Defendant supplied only selected portions of the trial transcript. A defendant must do more than make "bald assertions" that he was denied effective assistance of counsel; he must allege specific facts sufficient to demonstrate counsel's alleged substandard performance. Cummings, supra, 321 N.J. Super. at 170. Here, defendant failed to set forth any facts whatsoever that indicate trial counsel's failure to hire an expert to demonstrate intoxication or the passion/provocation defense was substandard. Defendant's asserted defense at trial, that he did not shoot the victim, makes intoxication and passion/provocation irrelevant.

Defendant also raises in Points VI and VII that trial errors were made. These claims of trial error will not be considered because they were not raised before the PCR judge. R. 2:10-2 (we will disregard claims of error by the trial court that were not properly preserved for appeal or brought to the attention of the trial court unless the error is capable of producing an unjust result). More importantly, these arguments should have been raised on direct appeal and thus cannot be raised in a PCR petition. R. 3:22-4(a)(1).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

139 a

CLERK OF THE APPELLATE DIVISION

SUPREME COURT OF NEW JERSEY  
C-16 September Term 2014  
073632

STATE OF NEW JERSEY,

PLAINTIFF-RESPONDENT,

v.

ON PETITION FOR CERTIFICATION

OMAR N. DAVIS,

DEFENDANT-PETITIONER.

FILED

SEP - 9 2014

*Mark Neary*  
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-001511-12 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 3rd day of September, 2014.

*Mark Neary*  
CLERK OF THE SUPREME COURT

The foregoing is a true copy  
of the original on file in my office.

*Mark Neary*  
CLERK OF THE SUPREME COURT  
OF NEW JERSEY

140 a

**Petition for Relief From a Conviction or Sentence  
By a Person in State Custody  
(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)**

**Instructions**

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.
2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.
3. Make sure the form is typed or neatly written.
4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.
6. You must pay a fee of \$5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed in forma pauperis (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds \$ 200.00, you must pay the filing fee.
7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.
8. When you have completed the form, send the original and 1 copies to the Clerk of the United States District Court at this address:  
Clerk, United States District Court for  
Address  
City, State Zip Code
9. **CAUTION:** You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
10. **CAPITAL CASES:** If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.

141 a

AO 241 (Rev. 06/13)

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

United States District Court	District: New Jersey
Name (Under which you were Convicted) Omar N. Davis	
Place of Confinement: New Jersey State Prison - P.O. Box 861 Trenton, New Jersey 08625	Prisoner No.: 448264
Petitioner (include the name under which you were convicted) Omar N. Davis	
Respondent (authorized person having custody of petitioner) v. Stephen M. D'Ilio, et al	
The Attorney General of the State of New Jersey	

**PETITION**

1. (a) Name and location of court which entered the judgment of conviction you are challenging:  
Superior Court of New Jersey - Law Division - Mercer County, 209 S. Broad Street, Trenton, New Jersey 08650-0068
1. (b) Criminal docket or case number (if you know): 00-06-192
2. (a) Date of judgment of conviction (if you know): March 28, 2003
2. (b) Date of sentencing: March 28, 2003
3. Length of sentence: Life w/ 30 parole ineligibility
4. In this case, were you convicted on more than one count or of more than one crime? Yes  No
5. Identify all crimes of which you were convicted and sentenced in this case:  
Murder and possession of a weapon for an unlawful purpose
6. (a) What was your plea? (Check one)
 

(1) Not guilty    (3) Nolo contendere (no contest)  
 (2) Guilty    (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have?  
 Jury    Judge only

142a

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes  No

8. Did you appeal from the judgment of conviction?

Yes  No

9. If you did appeal, answer the following:

(a) Name of court: Superior Court of New Jersey - Appellate Division

(b) Docket or case number (if you know): A-0058-03T4

(c) Result: Affirmed

(d) Date of result (if you know): March 30, 2004

(e) Citation to the case (if you know): Unpublished

(f) Grounds raised: (1) The Prosecutor's Improper Comments in His Opening and Summation Deprived Defendant of a Fair Trial (Not Raised Below); (2) The Admission of Testimony About Defendant's House Having Been Raided for Drugs in the Past Created a Degree of Prejudice not Curable by the Court's Limiting Instructions, and Requires Reversal; (3) The Life Sentence imposed upon Defendant for Murder was Manifestly Excessive Under all of the Applicable Circumstances; (4) The Sentence must be Vacated Because in Imposing it, the Trial Court Violated Constitutional Principles Set Forth in Blakely v. Washington, and State v. Natale; (5) The Court Erred in Failing to Merge the Charge of Possession of a Weapon for an Unlawful Purpose into the Murder Charge (Not Raised Below).

(g) Did you seek further review by a higher state court?  Yes  No

If yes, answer the following:

(1) Name of court: Supreme Court of New Jersey

(2) Docket or case number (if you know): 59,759

(3) Result: Denied

(4) Date of result (if you know): September 8, 2006

(5) Citation to the case (if you know): 180 N.J. 454; 852 A.2d 191

(6) Grounds raised: See 9(f)

(h) Did you file a petition for certiorari in the United States Supreme Court?  Yes  No

If yes, answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A

(3) Date of result (if you know): N/A

(4) Citation to the case (if you know): N/A

143a

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?  Yes  No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Superior Court of New Jersey - Mercer County, Law Division

(2) Docket or case number (if you know): 99-07-0665

(3) Date of filing (if you know): September 20, 2007

(4) Nature of proceeding: Post-Conviction Relief

(5) Grounds raised: (1) The Indictment Should Have Been Dismissed In Its Entirety (2) Defendant Was Denied The Effective Assistance Of Trial Counsel In Violation Of The United States And New Jersey Constitutions (3) The Defendant Was Deprived His Constitutional Right To Present A Defense (4) The Defendant Was Deprived His Constitutional Right To Cross-Examination (5) Defendant Was Denied The Effective Assistance Of Appellate Counsel (6) An Evidentiary Hearing Is Required With Regard To The Allegations Of Defendant's Petition For Post Conviction Relief.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?  
 Yes  No

(7) Result: Denied.

(8) Date of result (if you know): September 10, 2010.

(b) If you filed any second petition, application or motion, give the same information: N/A

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?  
 Yes  No

(7) Result: N/A

(8) Date of result (if you know): N/A

(c) If you filed any third petition, application, or motion, give the same information: N/A

(1) Name of court: N/A

144 a

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes  No

(7) Result: N/A

(8) Date of result (if you know): N/A

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition:  Yes  No

(2) Second petition:  Yes  No

(3) Third petition:  Yes  No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:  
Petition for Certification to New Jersey Supreme Court.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

**CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

**GROUND ONE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
 Yes  No

145a

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

## **GROUND TWO: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

### **PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

146 a

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

### **GROUND THREE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?  Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

147a

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?  Yes  No

(4) Did you appeal from the denial of your motion or petition?  Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

**GROUND FOUR: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Four, explain why:

**(c) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

**(d) PLEASE SEE ATTACHED**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
 Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available):

148a

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  
Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: \_\_\_\_\_

**GROUND FIVE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Five, explain why:

(c) Direct Appeal of Ground Five:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
 Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

149 a

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?  
Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five:

**GROUND SIX: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Six, explain why: N/A

(c) Direct Appeal of Ground Six:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

150 a

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Six:

**GROUND SEVEN: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Seven, explain why: N/A

(c) Direct Appeal of Ground Seven:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

151a

Docket or case number (if you know): \_\_\_\_

Date of the court's decision: \_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_

Docket or case number (if you know): \_\_\_\_

Date of the court's decision: \_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Seven:

**GROUND EIGHT: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Eight, explain why: N/A

(c) Direct Appeal of Ground Eight:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

152a

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Eight:

**GROUND NINE: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Nine, explain why: N/A

(c) Direct Appeal of Ground Nine:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

153a

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Nine:

**GROUND TEN: PLEASE SEE ATTACHED**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**PLEASE SEE ATTACHED**

(b) If you did not exhaust your state remedies on Ground Ten, explain why: N/A

(c) Direct Appeal of Ground Ten:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

154 a

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): \_\_\_\_

Date of the court's decision: \_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_

Docket or case number (if you know): \_\_\_\_

Date of the court's decision: \_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Ten:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes  No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: N/A.

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which

155a

ground or grounds have not been presented, and state your reasons for not presenting them: \_\_\_\_\_

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. N/A.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: UNKNOWN

(b) At arraignment and plea: UNKNOWN

(c) At trial: Holly J. Ford, 126 White Horse Pike, Haddon Heights, New Jersey 08035

(d) At sentencing: SAME AS 16(C)

(e) On appeal: Susan Brody, 31 Clinton Street, P.O. Box 46003, Newark New Jersey 07101

(f) In any post-conviction proceeding: A. Harold Kokes, 728 West Avenue, Suites S201-202  
New Jersey 08553

(g) On appeal from any ruling against you in a post-conviction proceeding: A. Harold Kokes, 728 West Avenue,  
Suites S201-202 New Jersey 08553

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes  No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A.

(b) Give the date the other sentence was imposed: N/A.

(c) Give the length of the other sentence: N/A.

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes  No

18. TIMELINESS OF PETITION: PLEASE SEE ATTACHED

156 a

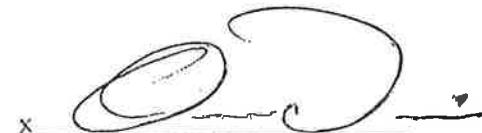
If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.<sup>1</sup>

Therefore, petitioner asks that the Court grant the following relief: or any other relief to which petitioner may be entitled.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on Nov 17, 2014

Executed on \_\_\_\_\_

  
X \_\_\_\_\_  
Omar Davis

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition N/A

<sup>1</sup> The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:
  - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
  - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
  - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
  - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

157a

Omar N. Davis v. Stephen D'Ilio, et. al.  
Case No. \_\_\_\_\_

Attachments

**9.(f) Grounds Raised:** (1) The Prosecutor's Improper Comments in His Opening and Summation Deprived Defendant of a Fair Trial (Not Raised Below); (2) The Admission of Testimony About Defendant's House Having Been Raided for Drugs in the Past Created a Degree of Prejudice not Curable by the Court's Limiting Instructions, and Requires Reversal; (3) The Life Sentence imposed upon Defendant for Murder was Manifestly Excessive Under all of the Applicable Circumstances; (4) The Sentence must be Vacated Because in Imposing it, the Trial Court Violated Constitutional Principles Set Forth in Blakely v. Washington, and State v. Natale; (5) The Court Erred in Failing to Merge the Charge of Possession of a Weapon for an Unlawful Purpose into the Murder Charge (Not Raised Below).

**11.(a)(5) Grounds Raised:** (1) Trial Counsel did not Retain nor have Petitioner Evaluated by a Psychiatrist or Psychologist for Potential Defense of Voluntary Intoxication or Passion/Provocation; (2) Trial Counsel did not Retain an Expert for Defense of Voluntary Intoxication; (3) Trial Counsel did not Retain any Expert for defense of Passion/Provocation; (4) Trial Counsel did not Object to the State's Request for a Flight Charge; (5) Petitioner was Never Advised of the Sentence He was Facing, if He went to Trial and was Convicted. If Petitioner had been so Advised, He Would have Entered into Meaningful Plea Discussion with the State; (6) Petitioner was Denied Effective Assistance of Counsel when His Attorney Failed to Object to the Admission of Evidence Obtained in Violation of Petitioner's Fifth Amendment Right to Remain Silent; (7) Petitioner argues that the State Purposely Created the Initial Mistrial Because Petitioner Believes the State Knew the Contents of Detective Hires' Improper Testimony Before Same Improper Testimony was Elicited; (8) Petitioner Argues that Detective Hires' Inability to Testify at the Second Trial was not Supported by sufficient Medical Documentation. The Trial Court's Determination that Detective Hires' was Medically Excused from Testifying at the Second Trial Violated Petitioner's Right to Confront and Cross-Examine His Accuser (Detective Hires); (9) (a) Even if the Court Finds that Each of the Above Points, Individually, is not Sufficient Evidence of a "Prima Facie" Finding that Requires that Petitioner is Entitled to an Evidentiary Hearing, the Cumulative Effect of same Errors Should Compel the Court to Grant same Evidentiary Hearing, (b) Petitioner was Denied Effective Assistance of Counsel when His Attorney Failed to have Petitioner Evaluated, Retain an Expert for Voluntary Intoxication, Retain any Expert, whatsoever, for Passion/Provocation and Object to the Flight Charge; (10) The Inadequate Representation the Petitioner Received at Trial Fell Below an Objective Reasonable Standard thus Violating His Rights to Effective Assistance of Counsel Under the United States and New Jersey Constitutions, (a) Trial Counsel's Failure to Investigate Whether a Psychologist or Psychiatrist would have Offered a Opinion of Petitioner's Legal Insanity Served to Deny Petitioner of Effective Assistance of Counsel, (b) Trial Counsel was Ineffective in Her Assistance Through Her Failure to Thoroughly Pursue and Present an Passion Provocation Defense, (c) The Ineffective Assistance Offered by Trial

1 /58a

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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-001511-12T2

ACTION

ON APPEAL FROM

SUPERIOR COURT-LAW DIVISION  
CRIMINAL PART-ATLANTIC COUNTY

SAT BELOW

HON. ALBERT J. GAROFOLO, J.S.C  
(RET.) t/a

STATE OF NEW JERSEY,  
COMPLAINANT/RESPONDENT,

v.

OMAR DAVIS,  
APPELLANT/PETITIONER.

---

APPELLATE BRIEF ON BEHALF OF APPELLANT/PETITIONER, OMAR DAVIS.

---

A. HAROLD KOKES, ESQ.  
728 WEST AVENUE, SUITES S201-202  
OCEAN CITY, NEW JERSEY 08226  
(609) 399-1111 FAX: (609) 391-1337  
ahkoffice@verizon.net

A. HAROLD KOKES, ESQ.  
ON THE BRIEF  
April 8, 2013

APPELLANT/PETITIONER IS INCARCERATED

159 a

TRANSCRIPT

PAGE NOS.

1T OCTOBER 22, 2012 TRANSCRIPT OF PCR HEARING-----4

TABLE OF CONTENTS

PROCEDURAL HISTORY-----	1-3
STATEMENT OF FACTS-----	3-6
LEGAL ARGUMENT-----	6-18
POINT I: THE LOWER COURT ERRED IN DENYING PETITIONER'S POST-CONVICTION RELIEF APPLICATION WITHOUT SCHEDULING AN EVIDENTIARY HEARING-----	6-7
POINT II: THE LOWER COURT ERRED IN DENYING PETITIONER'S REQUEST THAT THE RECORD REMAIN OPEN PENDING THE STATE'S SUPPLYING AN OFFICIAL TRANSCRIPT OF THE NOVEMBER 7, 2001 PROCEEDINGS-----	7-8
POINT III: THE LOWER COURT ERRED IN REFUSING TO SHIFT THE BURDEN TO THE STATE IN LIGHT OF PETITIONER'S UNREBUTTED SUBMISSIONS THAT NO MEANINGFUL PRETRIAL CONFERENCE, WHATSOEVER, OCCURRED-----8	
POINT IV: THE LOWER COURT ERRED IN FAILING TO REQUIRE THE STATE TO COMPEL THE PRESENCE OF PETITIONER'S FORMER TRIAL COUNSEL, NOW PENNSYLVANIA TRIAL JUDGE HOLLY FORD-----8	
POINT V: THE LOWER COURT ERRED IN ITS' FAILURE TO FIND ANY INEFFECTIVE ASSISTANCE OF COUNSEL, WHATSOEVER; INCLUDING, BUT NOT LIMITED TO, FORMER TRIAL COUNSEL'S (1) NOT HAVING PETITIONER EVALUATED; (2) NOT RETAINING ANY EXPERTS, WHATSOEVER, FOR EITHER VOLUNTARY INTOXICATION OR PASSION/PROVOCATION AND (3) FAILURE TO OBJECT TO THE FLIGHT CHARGE-----9-16	

1609

PAGE NOS.

POINT VI:

PETITIONER ARGUES THAT THE STATE PURPOSELY  
CREATED THE INITIAL MISTRIAL BECAUSE  
PETITIONER BELIEVES THE STATE KNEW THE  
CONTENT OF DET HIRES' IMPROPER TESTIMONY  
BEFORE SAME IMPROPER TESTIMONY WAS ELICITED-----16

POINT VII:

PETITIONER ARGUES THAT DET HIRES' INABILITY  
TO TESTIFY AT THE SECOND TRIAL WAS NOT  
SUPPORTED BY SUFFICIENT MEDICAL DOCUMENTATION.  
THE TRIAL COURT'S DETERMINATION THAT DET. HIRES  
WAS MEDICALLY EXCUSED FROM TESTIFYING AT THE  
SECOND TRIAL VIOLATED PETITIONER'S RIGHT TO  
CONFRONT HIS ACCUSER (DET. HIRES), AND  
PETITIONER'S TRIAL COUNSEL'S STIPULATION  
THAT CERTAIN PORTIONS OF DET HIRES' TESTIMONY  
BE READ INTO THE RECORD IS FURTHER EVIDENCE OF  
INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL-----17

POINT VIII:

EVEN IF THE COURT FINDS THAT EACH OF THE  
ABOVE POINTS, INDIVIDUALLY, IS NOT SUFFICIENT  
EVIDENCE OF A "PRIMA FACIE" FINDING THAT REQUIRES  
THAT PETITIONER IS ENTITLED TO AN EVIDENTIARY  
HEARING, THE CUMULATIVE EFFECT OF SAME ERRORS  
SHOULD COMPEL THE COURT TO GRANT SAME  
EVIDENTIARY HEARING-----17-18

CONCLUSION-----18

STATUTES CITED

*N.J.S.A. 2C:11-3a(1) (2)*-----1  
*N.J.S.A. 2C:39-4a*-----1

1619

PAGE NOS.

RULES CITED

R.3:22-1-----18

TABLE OF CASES

<i>Missouri v. Frye</i> , ____ U.S. ___, 132 S.Ct. 1399 (2012)-----	8
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)-----	17
<i>Strickler v. Green</i> , 527 U.S. 263 (1999)-----	14
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986)-----	9
<i>Nix v. Whiteside</i> , 475 U.S. 157 (1986)-----	14
<i>Strickland v. Washington</i> , 466 U.S. 688 (1984)-----	10
<i>State v. Taccetta</i> , 200 N.J. 183 (2009)-----	5
<i>State v. Fisher</i> , 156 N.J. 494 (1998)-----	10
<i>State v. Preciose</i> , 129 N.J. 451 (1992)-----	6
<i>State v. Fritz</i> , 105 N.J. 42 (1987)-----	10
<i>State v. Andrew Dennis</i> , 2001 WL 31360 (App. Div. 2011)----	5

CONSTITUTIONS

U.S. Constitution: Sixth Amendment-----	10
Art. I, ¶10 of the New Jersey Constitution-----	10

APPELLANT'S EXHIBITS APPENDIX I

1a-4a INDICTMENT NUMBER 00-06-1292-----	1
5a-98a FEBRUARY 5, 2003 TRIAL TRANSCRIPT-----	1
99a-100a MARCH 28, 2003 JUDGMENT OF CONVICTION AND ORDER FOR COMMITMENT-----	1

APPELLANT'S EXHIBITS APPENDIX II

101a-112a MARCH 29, 2006 APPELLATE DIVISION DECISION-----	1
113a-151a PETITIONER'S JANUARY 30, 2007 <i>PRO SE</i> APPLICATION FOR POST-CONVICTION RELIEF-----	1-2

162a

PAGE NOS.

152a-168a	PETITIONER'S MARCH 19, 2007 PRO SE BRIEF IN SUPPORT OF POST-CONVICTION RELIEF APPLICATION	2
169a-170a	PETITIONER'S MARCH 20, 2009 PRO SE AFFIDAVIT	2
171a	MAY 27, 2010 ORDER	2
172a-173a	PETITIONER'S FEBRUARY 14, 2011 CERTIFICATION IN SUPPORT OF POST-CONVICTION RELIEF APPLICATION	2
174a	PETITIONER'S JUNE 5, 2012 SUPPLEMENTAL CERTIFICATION IN SUPPORT OF POST-CONVICTION RELIEF APPLICATION	2

**APPELLANT'S EXHIBITS APPENDIX III**

175a-236	PETITIONER'S AUGUST 13, 2012 SUPPLEMENTAL CERTIFICATION IN SUPPORT OF POST-CONVICTION RELIEF APPLICATION	2
237a-239a	STATE'S AUGUST 15, 2012 OPPOSITION LETTER BRIEF	2
240a-245a	PETITIONER'S OCTOBER 11, 2012 SUPPLEMENTAL BRIEF	3
246a	OCTOBER 30, 2012 ORDER DENYING PETITIONER'S POST-CONVICTION RELIEF APPLICATION	3

**APPELLANT'S EXHIBITS APPENDIX IV**

247a-251a	STATE V. ANDREW DENNIS, 2011 WL 31360 (APP. DIV. 2011)	5
252a-298a	SEPTEMBER 26, 2002 PARTIAL TRIAL TRANSCRIPT	16
299a-305a	FEBRUARY 19, 2003 PARTIAL TRIAL TRANSCRIPT	17

163a

PROCEDURAL HISTORY

In June, 2000, an Atlantic County Grand Jury returned Indictment Number 00-06-192, charging Appellant/Petitioner, Omar N. Davis, (hereinafter Petitioner) with the murder of Raamah Huggins-El, in violation of N.J.S.A. 2C:11-3a(1)(2) (Count One), and possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4a (Count Two). (1a-4a)

Following a mistrial in September, of 2002, the case was tried before the Honorable Albert J. Garofolo, P.J.S.C. (hereinafter Judge Garofolo), and a Jury from February 4, 2003, to February 26, 2003. The Jury returned Guilty Verdicts on both Counts. A copy of the February 5, 2003 Trial transcript is included in the Appendix. (5a-98a)

On March 28, 2003, Judge Garofolo Sentenced Petitioner on Count One to a term of life with a thirty (30) year period of parole ineligibility, and on Count Two to a concurrent term of ten (10) years pursuant to the No Early Release Act. (99a-100a)

On August 29, 2003, Petitioner filed a Notice of Appeal.

On March 29, 2006, the Appellate Division affirmed the Lower Court's verdict and finding. (101a-112a)

On approximately January 30, 2007, Petitioner filed a *pro se* Application for Post-Conviction Relief (hereinafter PCR) with

1649  
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the Superior Court, Atlantic County, Law Division-Criminal Part.  
(113a-151a)

On March 19, 2007, Petitioner filed a *Pro Se* Brief in Support of PCR. (152a-168a)

On March 20, 2009, Petitioner filed a *Pro Se* Affidavit in Support of Motion to Proceed Within Time. (168a-170a)

On May 27, 2010, the Trial Court issued an Order confirming that Petitione's PCR was timely filed. (171a)

On February 14, 2012, Petitioner filed a Certification in Support of this PCR. (172a-173a)

On June 5, 2012, the undersigned filed a Supplemental Certification in Support of Petitioner's PCR. (174a)

On August 13, 2012, the undersigned filed a Supplemental Brief in Support of Petitioner's PCR. (175a-236a)

According to the Atlantic County Prosecutor's Office records and a diligent search of the Court's records and file, no Pretrial Memo nor any record of a meaningful Pretrial Conference could be located.

On August 15, 2012, the State submitted an Opposition Letter Brief. (237a-239a)

165a

On October 11, 2012, the undersigned submitted a Supplemental Brief in Support of Petitioner's PCR. (240a-245a)

On October 22, 2012, the Lower Court entertained Oral Argument on Petitioner's PCR.

On October 30, 2012, the Lower Court entered an Order Denying Appellant's PCR. (246a)

On November 27, 2012, Petitioner filed his Notice of Appeal of the above PCR denial with the Appellate Division.

#### STATEMENT OF FACTS

After a Mistrial was declared during Petitioner's First Trial, Petitioner was tried before Judge Garafolo and the Jury found Petitioner Guilty of Counts One (1), N.J.S.A. 2C:11-3a(1)(2) (Murder) and Count Two (2), N.J.S.A. 2C:39-4a (Possession of a Weapon for Unlawful purposes on February 26, 2003.

Petitioner was Sentenced to a term of life with a thirty (30) year parole ineligibility period on Count One (1), and a concurrent ten (10) year Sentence pursuant to the No Early Release Act on Count Two (2) on March 28, 2003.

Petitioner filed an Appeal, which Appeal affirmed the Lower Court's verdict and finding on March 29, 2006.

166a  
3

On January 30, 2007, Petitioner filed a *pro se* first Post-Conviction Relief Application (hereinafter 1<sup>st</sup> PCR). (112a-150a)

According to all available records, Petitioner's Trial Counsel retained no Experts to evaluate Petitioner's potential Intoxication and Diminished Capacity Defenses. According to Petitioner's June 5, 2012 Supplemental Certification, no plea bargain was ever presented to him, nor was he advised of the maximum Sentence he was facing. (173a) (1T p.16, lines 13-17; p.18, lines 5-6; p.20, lines 16-18 and p. 47, lines 8-10 and 14-15)

As the undersigned argued on Petitioner's behalf, no record of any plea offer, meaningful Pretrial Conference or Pretrial Memo could be located. (1T p. 6, lines 13-14; p. 20, lines 16-15; p. 21, lines 3-9 and p. 22, lines 19-22) Thus, the burden should have shifted to the State to show there was a meaningful Pretrial Conference. (1T p. 5, lines 13-15)

Therefore, this reviewing Court should determine that the Lower Court was presented with unrebutted proofs that neither a Pretrial Memo existed, nor a meaningful Pretrial Conference was held. (1T p. 5, lines 12-14; p.6, lines 24-25; p. 7, lines 1-6 and p. 21, lines 3-9) To rebut the above proofs, the Lower Court should have required the State to compel the presence of Petitioner's former Trial Attorney, now Pennsylvania Trial Judge

Holly Ford, after Petitioner presented his *prima facie* case that there was neither a meaningful Pretrial Conference, nor was a Pretrial Memo filed. (1T p.7, lines 15-20; p. 8, lines 20-21 and 25; p. 9, lines 1-5; p. 22, lines 18-22 and p. 23, lines 22-24)

At a minimum, the Lower Court should have scheduled an Evidentiary Hearing. (1T p. 9, lines 11-15) At same Hearing all of Petitioner's additional points, including the lack of having Petitioner evaluated, retaining Experts, or objecting to the Flight charge could have been developed on Petitioner's behalf pursuant to the holdings in *State v. Taccetta*, 200 N.J. 183 (2009) and *State v. Andrew Dennis*, 2011 WL 31360 (App. Div. 2011). (1T p. 9, lines 17-18 and 21-23) (247a-251a)

At the Evidentiary Hearing the Lower Court should have scheduled, the burden should have been placed on the State to rebut Petitioner's sworn statement that no plea offer was tendered, no Pretrial Conference was held and Petitioner executed no Pretrial Memo. (1T p. 18, lines 11-17)

At the October 22, 2012 Oral Argument on Petitioner's PCR, the State could not disagree there was an inability to find a Pretrial Memo or even the recording of a meaningful Pretrial conference. (1T p. 29, lines 5-22 and p. 30, lines 1-3)

Further, the State should have supplied an official transcript of the November 7, 2001 proceedings to which the

State referenced as an unofficial transcript. (1T p. 36, lines 7-14)

Further, the Court should not have closed the record without any transcript being supplied. (1T p.37, lines 27-20)

Moreover, as the Trial record confirms, the Court erred when it stated on October 22, 2012 that, "There were no other facts indicated by him or any other witness that would suggest he was under the influence of alcohol or anything else." (2T p. 72, lines 16-20)

LEGAL ARGUMENT

**POINT I: THE LOWER COURT ERRED IN DENYING  
PETITIONER'S POST-CONVICTION RELIEF APPLICATION  
WITHOUT SCHEDULING AN EVIDENTIARY HEARING**

As our Supreme Court stated in *State v. Preciose*, 129 N.J. 451, 462 (1992), "Where a defendant has presented a *prima facie* claim of ineffective assistance of counsel and the asserted facts in support thereof are outside the record, an evidentiary hearing is required." (emphasis added) *Dennis*, *supra*. at p.3

In this PCR the Lower Court committed the same error as the Lower Court in *Dennis*. As the Appellate Division held in the unpublished decision in *Dennis*, "to interpret these comments, as did the PCR court, as an outright rejection of a plea offer that was never actually placed before the pre-trial judge is purely speculative and unworthy of any weight or deference." *Dennis*,

*supra*, at p. 4

As Petitioner argues, because no plea offer was tendered, the State's argument should be rejected for the same reasons the Appellate Division advanced in *Dennis* as follows, the issue is clearly, "...whether defendant would have or could have entered a guilty plea to the purported plea offer if correctly advised concerning the sentencing consequences." *State v. Taccetta*, 351, 200 N.J. Super. 196 (App. Div.), certif. denied, 174 N.J. 544 (2002), rev'd after remand 200 N.J. 183 (2009) (emphasis in original)

For the foregoing reasons the Lower Court should have held an Evidentiary Hearing.

**POINT II: THE LOWER COURT ERRED IN DENYING PETITIONER'S REQUEST THAT THE RECORD REMAIN OPEN PENDING THE STATE'S SUPPLYING AN OFFICIAL TRANSCRIPT OF THE NOVEMBER 7, 2001 PROCEEDINGS.**

The Lower Court should have required the State to supply an official transcript of the November 7, 2001 proceedings, or the Court could have ordered same transcript *sua sponte* as follows: "...I would want to have a certified transcript." (1T p. 35, lines 18-19) and "And Your Honor, I think, can even order one." The Court agreed, "Well, I can." (1T page 12-14)

The Lower Court's failure to require the State to supply an official transcript of the November 7, 2001 proceedings, or the Court to order one *sua sponte*, was error. At a minimum, the

Trial Court should have left the record open pending receipt and review of an official transcript. (1T p. 37, lines 17-19)

**POINT III: THE LOWER COURT ERRED IN REFUSING TO SHIFT THE BURDEN TO THE STATE IN LIGHT OF PETITIONER'S UNREBUTTED SUBMISSIONS THAT NO MEANINGFUL PRETRIAL CONFERENCE, WHATSOEVER, OCCURRED.**

The Lower Court's failure to shift the burden to the State to prove; (1) a meaningful Pretrial Conference was held, (2) a Pretrial Memo was filed, or (3) to compel the presence of Judge Ford was error. *Dennis, supra.*, and *Missouri v. Frye*, 132 S.Ct. 1399 (2012)

**POINT IV: THE LOWER COURT ERRED IN FAILING TO REQUIRE THE STATE TO COMPEL THE PRESENCE OF PETITIONER'S FORMER TRIAL COUNSEL, NOW PENNSYLVANIA TRIAL JUDGE HOLLY FORD.**

The Lower Court's failure to require the State to compel the presence of former Attorney now Pennsylvania Trial Judge Holly Ford; or, at the very least, to shift the burden to the State after Ordering an Evidentiary Hearing, at which Hearing the Court, the State, or all involved could compel Judge Ford's presence; was reversible error. As the United States Supreme court held in *Frye* "...criminal defendants require effective counsel during plea negotiations." "Anything less..might deny defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Frye, supra*, at p.1407-1408.

**POINT V: THE LOWER COURT ERRED IN ITS' FAILURE TO FIND ANY INEFFECTIVE ASSISTANCE OF COUNSEL, WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, FORMER TRIAL COUNSEL'S: (1) NOT HAVING PETITIONER EVALUATED; (2) NOT RETAINING ANY EXPERTS, WHATSOEVER, FOR EITHER VOLUNTARY INTOXICATION OR PASSION/PROVOCATION AND (3) FAILURE TO OBJECT TO THE FLIGHT CHARGE.**

After reviewing the Trial and Appellate records to date, it should be clear that Trial Counsel did not effectively represent Petitioner.

It appears that Trial Counsel for Petitioner did not understand the law of the land as annunciated by the United States Supreme Court, as well as the law of New Jersey by the New Jersey Supreme Court and Appellate Division, which clearly agree that retaining the above experts or objecting to the Flight Charge, were critical to Petitioner's Defense before and during Trial.

Petitioner is entitled to effective representation by Counsel. The failure to: (1) have Petitioner evaluated (Point I of below PCR Brief); (2) retain an expert for voluntary intoxication or retain any expert, whatsoever, for Passion/Provocation (Point II of below PCR Brief) and (3) object to the Flight Charge (Point III of below PCR Brief), deprived Petitioner of the effective assistance of Counsel.

Therefore, Petitioner is entitled to relief. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Even though *Kimmelman* addressed

a Motion to Suppress, the Court's language regarding Counsel's failure to file a Suppression Motion should apply to Petitioner's Counsel's failure to have Defendant evaluated; retain an expert for voluntary intoxication; retain any expert, whatsoever, for Passion/Provocation and object to the Flight Charge.

Although the State may argue that the failures to address the above issues may not, in and of themselves, constitute ineffective assistance of Counsel, *Kimmelman, supra*, at p. 384, Trial Counsel's failure to have Petitioner evaluated; retain an expert for voluntary intoxication; retain any expert, whatsoever, for Passion/Provocation and object to Flight Charge should be analyzed pursuant to the holding in *Strickland v. Washington*, 466 U.S. 668 (1984), *State v. Fritz*, 105 N.J. 42 (1987), under the Sixth Amendment to the United States Constitution, Art. I, ¶10 of the New Jersey Constitution, and *State v. Fisher*, 156 N.J. 494, 499-600 (1998). Under *State v. Fritz, supra*, at p. 52, the Appellant only needs to first demonstrate that, giving extreme deference to the presumption that Counsel's conduct falls within a range of reasonable professional assistance, Counsel made errors so serious that "counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." *Fisher, supra*, at p. 499 (citing *Strickland, supra*, 466 U.S. at p. 687.)

Once Petitioner can show the requisite deficient performance, Petitioner must then also demonstrate prejudice. *Id.* In order to demonstrate prejudice, Petitioner must show a reasonable probability that, but for Counsel's mistakes, the result of the proceeding would have been different. In determining whether or not a reasonable probability exists, the Court need only find that there exists "a probability sufficient to undermine confidence in the outcome." *State v. Fisher, supra*, at p.500; *State v. Fritz, supra*, at p. 52 (quoting *Strickland, supra*. at p. 694).

Finally, in order to obtain relief based upon ineffective assistance of Counsel in the context of a failure to have Defendant evaluated; retain an expert for voluntary intoxication; retain any expert, whatsoever, for Passion/Provocation and object to Flight Charge, Petitioner must also prove that his claim is "meritorious." *State v. Fisher, supra*, at p. 501; and *Kimmelman v. Morrison, supra*, at p. 365. To determine a meritorious claim, the Court must be satisfied that there exists a "probability that the verdict would have been different absent the excludible evidence." *Kimmelman v. Morrison, supra*, 477 U.S. at p. 365.

Clearly, Petitioner can show that a *prima facie* case of ineffective assistance of Counsel exists in this case.

In this case, there should be no dispute that Counsel

failed to have Petitioner evaluated; retain an expert for voluntary intoxication; retain any expert, whatsoever, for Passion/Provocation and to object to the Flight Charge.

Apparently, same retaining of experts or objecting to the Flight Charge were never discussed with Petitioner.

A review of Petitioner's Trial clearly shows that a large portion of his Defense should have been addressed Pretrial, except for the failure to object to the Flight Charge.

It is clear that a more careful analysis of Petitioner's need for retaining of the experts in question would have caused competent Counsel to retain same experts.

Because the matter was placed on the Trial list, Counsel had nothing to lose by retaining the experts in question.

Therefore, it appears that Trial Counsel in this case was less than competent by not requesting the necessary expert evaluations. Thus, Counsel's failure to even explore retaining the experts, as well as Trial Counsel's failure to object to the Flight Charge are *prima facie* evidence that she was acting outside the scope of reasonable professional assistance and was not functioning as the type of Counsel the Sixth Amendment of the United States Constitution guarantees. *State v. Fisher, supra*, at p. 499.

In this case, there is no question as to the state of the law at the time of Petitioner's Pretrial Conference. Clearly

Trial Counsel could have and should have retained the requisite experts for evaluating Petitioner. The failure to retain same experts should be held, in and of itself, to constitute ineffective assistance of Counsel, even if Defense Counsel had objected to the Flight Charge in question.

Even though *Fisher* deals with Suppression Motions, the Court's language confirming that "counsel's performance was deficient(,)" *Fisher, supra*, at p. 507, should also be applied to Trial Counsel's failure to have Petitioner evaluated; retain an expert for voluntary intoxication; retain any expert, whatsoever, for Passion/Provocation and to object to the Flight Charge.

The failure of Trial Counsel to explore the above areas cannot be excused by any argument that other Counsel might have suffered from the same infirmity. Recently, the Third Circuit Court of Appeals held that the failure of Counsel in a criminal case to not know the Sentencing range for an offense constituted ineffective assistance. *State v. Baker*, 177 F.3d. 149 (3d Cir. 1999), cert. denied, 528 U.S. 911 (1999). It was ineffective performance notwithstanding the extraordinary circumstances in which three different Judges and the Prosecutor were also unaware of the appropriate Sentencing range. Their ignorance did not ameliorate Trial Counsel's ineffectiveness. *Id.* at p. 154. Thus, if it is argued that other Counsel might have chosen

not to have Petitioner evaluated; retain an expert for voluntary intoxication; retain any expert, whatsoever, for Passion/Provocation, as well as not object to the Flight Charge, those facts do not make Mr. Davis' Trial Counsel more effective.

The second prong of the test of ineffective assistance of Counsel is that which requires Petitioner to show a reasonable probability that, but for Counsel's errors, the result of the proceeding would have been different. As discussed above, that probability is one which undermines the Court's confidence in the outcome, *State v. Fisher, supra*, at p. 500.

After examining the facts presented to this Court and interpreted "in a light most favorably to defendant," *Ibid.* [quoting *State v. Preciose*, 129 N.J. 451, 462 (1992)], Mr. Davis has clearly shown a reasonable probability of demonstrating prejudice.

A reasonable probability is, of course, something less than a preponderance of the evidence. *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). It is a probability that undermines the Court's confidence in the result, but it is not a test of whether the Petitioner "would more likely than not have received a different" result. *Strickler v. Green*, 527 U.S. 263 (1999), (discussing *Brady* violations). (emphasis added)

The dissent in *Strickler* offers guidance to this Court as to what a reasonable probability is. Justice Souter in his

dissent cautioned against Courts believing that reasonable probability was a level of certainty anywhere near "more likely than not." *Id.* at 527 U.S. 263, (Souter, J., dissenting). In a lengthy discussion of that standard and comparisons with other similar standards such as "reasonable likelihood" and "reasonable possibility," Justice Souter postulated that Courts would be "better off speaking of a 'significant possibility' of a different result." *Ibid.*

Whatever similarity is to be ascribed to reasonable probability with respect to other tests, one thing is known; "The 'reasonable probability' test is not a stringent one." *Baker, supra* at p. 154.

When viewed in the above context, it should be clear there exists a reasonable probability that, had Trial Counsel had Petitioner evaluated; retained any expert for voluntary intoxication; retained any expert, whatsoever, for Passion/Provocation or objected to the Flight Charge, the result would have been different, especially with the assistance of the expert(s) in question.

With respect to the requirement that the claim is "meritorious" under *Fisher* and *Kimmelman*, the record is clear that it is highly probable that the verdict would have been different if Petitioner's Trial Counsel had Petitioner evaluated; retained an expert for voluntary intoxication;

retained any expert, whatsoever, for Passion/Provocation and objected to the Flight Charge.

Thus, the third prong of the test specific to Petitioner's effective assistance of Counsel argument has been met, especially in light of Trial Counsel's failure to have Petitioner evaluated; retain an expert for voluntary intoxication; retain any expert, whatsoever, for Passion/Provocation and object to the Flight Charge.

**POINT VI: PETITIONER ARGUES THAT THE STATE PURPOSELY CREATED THE INITIAL MISTRIAL BECAUSE PETITIONER BELIEVES THE STATE KNEW THE CONTENT OF DET. HIRES' IMPROPER TESTIMONY BEFORE SAME IMPROPER TESTIMONY WAS ELICITED.**

Petitioner argues in the PCR presented to the Lower Court that the State purposely created the initial Mistrial because Petitioner believes the State knew the content of Det. Hires' improper testimony before same improper testimony was elicited. Petitioner relies on the Trial transcript below of September 26, 2002 (252a-298a p.78 lines 1 through p.168 line 17) in support of his belief that the State knew of the content of Det. Hires' improper testimony before same improper testimony was elicited.

1799

POINT VII: PETITIONER ARGUES THAT DET. HIRES' INABILITY TO TESTIFY AT THE SECOND TRIAL WAS NOT SUPPORTED BY SUFFICIENT MEDICAL DOCUMENTATION. THE TRIAL COURT'S DETERMINATION THAT DET. HIRES WAS MEDICALLY EXCUSED FROM TESTIFYING AT THE SECOND TRIAL VIOLATED PETITIONER'S RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER (DET. HIRES), AND PETITIONER'S TRIAL COUNSEL'S STIPULATION THAT CERTAIN PORTIONS OF DET. HIRES' TESTIMONY BE READ INTO THE RECORD IS FURTHER EVIDENCE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Petitioner argues that Det. Hires' inability to testify at the second Trial was not supported by sufficient medical documentation. Petitioner's Trial Counsel's agreement to Stipulate to portions of Det. Hires' prior testimony and let same be read into the record is further support of Petitioner's argument that Trial Counsel was ineffective. (February 19, 2003 partial Trial Transcript 299a-305a of Appendix IV p.11, lines 18 through p. 21 line 6)

Further, the Lower Court's determination that Det. Hires was medically excused from testifying at the second Trial violated Petitioner's right to confront and Cross-examine his accuser (Det.Hires). *Crawford v. Washington*, 531 U.S. 36 (2004)

POINT VIII: EVEN IF THE COURT FINDS THAT EACH OF THE ABOVE POINTS, INDIVIDUALLY, IS NOT SUFFICIENT EVIDENCE OF A "PRIMA FACIE" FINDING THAT REQUIRES THAT PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING, THE CUMULATIVE EFFECT OF SAME ERRORS SHOULD COMPEL THE COURT TO GRANT SAME EVIDENTIARY HEARING.

Even if the Court finds that each of the above Points is

180 a

insufficient to require an Evidentiary Hearing, the cumulative effect of all of the above failings should compel the Court to Order same Hearing.

**CONCLUSION**

Based on the foregoing, it is respectfully requested that the reviewing Court vacate and reverse Petitioner's Convictions. In the alternative, if the reviewing Court does not vacate and reverse Petitioner's Convictions, Petitioner respectfully requests that the reviewing Court Grant Petitioner's PCR and Remand for an Evidentiary Hearing.

Moreover, it is respectfully submitted that Petitioner is entitled to Post-Conviction Relief pursuant to R. 3:22-1 et seq.

Therefore, the reviewing Court should vacate and reverse his Convictions. If same vacating and reversal is not Granted, the reviewing Court should remand the matter for an Evidentiary Hearing for all of the above reasons.

Respectfully submitted,



A. HAROLD KOKES, ATTORNEY FOR  
PETITIONER, OMAR DAVIS

1819

SUPERIOR COURT OF NEW JERSEY  
ATLANTIC COUNTY/CRIMINAL DIVISION  
INDICTMENT NO: 00-06-1292-I  
APPEAL NO: A-1511-12-T2

-----x  
THE STATE OF NEW JERSEY, :

PLAINTIFF,

v. : STENOGRAPHIC TRANSCRIPT  
OF:

OMAR DAVIS, ----- STATUS CONFERENCE -----

DEFENDANT. : AND BAIL REDUCTION -

-----x  
DATE: NOVEMBER 7, 2001

PLACE: ATLANTIC COUNTY COURTHOUSE  
MAYS LANDING, NJ 08330

B E F O R E:

THE HONORABLE ALBERT J. GAROFOLO, P.C.R.J.S.C.

TRANSCRIPT ORDERED BY:

A. HAROLD KOKES, ESQUIRE

A P P E A R A N C E S:

WILLIAM MERZ, ASSISTANT COUNTY PROSECUTOR  
FOR THE STATE OF NEW JERSEY

HOLLY J. FORD, ESQUIRE  
ATTORNEY FOR THE DEFENDANT  
126 WHITE HORSE PIKE  
HADDON HEIGHTS, NJ 08035-1932

\* \* \* \* \*



Q. MOORE, CSR  
SUPERVISOR  
BOULEVARD-2ND FLOOR  
NG, NJ 08330

581a

## 1 P R O C E E D I N G S

2 THE COURT: This is the matter of State v.  
3 Omar Davis for status conference. Appearances.

4 MS. FORD: Holly Ford on behalf of Omar  
5 Davis, the defendant in this matter.

6 MR. MERZ: William Merz for the State.

7 THE COURT: Okay. Status is?

8 MR. MERZ: Judge, we spoke informally with  
9 the Court on this matter. And it's been a case where  
10 there's been ongoing discovery that has been coming in  
11 to my office and I've been providing to the defense  
12 within the last couple of weeks. I provided statements  
13 that came in. There was more statements -- I mailed  
14 out "transcripts" I should say, of statements; the  
15 substance of which is contained in police reports, but  
16 the actual transcripts have been mailed out, and I  
17 believe three more this past Thursday.

18 The State has made a proffered -- a tentative  
19 offer in this case which was discussed with counsel,  
20 and my understanding is that there really isn't a  
21 meeting of the minds being close to resolving along the  
22 terms proposed by the State.

23 I was instructed by the First Assistant to --  
24 if that offer wasn't accepted today -- that, you know,  
25 the case should be placed on the trial list with the

582a

1 understanding that there be continuing investigation  
2 and possible further discovery provided, not limited  
3 to, but at least to the submission of additional  
4 evidence to the State Police lab for DNA testing which  
5 we've been informed by the State police lab that they  
6 could do in eight weeks.

7 I understand none of this is the fault of  
8 Defense Counsel. It's been a situation where, you  
9 know, it's been strained the way discovery has been  
10 coming in to me, and I think at least in some part due  
11 to the number of different investigators that have been  
12 assigned to the cases now, and I think a lot of things  
13 weren't done with continuity maybe that are done in a  
14 usual case where there is solidarity of investigative  
15 heading of the case. But be that as it may, Judge, I  
16 know from informal discussions that the Court may  
17 intend to place this case on the trial list today for  
18 sometime in the month of February. And all I can say  
19 is that even if all of these things had been  
20 accomplished and there had been a hundred percent  
21 discovery provided to the Defendant, the Defendant  
22 would probably be in the same position, given the  
23 calendering of the homicide trials that may be the case  
24 anyway --

25 THE COURT: Yes.

583 a

1                   MR. MERZ: -- so I would ask the Court to do.  
2 that with the understanding --

3                   THE COURT: Except that we might have been  
4 ready before all of these scheduling problems occurred.

5                   MS. HOLLY: Right.

6                   MR. MERZ: Merz that's correct, Judge.  
7 You're right. But I would ask the Court to do that now  
8 with the understanding that maybe there is some  
9 material evidence provided -- and I don't know that  
10 there will be -- but if there is, that maybe the Court,  
11 if there was any plea discussions which the Court might  
12 not ordinarily entertain, maybe it would given that  
13 procedural posture; that's all I can say.

14                  THE COURT: Well, I would ask that you convey  
15 to Mr. Talasnik who I think is reasonable -- a  
16 reasonable person -- that my view is that if the  
17 Defense did not accept today's offer, that it would not  
18 be viewed -- at least and my mind -- as being dilatory  
19 or unreasonable. In fact, in light of the existence of  
20 other tangible evidence which might be of some  
21 probative value either because of it's positive --  
22 certainly Defense Counsel is hopeful it's not positive  
23 -- but by virtue of it not being positive in the sense  
24 that is positive for the State would thereupon be as  
25 positive for the Defense, with that out there and

1 unknown it might be viewed as inappropriate for her to  
2 even recommend that her client accept the offer. So I  
3 think that Mr. Talasnik although a reasonable person  
4 would be unreasonable if he were to take that position  
5 in the future. I think at this point in time the  
6 shortcomings of the State in terms of the trial  
7 readiness are already a matter of record; they need not  
8 be reiterated; they were the subject of a previous  
9 Motion to Reduce Bail which was granted in a rather  
10 substantial fashion.

11 I will give it a trial date now so as to at  
12 least get it to a point where if all things fall into  
13 place and we're in a position to try it, we can do so  
14 without having had ten other cases put in front of it;  
15 so I'm going to give it a trial date of February 4th.  
16 And it's difficult to give a plea cutoff not knowing  
17 when the forensic evidence would be provided by way of  
18 discovery. But I would say that if counsel can  
19 document the receipt of discovery, and should be able  
20 to do that, that certainly seven days within that date  
21 I think would be sufficient time for you to consider  
22 that evidence with your client and family, if they wish  
23 to be involved, and make a decision about a plea.

24 MS. FORD: Your Honor, may I just be heard  
25 for a moment?

585a

1                   THE COURT: Certainly.

2                   MS. FORD: Thank you, your Honor. I only  
3 thank God that I have an ongoing and very positive  
4 relationship with Mr. Merz over the years as a  
5 prosecutor because this case goes beyond what I think  
6 is a reasonable or even could be contemplated as  
7 reasonable. It's an abomination, at this point, the  
8 way this has been handled. I do believe he has been  
- 9 getting it piecemeal, but how anyone would anticipate  
- 10 that I could possibly have my client fully understand a  
11 plea offer based on things that we don't even know are  
12 there -- Mr. Merz said that I had references in the  
13 police reports. I don't have references to some of the  
14 things: like, there was a transcript that I just  
15 received of a statement allegedly heard by someone  
16 approximately five months after the killing itself --  
17 which is something that I had not even contemplated. I  
18 don't want to be blind-sided. I don't think it's fair  
19 for my client to be blind-sided.

20                  I would ask that your Honor look at both the  
21 Bail Motion and the Motion For a Speedy Trial. And if  
22 I need to re-file those rather than renew them, I will  
23 certainly do that, your Honor.

24                  THE COURT: Okay. Mr. Merz, your response?

25                  MR. MERZ: I can't disagree with what

5869

1 counsel's saying. However, I think that the remedy of  
2 a further bail reduction, I don't know that it's a  
3 dilatory amount of time, you know, justifies a further  
4 reduction in an already very reasonable bail for an  
5 offense of this magnitude.

6 And with respect to the speedy trial issue, I  
7 mean, I think that's been addressed today to the best  
8 extent that the Court can deem it by giving it the  
9 February 4 date.

10 THE COURT: This case was indicted a year ago  
11 in June. Is that a year ago in June?

12 MS. FORD: That's correct. The arrest was in  
13 April of 2000.

14 THE COURT: April of 2000?

15 MS. FORD: Yes, your Honor.

16 THE COURT: So we're over a year and a-half.

17 MS. FORD: Right.

18 THE COURT: You know, the length of time  
19 certainly is considerable, it's more the reasons than I  
20 think it's the length of time. I think if you look at  
21 court calendars across the State, you would find that a  
22 year and a-half is certainly not anywhere near the  
23 oldest case. I have an occasion to be involved in a  
24 statewide basis looking at backlog, and it is not  
25 uncommon to see three year old cases in perhaps a

587a

1 number of them. But the reasons in this case are not  
2 -- are not good. I certainly don't think we have  
3 approached the point where I can reasonably consider a  
4 dismissal as a punitive thing, but I think that -- and  
5 I made this observation at the time that I granted the  
6 bail reduction the last time -- I think that if the  
7 State is going to take the position that pretrial  
8 incarceration is necessary, that it ought to approach  
9 from its own standpoint level of conscientiousness and  
10 seriousness that the first position takes, that is that  
11 this is a serious case and warrants a substantial bail.  
12 I think under the circumstances another bail reduction  
13 is in order. I will reduce it to 200,000 cash or bond.

14 MS. FORD: Thank you, your Honor.

15 (Whereupon, the matter concluded.)

16 \* \* \* \*

17  
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22  
23  
24  
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588a

C E R T I F I C A T I O N

I, TERESITA V. Q. MOORE, C.C.R. License Number  
30X100100400 a Certified Court Reporter in and for the  
State of New Jersey, do hereby certify the foregoing to  
be prepared in full compliance with the current  
Transcript Format for Judicial Proceedings and is a  
true and accurate non-compressed transcript to the best  
of my knowledge and ability.

Teresita V. Q. Moore      May 13, 2013

Teresita V. Q. Moore

Date

589 a

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - CRIMINAL PART  
ATLANTIC COUNTY  
INDICTMENT NUMBER: 00-06-1292  
A.D. NUMBER: A-1511-12-T2

STATE OF NEW JERSEY )  
)  
)  
)  
V. ) TRANSCRIPT OF  
) PCR HEARING  
)  
OMAR DAVIS, )  
)  
DEFENDANT. )

PLACE: Atlantic County Criminal Courthouse  
4997 Unami Boulevard  
Mays Landing, New Jersey 08330

DATE: October 22, 2012

BEFORE:

HON. ALBERT GAROFOLO, J.S.C.

TRANSCRIPT REQUESTED BY:

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APPEARANCES:

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590 a

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I N D E X

October 22, 2012

**ARGUMENT:**

Mr. Kokes Page 4, 46, 49

Mr. Lipari Page 35, 48

**COURT FINDINGS:** Page 50

591 a

Colloquy

3

1                   THE COURT: All right, this is the matter of  
2 State versus Omar Davis. Indictment 00-06-1292,  
3 scheduled for oral argument today on the petitioner's  
4 petition for a post-conviction relief. Counsel, your  
5 appearances, please.

6                   MR. LIPARI: Counsel.

7                   MR. KOKES: Judge, Hal Kokes, from Ocean  
8 City, on behalf of Mr. Davis.

9                   MR. LIPARI: Jack Lipari, Assistant  
10 Prosecutor, on behalf of the State.

11                  MR. KOKES: Judge, with the Court's  
12 permission, could my client have his writing hand  
13 uncuffed, so if there are any notes or anything that he  
14 could --

15                  THE COURT: Yes.

16                  MR. KOKES: -- write them for me. Are you  
17 right-handed, Omar?

18                  MR. DAVIS: Yes.

19                  MR. KOKES: Thank you, Your Honor.

20                  THE COURT: Mr. Kokes.

21                  MR. KOKES: Judge, I was going to say it's my  
22 application. I presume I'm proceeding.

23                  THE COURT: Yes.

24                  MR. KOKES: Judge, I will do everything in my  
25 power not to belabor anything that's been presented to

592a

Mr. Kokes - Argument

4

1 Your Honor. Fortunately for Mr. Davis, the State and  
2 the system itself is -- you've been recalled, because  
3 at one point this was actually reassigned to a judge,  
4 Judge Baker, that obviously wasn't the trial judge.

5 Omar, you can sit. Judge, I was just letting Omar  
6 know he can sit.

7 THE COURT: Yes, okay.

8 MR. KOKES: But I kind of stepped on your  
9 toes, because that's --

10 THE COURT: That's all right.

11 MR. KOKES: That's your call to make.

12 THE COURT: That's all right.

13 MR. KOKES: Judge, the tension, we  
14 respectfully argue in this case, revolves around how  
15 does the Court look at two very important cases. One,  
16 I believe still unpublished opinion of State versus  
17 Andrew Dennis, which is a case out of the Atlantic  
18 County Superior Court. And the other is the Supreme  
19 Court case of State versus Taccetta.

20 I believe the record is abundantly clear that  
21 there is nothing in the record that confirms that my  
22 client, Mr. Davis, was engaged in nor allowed to  
23 consider any plea offers whatsoever. So, we think the  
24 Court should focus on the evaluation of the Appellate  
25 Division in State versus Andrew Dennis, which, Judge, I

593a

1 know Mr. Lipari has and I sent Your Honor a copy, not  
2 that Your Honor wouldn't have reviewed it anyway.

3 So, my focus will be briefly addressing Dennis and  
4 then discussing any of the State's arguments under,  
5 again, the very important Supreme Court case of State  
6 versus Taccetta. Then, Judge, I will rely on the  
7 record except to explain to Your Honor that briefly, as  
8 far as the concept of Taccetta goes, and then I'll jump  
9 into the Dennis analysis. We respectfully argue that  
10 if this -- if the Court is inclined at all to accept  
11 the State's Taccetta argument and believe that that  
12 would be controlling, that because of what we've been  
13 able to submit thus far, in reality the burden should  
14 shift to the State to at least show that there was a  
15 meaningful pretrial conference colloquy, because there  
16 is a difference between Mr. Dennis and Mr. Taccetta.

17 Mr. Dennis, even though he went to trial,  
18 apparently did not testify, whereas in my client's  
19 case, Mr. Davis, I was not trial counsel, but he did  
20 testify. However, Judge, because there is no record  
21 whatsoever, nor -- not even a pretrial memo. And,  
22 Judge, I don't want to even try to figure out how long  
23 you were on the bench out here, first trying and then  
24 presiding judge, but still trying a bunch of cases,  
25 that without a pretrial memo, without any pretrial

1 discussions between then counsel for Mr. Davis, Ms.  
2 Ford, or the Court, which is always -- there's always a  
3 colloquy, that this Court again should focus on Dennis.

4 And, Judge, unfortunately for Dennis, we just have  
5 five pages of an unpublished opinion that I'm going to  
6 rely on. I'm calling them the West Law pages, for lack  
7 of a better reference, and I did supply a copy to Your  
8 Honor. And the last full paragraph on page two, the  
9 second line talks about what we respectfully argue has  
10 been submitted to Your Honor, which are Defendants  
11 here, Mr. Davis, there, Mr. Dennis, is unrebutted  
12 proofs. What are those unrebutted proofs?

13 The unrebutted proofs are there's no pretrial  
14 memo, there's no meaningful pretrial conference where  
15 -- and, Judge, I never did pick a jury before you, but  
16 I have heard that you always entered into a meaningful  
17 pretrial colloquy with every person that rejected a  
18 State's plea offer. And, Judge, again, you did it. I  
19 never had to pick twelve in front of you -- to be  
20 accurate, really choose 14 or 16. But the unrebutted  
21 proofs before this Court right now are that didn't  
22 happen.

23 Now, I can't represent to the Court there's no way  
24 it happened, but I can represent to the Court, through  
25 the assistance of Ms. Heller, the supervising court

1 reporter, and spending many hours in this building, and  
2 the State doing a diligent search themselves paperwork  
3 wise, there's not even a pretrial memo and there is no  
4 recording. Nor the various court reporters, who you  
5 know very well, Ms. Brendel and Ms. Moore, who did sit  
6 on certain pretrial events. There's no recording, no  
7 transcript and that is Mr. Davis's -- one of his most  
8 important points is, Judge, I understand that our  
9 Supreme Court has said under Taccetta that he, Mr.  
10 Davis, can't perjure himself, but the Court wouldn't  
11 have gotten there if there was a meaningful pretrial  
12 conference.

13 The issue of perjury wouldn't even be before this  
14 Court and it's our position, again, under the concept  
15 of unrebutted proofs, without the testimony of Ms.  
16 Ford, which she's a judge in Pennsylvania now, Judge.  
17 I won't go into any in depth conversations, but I will  
18 tell Your Honor that if the State were to produce her,  
19 I am confident she would tell this Court she doesn't  
20 even have a file. So, maybe she would have a  
21 recollection, maybe not, but again, at this juncture,  
22 there are unrebutted proofs that Mr. Davis was given no  
23 meaningful pretrial discussions and in Dennis, at the  
24 very bottom of page two, the -- that court, the  
25 Appellate Court, found that the trial court erred in

1 denying the PCR petition because the record established  
2 a prima facie case of, in Dennis, ineffective  
3 assistance of counsel. In Omar Davis, we respectfully  
4 argue, no meaningful pretrial conference where Mr.  
5 Davis was given any opportunity to enter into any plea  
6 discussions whatsoever.

7 Page three of that second first full paragraph  
8 starts with it is also clear plea bargain's a critical  
9 stage. The second quote out of, I believe it's from  
10 State versus Nichols, a Supreme Court case from '76,  
11 apparently citing a Third Circuit case, this is the  
12 important thing that this Court should consider.

13 "A Defendant has the right to make a  
14 reasonably informed decision whether to accept a  
15 plea offer and knowledge of potential sentence  
16 exposure is crucial in a decision as to whether to  
17 plead guilty."

18 That precedes the Taccetta analysis, Judge, and  
19 that's where the record is silent and that's where it's  
20 our position that the burden should then shift to the  
21 State.

22 And even if they were to call Judge Ford, however  
23 you would do that, whatever the vehicle would be. Your  
24 Honor would invite her, they would ask her to come  
25 down, I don't know that vehicle to call an out of state

597a

Mr. Kokes - Argument

9

1 judge. I've never done it before. But we respectfully  
2 argue it's not Mr. Davis's burden to produce that. If  
3 there is no record, which I think this record, the PCR  
4 record, is very clear that at this juncture there is no  
5 record of any meaningful pretrial conference. The  
6 controlling case in this Court's analysis to at least  
7 order an evidentiary hearing should be Dennis and not  
8 the case the State cites, which is Taccetta.

9 So, at the bottom of page three, we respectfully  
10 argue that the Preciose -- hopefully I said that right,  
11 Judge -- the Preciose analysis should control, which is  
12 where a defendant has presented a prima facie claim of  
13 ineffective assistance of counsel and the asserted  
14 facts in support thereof are outside the record, an  
15 evidentiary hearing is required.

16 Now, Mr. Davis has submitted sworn statements to  
17 Your Honor about a lack of any even retaining, let  
18 alone evaluations by certain experts. And again, I'm  
19 going to do my best not to belabor that record. I know  
20 Your Honor reviewed this very carefully. So, I'm not  
21 going to talk about passion provocation, intoxication  
22 or any of those other experts. It's in the record and  
23 the record speaks for itself.

24 But it's our position at this juncture, Judge,  
25 that without something further, and we respectfully

5989

Mr. Kokes - Argument

10

1 argue it would be the State's burden to produce  
2 whatever would be further, that this Court should, at a  
3 minimum, order an evidentiary hearing. So, --

4 THE COURT: Mr. Kokes, let me --

5 MR. KOKES: Yes.

6 THE COURT: -- stop you for a moment.

7 MR. KOKES: Of course.

8 THE COURT: First of all, the Dennis decision  
9 was rendered between the Taccetta opinion and its being  
10 heard by the Supreme Court, correct?

11 MR. KOKES: Well, we have Ta --

12 THE COURT: Taccetta had not yet been  
13 reversed by the Supreme Court when Dennis was written.

14 MR. KOKES: Judge, actually Dennis says  
15 decided January 6, 2011. And my copy of the Taccetta  
16 opinion says July 30, 2009.

17 THE COURT: That's what I'm saying.

18 MR. KOKES: But no, the Appellate Division  
19 ruled on Dennis after Taccetta.

20 MR. LIPARI: I think you have the Appellate  
21 Division citation. This is that opinion.

22 THE COURT: The Appellate Division -- because  
23 Taccetta references --

24 MR. KOKES: Judge, --

25 THE COURT: I'm sorry, Dennis references

Mr. Kokes - Argument

11

1 Taccetta's Appellate Division decision --

2 MR. KOKES: Judge, --

3 THE COURT: -- as standing for the  
4 proposition that a new trial should be awarded in their  
5 case.

6 MR. KOKES: I'm loathe to interrupt the Court  
7 and I hope I -- hopefully I'm not. I'm relying on even  
8 the State's citing of Taccetta, page two of the State's  
9 August 15<sup>th</sup> brief, State versus Taccetta, 200 NJ 183,  
10 2009. And Andrew Dennis, again, Judge, was January 6,  
11 2011.

12 And, Judge, the best we can do with unpublished  
13 opinions is see if there's been any change. So, if  
14 there's a change in Dennis, I don't want to  
15 misrepresent the law to Your Honor. But my  
16 understanding is the Appellate Division opinion under  
17 Dennis says -- and, Judge, I gave you a copy and I have  
18 another copy here, if you want me to approach. Judge,  
19 should I approach?

20 THE COURT: Not yet.

21 MR. KOKES: Okay. The unpublished West Law  
22 version of Dennis I have is January 6, 2011. So, it's  
23 our position that Dennis, an Appellate Division opinion  
24 which here we go, we got to be lawyer-like here, is  
25 binding on Your Honor.

600 a

Mr. Kokes - Argument

12

1 THE COURT: Go ahead.

2 MR. KOKES: Is a year and a half after  
3 Taccetta. So, that's why we respectfully argue that  
4 this Court's focus should really be on the more recent  
5 statement by the Appellate Court on this Court.

6 And where I was, Judge, I was going to go into  
7 page four of Dennis, not that I'm bothered by the  
8 interruption, but that's where my focus lay, at that  
9 juncture. Again, we have to be mindful of the opinion  
10 of Taccetta, completely. But, Judge, the State's own  
11 citing of Taccetta --

12 THE COURT: Well, I'm just wondering why in  
13 the opinion in Dennis that it cites to the Appellate  
14 Division cite of Taccetta, --

15 MR. LIPARI: This says --

16 THE COURT: -- not the Supreme Court.

17 MR. LIPARI: This says reversed. It says  
18 reversed --

19 THE COURT: Oh, okay. But it's citing the  
20 language from Taccetta, --

21 MR. LIPARI: Right.

22 THE COURT: -- which is then later reversed  
23 by the Supreme Court.

24 MR. KOKES: Well, Judge, --

25 THE COURT: And let me ask you this. Why

601 a

Mr. Kokes - Argument

13

1 would this not be worthy of a published opinion if it  
2 were essentially establishing new law?

3 MR. KOKES: I can't speak for the committee  
4 that publishes the opinions, but luckily with West Law  
5 we have it.

6 And, Judge, I'm just going to show the State  
7 another cite on page four of Dennis, because the court  
8 in Dennis does reference the Supreme Court opinion on  
9 page four. Judge, it says -- and that was exactly  
10 where I was about ready to go. And, again, I'm not  
11 trying to pick a point with this Court that the  
12 interruption or sidetrack is -- we're on a very  
13 important part of this.

14 But, Judge, near the bottom of page four it cites  
15 the 200 NJ opinion in Taccetta, which was the next  
16 quote I was going to say that Mr. Davis relies on.

17 "Whether a defendant would or could have  
18 entered a guilty plea to the purported plea offer  
19 if correctly advised concerning the sentencing  
20 consequences",

21 Taccetta supra 200 NJ at 193, 194.

22 So, to procure an opinion by Judges Parrillo and  
23 Espinosa, which, Judge, if it's been reversed, if it's  
24 modified or whatever, I am not trying to misrepresent  
25 the law to this Court. We've known each other a long

60d a

Mr. Kokes - Argument

14

1 time. I wouldn't do that. But we still --

2 THE COURT: What would distinguish this, the  
3 facts of this case, from Taccetta, the Supreme Court  
4 decision?

5 MR. KOKES: The State may argue that in  
6 Dennis Mr. Dennis didn't testify. If that's the  
7 State's argument, then what our position's going to be  
8 is, Judge, go back to the scores of trials you've had.  
9 Every defendant that goes to trial has entered and  
10 continues to maintain his or her not guilty plea. So,  
11 just the fact that Mr. Dennis may or may not have  
12 testified and Mr. Taccetta did or didn't testify and  
13 Mr. Davis testified should not be the controlling point  
14 of this Court.

15 It should be that Dennis was decided after  
16 Taccetta. Dennis, I think, clearly demonstrates to  
17 this Court that the burden should now shift to the  
18 State to show that Mr. Davis basically did waive those  
19 rights, because we respectfully argue that we have  
20 unrebutted proofs and we've presented a minimum *prima  
facie* case that he had no meaningful pretrial  
22 conference --

23 THE COURT: I understand. I understand that.

24 MR. KOKES: Okay.

25 THE COURT: But isn't Taccetta identical to

603a

Mr. Kokes - Argument

15

1 the facts of this case, whereas the Defendant asserts  
2 his innocence and is claiming that he would have  
3 claimed he was guilty had he received the benefit of  
4 knowing what the maximum sentence could be?

5 MR. KOKES: Judge, --

6 THE COURT: Aren't they identical, really, in  
7 terms of their facts?

8 MR. KOKES: Well, I think we have a problem  
9 on page 194 of Taccetta, right where, again -- Judge,  
10 and I think you'll chuckle at this and I think Mr.  
11 Lipari will too. I like the books. I don't like these  
12 new West Law, because we always got to find what page  
13 we're on, right, Judge?

14 THE COURT: Yes.

15 MR. KOKES: And I see you smiling. So, I  
16 hope the record will be very clear that --

17 THE COURT: Yeah.

18 MR. KOKES: -- that -- so, if you go to Star  
19 194, which now is page 194, because in the old days we  
20 just had the creams and the greens and we could to page  
21 194.

22 THE COURT: Okay.

23 MR. KOKES: So, at Star 194, under head note  
24 two, clearly says as noted earlier -- it's, again, the  
25 line beneath Star 194. As noted earlier, the PCR judge

604a

Mr. Kokes - Argument

16

1 made a number of factual findings. A plea offer was  
2 extended to defendant. Defendant's offer was part of a  
3 proposed global settlement. And then I'm skipping a  
4 little bit, Judge, but, again, I'm not trying to --

5 THE COURT: Okay.

6 MR. KOKES: -- you know, get out  
7 completeness. And every codefendant would've accepted  
8 plea deals despite continuing exposure on a federal  
9 level, on and on. That's what we don't have in Davis.  
10 That's what, we respectfully argue, should shift the  
11 burden to the State.

12 THE COURT: Wait a minute. Wait a minute.  
13 You're saying not only was he not advised of the  
14 maximum sentence, but he was not tendered any plea  
15 agreement at all?

16 MR. KOKES: Yes. Yes, that is the record at  
17 this juncture.

18 THE COURT: All right, okay. Now, let me get  
19 to my next point with you then.

20 MR. KOKES: Yes, Your Honor.

21 THE COURT: You know, from having practiced  
22 in this county as long as you have, --

23 MR. KOKES: 31 years, Judge.

24 THE COURT: -- the zeal with which judges try  
25 to get cases to settle.

605a

Mr. Kokes - Argument

17

1 MR. KOKES: Most certainly.

2 THE COURT: Okay. You know the zeal with  
3 which every status conference is handled.

4 MR. KOKES: Just had two today myself, Judge.

5 THE COURT: And the first question is what's  
6 the offer. From arraignment status through status  
7 conferences, subsequent status conferences, has the  
8 offer changed. What is the offer? Okay?

9 Now, not to blow my own horn, because I don't  
10 intend to do that, but I was a presiding judge here for  
11 15 years. I sat as chair of the criminal presiding  
12 judge conference. I taught at the new judge  
13 orientation how to manage cases, how to conduct  
14 pretrial conferences, status conferences, et cetera.

15 Do you think for a minute that I, or anyone,  
16 including the Prosecutor, would have wanted to engage  
17 in a trial of this difficulty after a mistrial, the  
18 length with which it took, the resources with which --  
19 that there was no effort to settle this case, that  
20 there was no offer made and that he didn't know that he  
21 stood to face life in prison if he were convicted? I  
22 mean that really -- I mean that's almost akin to saying  
23 prove the sun didn't rise yesterday. You know, I mean  
24 it's so palpably, to me, not possible that this case  
25 could've gone to two jury selections and a second trial

606 a

Mr. Kokes - Argument

18

1 without the Defendant knowing what he faced, without  
2 there having been a tender of a plea offer.

3 Your only crack in the door, Mr. Kokes, is that  
4 there's nothing to support it or corroborate that fact.  
5 You're trying to drive a Mack truck through that crack  
6 and you know what, you may get there. I don't know.

7 MR. KOKES: Judge, --

8 THE COURT: But that's really -- it's a  
9 failure of proof. It's an unexplainable failure of the  
10 fact that there's no pretrial conference memo in the  
11 file. That -- and by the way, did you ask Judge Ford  
12 for an affidavit or a certification?

13 MR. KOKES: At this juncture no, because she  
14 is a judge. Judge, she's --

15 THE COURT: So what?

16 MR. KOKES: -- an out of state judge. And  
17 she did indicate to me she had no file. So, if she has  
18 no file and she's a sitting judge, I don't -- and in  
19 another state, another jurisdiction, I don't know what  
20 power I have to even get a statement out of her except  
21 her representation to me I have no file.

22 But, Judge, if I could --

23 THE COURT: But you didn't ask her do you  
24 remember discussing with your client that he stood --  
25 he faced life in prison on a conviction?

607a

Mr. Kokes - Argument

19

1 MR. KOKES: Judge, again, since she's in  
2 another jurisdiction, I don't know what power I have,  
3 unless you can bring her here or the State can bring  
4 her here, to ask her those questions.

5 THE COURT: Now, when you say that --

6 MR. KOKES: Judge, no offense. You're on the  
7 second point. Can I address the first one or --

8 THE COURT: But wait.

9 MR. KOKES: Okay, all right.

10 THE COURT: No, --

11 MR. KOKES: Okay, all right.

12 THE COURT: When you say that there's no  
13 record of a plea agreement, what if there was no offer?

14 MR. KOKES: Then that --

15 THE COURT: What if there was no offer?

16 MR. KOKES: Then that flies in the face of  
17 your first point.

18 THE COURT: I understand that, but what if  
19 there was no offer? Then the single failing would be  
20 that he didn't know he faced life in prison.

21 MR. KOKES: Now I can finally do what I  
22 wanted to with your first point.

23 THE COURT: Okay, go ahead.

24 MR. KOKES: Which I'm going to count quietly  
25 five times. The record is silent. That's our problem.

608a

1 That's Mr. Davis's, I'm not going to say benefit, but  
2 that's his argument, which is there needs to be a  
3 record.

4 Judge, everything you said about point number one,  
5 which is 15 years as presiding judge, on all the  
6 committees. You know, way back when you were -- when  
7 you did the committee on the grand jury, when we did  
8 that lengthy gun argument about you being the head of  
9 the grand jury committee. There's a record.

10 Mr. Davis, there is not one pretrial memo, but he  
11 went to trial twice. There is no colloquy from the  
12 judge that taught other judges how to do it, Your  
13 Honor, just so the record's clear, of a colloquy. And  
14 I can tell Your Honor, having handled not as many  
15 murder cases and homicide cases as other attorneys in  
16 this building, but having handled several, that he, Mr.  
17 Davis, the record does not indicate he was given only  
18 an offer of a life term. You were given no record of  
19 that, Judge.

20 THE COURT: What year was this tried?

21 MR. KOKES: I think '01. '01? 2001.

22 THE COURT: Okay.

23 MR. KOKES: And the second was 2002, Judge.

24 And, Judge, again, I'm not saying a record  
25 couldn't be developed, but the resources at my

609a

1 disposal, and for the State's benefit -- and I will say  
2 his name only because I want him to get the total  
3 benefit of this, Mr. Lipari, was relying on me and my  
4 good word to come into this building and do hours and  
5 hours and hours of searching. And he believed,  
6 through, obviously, Ms. Heller, too, that there's no  
7 record. And, Judge, your team leader, whose name I  
8 won't say, but your old team leader, now I think also  
9 handling now, could find nothing.

10 Now, here's the interesting thing. If you  
11 remember, I was afraid that I would -- and let's go  
12 into the procedure of just this PCR. I was afraid I  
13 was going to have to file a nunc pro tunc application.  
14 You may recall that four years ago, before you retired  
15 and then came back. And fortunately for all of us in  
16 this courtroom, lo and behold, you reviewed your file,  
17 Judge, and you said Mr. Kokes, you don't need to do a  
18 nunc pro tunc. I have Mr. Davis's pro se PCR. It was  
19 within five years.

20 So, that's where, Judge -- and I appreciate the  
21 nod from the Court. You remember that because I'm  
22 okay, Judge, I got to do a nunc pro tunc here because I  
23 was of the mind that Mr. Davis, preserving his own  
24 timeframe, did it within five years. And then Your  
25 Honor said -- I think you even called me Hal, but

610 a

1 anyway, Mr. Kokes, you don't have to do that. You  
2 don't have to file the nunc pro tunc. He did file  
3 within five years. There was a record, you found it.

4 Judge, no offense to Your Honor, my understanding  
5 is I don't even know you have trial notes, let alone a  
6 pretrial memo, or the most important proceeding, which  
7 is the pretrial conference. So, again, I'm on point  
8 one, but I know it's important to Your Honor.

9 THE COURT: All right.

10 MR. KOKES: So, that's where -- and, Judge, I  
11 was about done with my Dennis analysis, whether a  
12 defendant would or could've entered a guilty plea to  
13 the purported plea offer, but it cites Taccetta. So,  
14 it's not like we have to now reinvent the Dennis wheel  
15 based on the new holding in Taccetta. Dennis followed  
16 Taccetta and unpublished opinion, but as far as I know,  
17 and I defer to the State and obviously Your Honor. You  
18 have all the resources. We respectfully argue that  
19 first of all Dennis was an Atlantic County case.  
20 Second of all, it's an Appellate Division opinion and  
21 it stands for the proposition that we hopefully have  
22 shifted the burden.

23 But I do need to address Taccetta. So, Judge,  
24 anymore questions about the Dennis holding?

25 THE COURT: No.

611a

1                   MR. KOKES: Thank you, Your Honor. And by  
2 the way, always interrupt me. We've known each other a  
3 long time.

4                   THE COURT: I -- you don't have to tell me  
5 that, Mr. Kokes.

6                   MR. KOKES: I know, but still. You never get  
7 me offline.

8                   THE COURT: Okay.

9                   MR. KOKES: And I mean that we all due  
10 affection to this Court. Many, many years -- a real  
11 quick story. My first bail hearing before Your Honor,  
12 you were glowing in your praise of me and I never lost  
13 sight of that day. And that's why when you ask  
14 questions, any good lawyer will stop, know where they  
15 are and answer Your Honor's question and not dance  
16 around.

17                  So, that being said, on Taccetta itself, Your  
18 Honor, I already went into Star 194. Again, I don't  
19 like this pagination. So, I don't need to repeat that.

20                  Now, we do understand and recognize that under  
21 Taccetta, that this Court cannot sanction perjury. But  
22 the only reason and the only way this Court can get  
23 there is if there was the meaningful pretrial  
24 conference and pretrial memo where there was a colloquy  
25 with Mr. Davis saying sir, do you understand you're

6120

Mr. Kokes - Argument

24

1 facing 20, serve ten, or whatever the plea offer  
2 would've been then. Because I don't think we had 85  
3 percent then, did we, Judge? '01?

4 THE COURT: I don't think so.

5 MR. KOKES: So, usually it was a half stip.  
6 That's why I threw 20, serve ten out there. And,  
7 Judge, you had so many murder cases you know how these  
8 plea bargains went. And this, again, is more an  
9 exercise in a hypothetical. We don't know what it was  
10 because there is no record of it.

11 So, the most important thing is the perjury  
12 analysis under Taccetta, no offense to the State and  
13 the briefing the State did to try to convince Your  
14 Honor this PCR should be denied. The analysis of  
15 Taccetta should not come into play until we open or  
16 close the door, whichever way you want to look at it,  
17 Judge, of what happened pretrial, where was the  
18 colloquy of Mr. Davis, where was his knowing rejection  
19 of the State's offer, before we even get to the first  
20 trial, which was a mistrial, which, again, I briefed  
21 it, so I'm not going to go there, Judge, or the second  
22 trial. The Taccetta analysis should not be the  
23 controlling analysis here, because there's -- would be  
24 no issue of a perjured plea.

25 And, Judge, my 31 --

613a

1 THE COURT: Well, let me --

2 MR. KOKES: Yes, Judge.

3 THE COURT: Let me ask you this, Mr. Kokes.

4 Why -- if there were a plea bargain or plea offer, why  
5 wouldn't he know it?

6 MR. KOKES: That's, no offense, Judge, the  
7 State's burden to show that. We need a record.

8 THE COURT: Wait a minute. Is he saying  
9 under oath I received no plea offer?

10 MR. KOKES: If this were going to an  
11 evidentiary hearing he would probably testify so, yes.

12 THE COURT: Okay. So, once that is  
13 established what difference does it make if he didn't  
14 know what the outside was, the outside?

15 MR. KOKES: Strickland, Fritz ineffective  
16 assistance of counsel. Because I'm confident, Judge,  
17 that if Mr. Merz were called --

18 THE COURT: But he can't say look, this was  
19 my offer. Had I known that I was exposed to life in  
20 prison I would've taken that offer. He can't say that.

21 MR. KOKES: Judge, --

22 THE COURT: Because he doesn't even say there  
23 was an offer.

24 MR. KOKES: If it would've been five, ten  
25 years less than life, he would've taken it.

614a

Mr. Kokes - Argument

26

1                   THE COURT: But don't you understand what I'm  
2 saying?

3                   MR. KOKES: Not at all.

4                   THE COURT: If he says there was no offer,  
5 how can he say today I would've taken the no offer to  
6 avoid a life in prison?

7                   MR. KOKES: Unfortunately, Judge, again,  
8 we're dealing in the hypothetical because you sat on,  
9 I'm guessing 50, 100, 150, 200 homicide charges.  
10 Unless it was the old death penalty statute, there were  
11 plea offers.

12                  THE COURT: Yeah, but I'm talking about him,  
13 not me. If -- it's his life. He can't say today under  
14 oath that he was or was not offered a plea agreement  
15 and what it was.

16                  MR. KOKES: He has to be given that plea  
17 offer by Ms. Ford. The -- Judge, there is nothing from  
18 Ms. Ford or the State saying this is what he offered.  
19 Judge, your pretrial memos, how many did you ever --

20                  THE COURT: But he can't say had I -- he  
21 can't --

22                  MR. KOKES: How many plea --

23                  THE COURT: What are you saying, that she  
24 received an offer and didn't convey it to him?

25                  MR. KOKES: At this point, Judge, we don't

615a

Mr. Kokes - Argument

27

1 know, because she's a judge now. How do I get her down  
2 here? Judge, I need to ask that question.

3 THE COURT: Come on. You have the interstate  
4 agreement on witnesses, the compact.

5 MR. KOKES: So, if you get served with that  
6 in Pennsylvania you have to appear in Pennsylvania,  
7 Judge?

8 THE COURT: If -- first you have to file a  
9 petition here for me to certify that she's a necessary  
10 witness. You take that to Pennsylvania to a court  
11 there and they could order her to appear here.

12 MR. KOKES: Having made the prima facie case  
13 we believe we've made, that's what we think the State's  
14 burden is today. The State needs to do that, to show  
15 just these unanswered questions, that Mr. Davis should  
16 not have that burden under Dennis.

17 THE COURT: All right.

18 MR. KOKES: Anywhere, Judge -- anyway, Judge,  
19 I was going to briefly make an aside to the five and a  
20 half years I was in this -- not this building, the old  
21 building, as a Public Defender. That every case had a  
22 pretrial memo, every case had plea discussions and  
23 because this record is silent, your 15 years as PJ and  
24 two years now recall?

25 THE COURT: No.

616 a

1 MR. KOKES: Close?

2 THE COURT: Close.

3 MR. KOKES: We're getting close to two years.  
4 17 and a half years, there needs to be a record made  
5 and I have done everything I can to try to make that  
6 record, short of what we think is the *prima facie* case  
7 we've made to have the State make the application to  
8 bring now Judge Ford down. And I'm confident, if  
9 brought down, she's going to say I have no file. At  
10 that juncture we can ask all the important questions.

11 Now, what could happen, if the State were so  
12 inclined, is we could have a proffer session with her.  
13 I would have no problem with that either.

14 THE COURT: But let me ask you this. Did you  
15 talk to Mr. Merz?

16 MR. KOKES: I don't believe there were any  
17 discussions with Mr. Merz. I know that he -- I'm  
18 sorry, I can't --

19 THE COURT: Mr. Merz is, by the way, the  
20 trial Prosecutor in the case.

21 MR. KOKES: Yes, William Merz. I understand,  
22 Judge.

23 I believe, and I defer to the State here, Mr.  
24 Lipari's a man of his word. I defer to the State here  
25 that I believe the -- Mr. Merz's old office, the

617a

Mr. Kokes - Argument

29

1 present Prosecutor's office, did pick his brain and I  
2 don't believe he had any recollection of a pretrial  
3 offer, pretrial memo or pretrial discussions.

4 THE COURT: Is that correct, Mr. Lipari?

5 MR. LIPARI: Your Honor, there was -- I had  
6 some discussion with Mr. Merz about this and he said  
7 there had to have been. And he asked --

8 THE COURT: Like me.

9 MR. LIPARI: He said they looked --

10 THE COURT: He's saying there had to have  
11 been, right?

12 MR. LIPARI: -- for a pretrial memo. And in  
13 the interest of just having a complete record on the  
14 point, you know, there was some discussion between us  
15 about the need for, as part of counsel's burden, to  
16 have to provide the record in order to basically  
17 provide all information that conceivably sheds light on  
18 the point.

19 Now, counsel did go through certain information,  
20 reviewed transcripts, listened to tapes and such, and  
21 there was one proceeding, on November 7 of 2001, and  
22 it's not through official transcripts, so I really  
23 can't decide it, but I know the information. Where  
24 there's allusion to the State having a tentative plea  
25 offer and that it -- there not being anywhere close to

618a

Mr. Kokes - Argument

30

1 a meeting of the minds on it. You know, and that's all  
2 I could find of the evidence that I looked at that bore  
3 on the subject.

4 It appears to me that the likelihood is that  
5 whatever it was that was tendered was not acceptable to  
6 Defendant because he was maintaining his innocence, or  
7 that he -- or that there wasn't a point -- a plea offer  
8 that was -- that Defendant would've accepted. I mean  
9 that's how I take what's in the record, the limited  
10 amount that there is, in view of what ultimately --

11 THE COURT: What's that in the form of, if --  
12 you're referring to?

13 MR. LIPARI: It was a transcript of November  
14 7<sup>th</sup>. I didn't order it. It's unofficial. I think  
15 it's the Defendant's burden to have to order the tra --

16 THE COURT: November 7<sup>th</sup>, what, status  
17 conference?

18 MR. LIPARI: 2001, status conference. And  
19 it's not an official transcript, but unofficial.

20 THE COURT: Okay.

21 MR. KOKES: Judge, that --

22 THE COURT: And conducted by me?

23 MR. LIPARI: Yes.

24 MR. KOKES: Judge, that preceded the second  
25 trial. And that was before it went on the trial list

619 a

1 the second time.

2 THE COURT: Understood, but I mean it's  
3 something.

4 MR. KOKES: And, Judge, if we can again  
5 reference your 17 years, and my 31 years as a  
6 practicing attorney, frequently when there's mistrials,  
7 the plea negotiations actually get ratcheted up and  
8 frequently, not -- we don't have a record in this case.  
9 Frequently, the State will make certain concessions and  
10 actually reduce their plea offer --

11 MR. LIPARI: That's -- that would be  
12 speculation.

13 MR. KOKES: -- when there's a mistrial.  
14 Well, I respectfully argue that this reference to --

15 THE COURT: All right.

16 MR. KOKES: -- an unofficial transcript of a  
17 status conference is akin to speculation too.

18 MR. LIPARI: Well, --

19 MR. KOKES: And, Judge, you did mention your  
20 years of experience. So, I don't think it's an  
21 improper comment. That -- rely on that same experience  
22 where, when there's a mistrial, frequently the plea  
23 negotiations get ratcheted up and sometimes the court  
24 even gets directly involved in the plea negotiations.

25 THE COURT: Well, don't you think that inures

600a

Mr. Kokes - Argument

32

1 to an argument that it likely did happen. It's just  
2 simply a failure of proof here in terms of  
3 corroboration?

4 MR. KOKES: We think that's, again, under  
5 Dennis, the State's burden.

6 THE COURT: All right. Go on with your other  
7 arguments.

8 MR. KOKES: Thank you, Your Honor.

9 THE COURT: Have a seat, Mr. Lipari.

10 MR. KOKES: So, we understand the concept  
11 under Taccetta that the Court cannot entertain perjured  
12 pleas. But, Judge, the concept of perjury in this case  
13 only applies after -- at or near the end of the second  
14 trial. The first trial, which was mistried, Mr. Davis  
15 clearly didn't testify. That was still in the State's  
16 part of the case where the mistrial occurred.

17 So, even if the Court's inclined to side with the  
18 Taccetta argument, we had at least, from the procedure  
19 you set for 15 and a half, almost 17 years, two  
20 meaningful pretrial conferences and probably plea cut  
21 offs. And there's nothing. There's absolutely  
22 nothing. Which we again respectfully argue, under  
23 Dennis, shifts the burden to the State.

24 So, the perjured plea concept under Taccetta, Your  
25 Honor, should not be controlling here, because of two

621a

1 very important reasons. First of all, Taccetta  
2 preceded Dennis. Second of all -- maybe 2A and 2B.  
3 Second of all, Judge, Dennis is an Appellate Division  
4 opinion and Dennis cites the Supreme Court opinion in  
5 Taccetta. That being said, Judge, if I could have a  
6 moment.

7 (Mr. Kokes confers with his client at this time)

8 MR. KOKES: Judge, just for the record, I  
9 appreciate the Court's indulgence. I just briefly had  
10 a discussion with Mr. Davis and all the other issues  
11 have been briefed. I don't think I need to really go  
12 into what both I've submitted -- actually, what first  
13 Mr. Davis submitted, what I then submitted, what Mr.  
14 Lipari submitted and then my final brief, second reply,  
15 whatever you want to call it, where at least I made  
16 sure that you had Dennis. So, if I could have one more  
17 moment, I think that was everything, Judge.

18 THE COURT: Okay.

19 (Mr. Kokes confers with his client at this time)

20 MR. KOKES: Judge, at this juncture, we will  
21 rely on our ability to rebut anything the State would  
22 present.

23 THE COURT: All right. Thank you, Mr. Kokes.

24 MR. KOKES: Thank you, Judge.

25 THE COURT: Mr. Lipari.

622 a

1                   MR. LIPARI: Your Honor, the -- I'd like to  
2 address primarily the Dennis argument. And for the  
3 record, the State submitted briefs dated July 7<sup>th</sup>,  
4 2008, that was addressed to Your Honor initially in  
5 response to Mr. Davis's submission. Then August 12<sup>th</sup>,  
6 2012, to -- August 15, 2012, to Judge Baker's  
7 attention, and then October 19, 2012, to Your Honor,  
8 attaching the sentencing transcript.

9                   MR. KOKES: Judge, if I may, I just want to  
10 look at that, the 19<sup>th</sup>.

11                  MR. LIPARI: Oh, I'm sorry.

12                  MR. KOKES: Judge, I'll review -- do you need  
13 this copy, Mr. Lipari?

14                  (Mr. Lipari and Mr. Kokes confer at this time)

15                  MR. KOKES: Judge, what we're doing, for the  
16 record, so the record is not blind, is I was away on  
17 Friday and --

18                  (Mr. Lipari and Mr. Kokes confer at this time)

19                  MR. KOKES: Yes, Judge, for the record, we  
20 are exchanging now what was my client's -- if I can  
21 just get it for the record. My client's --

22                  (Mr. Lipari and Mr. Kokes confer at this time)

23                  MR. KOKES: Judge, we're exchanging two  
24 documents at this juncture. One was a certification  
25 that I was mindful my client filed -- actually it would

623 a

1 be out in my car right now -- about the plea  
2 discussions. And for the record, Judge, I was out on  
3 Friday. I was actually down in Virginia. So, I don't  
4 need additional time, but I have -- I'm reviewing the  
5 State's one page brief to Your Honor dated the 19<sup>th</sup>.

6 THE COURT: Okay.

7 MR. LIPARI: All right. Now, Your Honor,  
8 there have been certain representations made and in the  
9 interest of accommodating or allowing things to proceed  
10 somewhat expeditiously, we looked through records of  
11 the proceedings informally. Now, this was without  
12 prejudice to our ability to insist upon production.  
13 I'm not going to do it if it's going to be an academic  
14 venture, but I think that that November 7<sup>th</sup> transcript,  
15 for example, is material because there's some --

16 THE COURT: Yeah, I'd like to see that. Even  
17 though it's unofficial, I mean I would like to see it.  
18 If it's something I think I would depend upon, I would  
19 want to have a certified transcript.

20 MR. LIPARI: The only reason I'm hesitant,  
21 because the court reporter's office was --

22 THE COURT: Didn't want it to be --

23 MR. LIPARI: Well, was -- yeah, didn't want  
24 it because it wasn't official and that's --

25 THE COURT: All right. But --

624 a

1 MR. LIPARI: With that caveat --

2 THE COURT: Just let me ask you this then  
3 about it.

4 MR. LIPARI: Yes.

5 THE COURT: I don't have to see it.

6 MR. KOKES: Judge, I'm loathe to interrupt  
7 the Court, but if it's anything that's meaningful and  
8 the State's relying on it, then it's not a great  
9 expense. There should be an official transcript  
10 produced.

11 THE COURT: Well, I understand and --

12 MR. KOKES: And Your Honor, I think, can even  
13 order one.

14 THE COURT: Well, I can.

15 MR. LIPARI: Well, except it's the  
16 Defendant's burden. I mean it's his point.

17 THE COURT: But hold on a moment. This is a  
18 transcript of a conference in open court?

19 MR. LIPARI: Yes.

20 THE COURT: Does -- is there a face page that  
21 shows appearances and who was present?

22 MR. LIPARI: I don't have that, no.

23 THE COURT: Okay. But presumably it is? I  
24 mean presumably.

25 MR. LIPARI: Yeah, I think if an official

625a

Mr. Lipari - Argument

37

1 transcript were ordered --

2 THE COURT: Now, and there is reference made  
3 in that transcript to there having been plea  
4 discussions with no meeting of the minds?

5 MR. LIPARI: If -- I can read it into the  
6 record, if you --

7 THE COURT: It's okay. That's -- you've  
8 already said that, right?

9 MR. LIPARI: Right.

10 THE COURT: Okay. All right, I just wanted  
11 to make sure that I understand what that purportedly  
12 says, but in terms of what I do today, in terms of  
13 substance, I'm not going to -- well, I may consider it  
14 procedurally, but not substantively. All right.

15 MR. KOKES: Can I make a suggestion, Judge?  
16 And again, you've given me deference over the years.  
17 If you -- I respectfully argue you not close the record  
18 today and I respectfully argue --

19 THE COURT: We may get there, Mr. Kokes.

20 MR. KOKES: Okay.

21 THE COURT: Let me hear from Mr. Lipari  
22 further.

23 MR. KOKES: Thank you, Judge.

24 MR. LIPARI: Thank you. And I don't say it  
25 to mislead the Court, I mean because there's -- there

626 a

1 are issues about discovery. There's outstanding  
2 discovery. There're issues where the State was late  
3 with getting things and --

4 THE COURT: I understand.

5 MR. LIPARI: So, what happened down the line,  
6 but I'm just saying that there is something there that  
7 evidences some discussion that didn't lead anywhere;  
8 that the parties were evidently, at least at that  
9 juncture, far apart. So, with that, I mean I -- I'm  
10 willing, to some extent, to proceed informally, but on  
11 some things I'd like to insist on formality. But --

12 THE COURT: Okay.

13 MR. LIPARI: In any case, the Dennis case is  
14 different than -- from the outset, though, I don't  
15 think it stands for the proposition that the burden  
16 shifts to the State. The burden is always on the  
17 Defendant in post-conviction relief and it's also on  
18 the Defendant on an ineffective assistance of counsel  
19 claim, except in those limited universe of cases where  
20 unreasonable representation or prejudice might be  
21 presumed or an attorney's so burdened by the -- by a  
22 conflict being one such situation.

23 But the Defendant basically bears a twofold burden  
24 to establish unreasonable attorney representation  
25 result in prejudice. And he bears that burden by a

627a

1 fair preponderance of the evidence. In order to get a  
2 hearing he has a burden to set forth a prima facie case  
3 and the Defendant hasn't done any of that.

4 The Taccetta case -- well, I mean the Dennis case  
5 was much different and it's not clear from the record,  
6 the opinion of the Dennis case, whether or not Dennis  
7 testified. So, it's not clear what arguments were  
8 advanced, assuming that he did. But there it was  
9 testified to by the defendant, if he thought he could  
10 get the extended term sentence that he ultimately  
11 received, that he would have accepted the guilty plea  
12 that was set forth.

13 And there was also a certification from the  
14 attorney in the case, who indicated that this is likely  
15 what she told him and that it basically corroborated  
16 what the defendant was contending. And then, based on  
17 that record, the court felt that there needed to be a  
18 hearing in the case. And we know that the parties  
19 involved, unfortunately, was counsel deceased in the  
20 case by the time the hearing came to its appointed  
21 date.

22 But here, I mean he basically has to establish  
23 that if he had known his exposure and the plea offer,  
24 that he would've pled guilty. But he's failed to  
25 establish that there was even a plea offer, with the

628a

Mr. Lipari - Argument

40

1 papers that he submitted. I mean there is this  
2 discussion that I allude to where it seems there's some  
3 tentative -- a tentative offer it's referred to,  
4 proffered a tentative offer. So, it's not even clear  
5 that he's established that there was a plea offer.

6 But even in order, hypothetically, to prevail on  
7 this type of claim he must show that there was a plea  
8 offer and that but for the failure to communicate it,  
9 he would've accepted it. And you don't have any of  
10 that. In order to evaluate that you'd have to know  
11 what he thought the exposure for the crime was and  
12 compare that to the plea offer.

13 He has projected nothing in that vein in the way  
14 of any material apprehension. All basically he's  
15 saying is that because the record does -- the record  
16 itself doesn't disclose discussion, that he's entitled  
17 to a hearing and there's just no support.

18 Dennis doesn't stand for that proposition. Dennis  
19 purports material misapprehension and failure to  
20 communicate actual exposure, basically underestimating  
21 it by double. And here, Defendant, is he claim -- he  
22 didn't know that he could get a life sentence for  
23 murder? It's just -- and then you have to, in order to  
24 prevail on it, you have to establish that well, there  
25 was this plea offer outstanding at the time that -- it

629

1 was still outstanding at the time, that I would've  
2 accepted it had I known my exposure.

3 It just is all conjecture, his application, and I  
4 reject the notion that you cannot get a certification  
5 from an attorney, because either she resides in another  
6 state or because she's a Superior Court Judge. I think  
7 that any person could provide information that's of use  
8 in a proceeding, to the extent it assists in the  
9 resolution of a cause. But to me that's part of the  
10 defense's burden in this situation.

11 And then with respect to the maximum sentence,  
12 it's the same point. He'd have to show that if he had  
13 known that, he would've accepted this hypothetical plea  
14 offer.

15 And I'd also add that there was police testimony  
16 in the case. I mean here we're talking about a murder  
17 case. I mean it -- Dennis was also a much more arcane  
18 or not as readily accessible to the layman concept of  
19 extended sentencing. In the world of phases, they  
20 usually are. I mean the common person knows that when  
21 you do something that he does, you're going to face a  
22 real likelihood that you're going to jail for the rest  
23 of your life.

24 And then there's police testimony that really bore  
25 that out, that the Defendant believed he was facing

630 a

Mr. Lipari - Argument

42

1 jail for the rest of his life. He said I'm never going  
2 to see any of this again. He effed up and he did this,  
3 during police testimony, on the ride to the jail.

4 Now, again, the transcripts have not been  
5 supplied. I don't think it's our burden to supply  
6 those things, but I've asked the Court to just take  
7 judicial notice of the testimony such as it is. And --

8 THE COURT: Well, I think some of that was  
9 recounted in the App. Div. decision.

10 MR. LIPARI: And I submitted my brief, which  
11 set forth the facts at some length. Of course Your  
12 Honor presided over the trial.

13 And then there's, when you get to the Taccetta  
14 argument, I think Taccetta stands for the notion that  
15 it's a case that involves protection of the system  
16 against perjured testimony. In order to prevail on the  
17 claim you can't say that well, I would've lied and pled  
18 guilty. I mean it's -- admittedly, it's different in  
19 the sense that you have a defendant testifying from the  
20 stand that he would've lied, but here you have a  
21 functional equivalent. Because even after the  
22 Defendant was convicted he's maintaining -- besides  
23 testifying and denying that he -- and that's in the  
24 record, he denied that he killed his friend and he  
25 denied a bunch of other evidence, statements that he

631a

1 made to authorities and such.

2 And then beyond that, he made statements at the  
3 presentence -- the presentencing authorities and at  
4 time of sentencing. I mean I think part -- it verges  
5 really on the disrespectful, and I gave Mr. Kokes the  
6 copy of it, but I cited to it. He said how -- why  
7 didn't Your Honor stop this from going on, you know,  
8 you're basically allowing a case to proceed without  
9 evidence. There was no proof in the case, convicted an  
10 innocent man, things to that effect. They're in the  
11 sentencing record.

12 So, I think that -- and that's another thing the  
13 Defendant hasn't established. I mean even if you got  
14 to the point -- I want to read from the -- I got the  
15 transcript. Well, there's no sense re -- I've set it  
16 forth in the -- in my letter. He said I was falsely  
17 accused of murder and I feel as though I shouldn't have  
18 even been indicted on this. There are no facts, no  
19 evidence pertaining to me and have me indicted, even as  
20 well as being convicted of murder in this case. I feel  
21 as though as you, as judge, should've stepped in and  
22 allowed this not to go this far, because there was no  
23 facts, no evidence in the witnesses' testimony or in  
24 this case.

25 So, getting to Taccetta, here, the Defendant, if

632 a

1 you rely on the documents of record, they flatly  
2 contradict any possible claim that the Defendant, if he  
3 had had some hypothetical plea offer, would've provided  
4 a factual burd -- basis to some murder or reduced  
5 murder count involving shooting this person. And  
6 there's no -- there's certainly no indication that the  
7 State was ever prepared to let him off the hook for  
8 homicide altogether.

9 So, he doesn't project in his -- in any of his  
10 submissions that but what I said in this trial  
11 testimony was not true. If I know I had -- was facing  
12 a life imprisonment, I would've admitted that I killed  
13 so and so under these circumstances. It might've maybe  
14 involved a reduced homicide or that I -- I, in fact,  
15 perjured myself, but I did so because I was afraid.  
16 You don't have anything like that.

17 I mean it's a hypothetical situation that I'm  
18 formulating, but I suppose if there were going to be a  
19 case that distinguished Taccetta and somehow allowed a  
20 person to get back into court on the notion that well,  
21 he submitted perjured testimony because -- for whatever  
22 reason and give that kind of right to post-conviction  
23 relief to a perjurer, I think the record would have to  
24 look more akin to the one that I'm describing, because  
25 this one doesn't even come close to. You don't have a

6336

1 Defendant close to saying that he conceded committing  
2 the crime and only did this because he was unaware of  
3 his exposure. That's just not the case here.

4 All -- basically what he's saying is that because  
5 we can't find the pretrial memo, that he should get out  
6 of the case and I don't think there's any authority for  
7 that proposition. And the State urges that, for that  
8 reason, relief should be denied on those claims.

9 Now, as to the other claims, as to the defenses,  
10 there's really nothing beyond what's in the record  
11 already to support the defenses further. Just to say  
12 that he should have an expert, the State would -- urges  
13 is not enough, because you would have no projection of  
14 what that expert defense might look like, just his  
15 blanket assertion, or bald assertion that well, he  
16 should've got an expert. So, and I think that, as a  
17 matter of law, that that allegation would fail even at  
18 a *prima facie* level.

19 I think this case is distinguishable from Taccetta  
20 in a material way, given all the protestations of  
21 innocence, the determined maintaining of innocence,  
22 even after conviction in the case. I think it would be  
23 -- amount to basically playing fast and loose with the  
24 Court or allowing one to make one -- make justice one's  
25 play tool to allow relief on this type of a claim.

634a

1       Thank you, Your Honor.

2           THE COURT: Thank you, Mr. Lipari.

3           MR. KOKES: Judge, we believe that the record  
4 should be made complete. Not having the benefit of  
5 that transcript, the Court itself can order it, the  
6 November 7, 2001. Procedurally, Judge, since you sat  
7 on the trial, luckily, we don't have to convince you  
8 when things happened, but that was approximately ten  
9 months before the first trial.

10         Again, relying on your years of experience, a ten  
11 month hiatus between a status conference and a trial,  
12 there are other meaningful events. And if it's a  
13 status conference before the first trial, they've not  
14 even gotten to the pretrial conference level. But we  
15 think the Court needs to review that transcript. Not  
16 that Mr. Davis disputes any of Mr. Lipari's  
17 representations of what the informal transcript says,  
18 but we think that should be.

19         Second, Judge, as far as relying on the sentencing  
20 transcript, briefly, again, that goes back to the  
21 Dennis argument. We wouldn't have a Taccetta  
22 protestation of innocence perjury issue if there were  
23 something in the record, through the Court's own  
24 ability to obtain or the State's own ability to obtain,  
25 to trigger the Court's basically -- I don't mean this

635a

Mr. Kokes - Argument

47

1 at all critically -- casting aside the Dennis argument,  
2 going directly to the Taccetta argument.

3 The only other point I wanted to make, Judge, is  
4 as far as the expert issue, the failure to retain at  
5 least three experts, go back to your experience, Judge.  
6 How would this Defendant -- luckily, you were on the  
7 defense side for a while as an attorney. How would  
8 this Defendant even know whether it could even be a  
9 viable defense, or at least explored, without the  
10 retaining of those experts. We haven't really  
11 addressed that much on the record today, because it was  
12 fully briefed, but that's an important point that would  
13 -- should not and I'm sure will not be lost on this  
14 Court, that that's just another aspect of the  
15 ineffective assistance of counsel.

16 That we, again, under Dennis, think the burden has  
17 shifted. We believe that you have a concept also of  
18 cumulative affect. That with all of that being said,  
19 this Court should order at least two things today. One  
20 is order a full transcript of the November 7, 2001  
21 appearance. I will indicate to Your Honor that my  
22 client has already qualified and I believe he  
23 qualified, since this is his first PCR, for assistance  
24 from the State if the Court thinks that Mr. Davis  
25 and/or the State -- state meaning through the Public

636 a

Mr. Lipari - Argument

48

1 Defender's office (indiscernible) like application,  
2 should have that transcript.

3           But we invite that transcript. It's ten months --  
4 yes, ten months before the first trial and with your  
5 experience, Judge, you know that status conferences  
6 precede pretrial conferences. That there should've  
7 been, we don't know what it was, we don't know what the  
8 colloquy was, a meaningful pretrial conference through  
9 both a pretrial memo and, obviously, the plea colloquy  
10 that should've been presented.

11           It's not in the record and that's why we  
12 respectfully argue that if an evidentiary hearing is  
13 granted, which is what Mr. Davis requests, that I would  
14 even join in the State in figuring out what's the most  
15 expeditious way to get Judge Ford down here. Maybe we  
16 could even do a consent order getting her down here. I  
17 don't think there'd be any fight either way.

18           THE COURT: Okay.

19           MR. KOKES: To make the record complete.

20           MR. LIPARI: I think the other side of it is  
21 that why not get all the transcripts. I mean that --  
22 if we really want to find out how it stood, you know,  
23 you can say that there may not have been terms recited  
24 or that they may not have said you can get life for  
25 murder, but you might get a sense of what the tenor of

637a

Mr. Kokes - Argument

49

1 what would hap -- what was happening was. I mean  
2 that's just a point that I make. We're kind of  
3 shooting somewhat in the dark and while I think that  
4 you can take some things on faith, in a situation like  
5 this it's better to err on the side of caution.

6 And another point about the fact that the  
7 Defendant statement at sentencing occurs after, you  
8 know, the failure -- the alleged failure to communicate  
9 a hypothetical plea offer, it's really inconsequential.  
10 He can't take back what he said just because it  
11 occurred after and it would entail sheer speculation to  
12 say that but for the formal pretrial memorandum process  
13 he wouldn't have said these things at sentencing.

14 I mean it could just as well be that, you know, he  
15 -- there was discussion. He rejected whatever might  
16 have been outstanding and he went to trial and he  
17 continued to maintain his innocence at trial and at  
18 sentencing. It's kind of a red herring. He doesn't  
19 get the benefit of saying well, he wouldn't have said  
20 that if -- he basically wins the argument without  
21 making it.

22 THE COURT: Okay.

23 MR. KOKES: Judge, the only brief response to  
24 that is I -- I'm confident the Court reviewed my August  
25 13<sup>th</sup> certification. I invite the State or the Court to

638a

Court Findings

50

1 even listen to or get transcripts.

2 Through the diligent search of Ms. Heller  
3 assisting me, we have located and I listened to just  
4 about every proceeding, Judge. I only say just about  
5 because sometimes, Judge, as you know, you call the  
6 case and barely any reference from either side, the  
7 case is postponed. I mean I didn't belabor those  
8 events. There was no pretrial conference.

9 Now, the promis gavel search that I believe Mr.  
10 Lipari and I and your team leader were privy to  
11 mentioned pretrial conferences. Each one of those,  
12 listened to every tape, because it's still the old  
13 cassette tapes, and then had at least proffers from the  
14 court reporters where there was anything and there was  
15 none.

16 THE COURT: Okay.

17 MR. KOKES: There was no meaningful pretrial  
18 conferences.

19 THE COURT: All right, thank you. All right,  
20 I'll address the issues raised by the Defendant pro se  
21 and then with the help of counsel one-by-one. The  
22 first is that trial counsel was ineffective in not  
23 retaining a mental health expert and an expert on  
24 voluntary intoxication.

25 There is nothing from Ms. Ford concerning wheth --

639 a

1 that is the defense counsel, that indicates that she  
2 did or did not pursue that possibility. This must,  
3 however, be considered in light of the Defendant's  
4 testimony, where upon he indicated he had consumed two  
5 shots of liquor prior to the murder and smoked  
6 marijuana after the murder. There were no other facts  
7 indicated by him or any other witness that would  
8 suggest he was under the influence of alcohol or  
9 anything else. Even less that the alleged, or possible  
10 intoxication, it's not even alleged, because he  
11 testified under oath that he was not. Nothing to  
12 suggest that his faculties were prostrated to the point  
13 where he could not form the mental states required for  
14 conviction of a charge of murder.

15 You know, we have to consider -- and I think it's  
16 perfectly relevant to consider the Defendant's  
17 testimony, because presumably -- well, it's under oath.  
18 Presumably, I think we take it at face value for being  
19 the truth, at least so far as he sees it. And  
20 presumably, these things would've been said to an  
21 expert. And what an expert rely upon in providing an  
22 opinion that he was under the influence, one, and two,  
23 that he was so under the influence that he was  
24 prevented from forming the requisite mental states  
25 necessary for the conviction.

640a

1 ineffectiveness, and two, that there's some likelihood  
2 that it would have or -- let me see exactly what the  
3 language is from Preciose. I think it warrants  
4 exactitude.

5 "A reasonable probability that but for  
6 counsel's unprofessional errors, the result of the  
7 proceeding would have been different."

8 Now, let me -- let's -- and let's talk about the  
9 prima facie case that the Defendant must establish for  
10 those two prongs. Prima facie case does not merely  
11 require that a petitioner make allegations and that it  
12 is necessarily established if there is a failure to  
13 rebut, effectively rebut those allegations, otherwise  
14 called bald assertions in cases that follows --  
15 followed Preciose, if not in Preciose itself.

16 Especially when there is -- now, it could carry  
17 the day when there is no other avenue for the  
18 prosecutor of the petition, which is the Defendant and  
19 defense counsel, when there are other avenues to  
20 establish it, like other witnesses. When other  
21 investigation can be done to corroborate or support the  
22 Defendant's claims. It's not, in my view, Mr. Kokes,  
23 sufficient to say my client steps forward and says  
24 this. It's up to the State to disprove it by the State  
25 going to those other possible witnesses, calling those

641a

1       witnesses, doing the investigation to disprove what my  
2       client says, which I say is *prima facie* evidence, or a  
3       *prima facie* case.

4           I think that that is not the case. I think that  
5       the petitioner is obliged to explore those avenues and  
6       provide the Court with the results of reasonable  
7       investigation, which, in my view, would have been a  
8       certification or affidavit, or even an interview, if  
9       you will, recorded interview of Ms. Ford concerning her  
10      conduct in this case, and Mr. Merz for that matter.  
11      But you could argue that, under, for example, Clawans,  
12      I suppose, if this defense is not obliged to go that  
13      far and go to the Assistant Prosecutor for help in  
14      establishing a *prima facie* case.

15       A *prima facie* case, essentially, is this. If what  
16      I say is true, this -- a result will follow. So,  
17      essentially, the Defendant would be saying that if I  
18      say that I was not told that I faced a life sentence  
19      upon conviction, I would have pled guilty. Well, what  
20      is there to establish that? Well, there is nothing.

21       There is no offer of a plea agreement, which, if  
22      it wasn't made, then there's nothing for him to compare  
23      the life sentence to. And in face of his protestations  
24      of innocence, every reason to believe he would still go  
25      forward with a trial. There is not a scintilla of

642a

## Court Findings

55

1 evidence in this case to suggest that there was any  
2 desire to pursue a guilty plea.

3 There's everything contrary to that. His  
4 testimony at trial, his testimony at time of sentencing  
5 and his position con -- presumably continues today that  
6 he's innocent of this. So, how can we say there is a  
7 reasonable probability that but for counsel's  
8 unprofessional errors, meaning that but for counsel  
9 telling him that he faced a life sentence, that there  
10 would've been a different result, when we have nothing  
11 to reasonably, reasonably compare it to.

12 If he came forward and said, you know, I was  
13 offered a ten, do five, let's just say for the sake of  
14 argument, and I didn't know I faced a life sentence and  
15 I wasn't told and he asserts that that's so and there's  
16 nothing to the contrary to disprove his allegation, now  
17 I think you got a prima facie case. But for him to say  
18 that, you know, you guys can't prove, number one, that  
19 I was told that I had a -- I faced a life sentence, but  
20 he also can't himself say I was offered thus and such.

21 And he's silent on it -- not silent necessarily,  
22 but unknowledgeable about it and the State has to be  
23 put to its proofs to establish that he was or was not  
24 offered a plea agreement? I think that's turning the  
25 prima facie case on its ear.

643 a

1           So, I find that on all arguments made that the  
2 Defendant has failed to establish a prima facie case to  
3 require an evidentiary hearing and I deny the petition.

4           Mr. Lipari, you'll provide the appropriate form of  
5 order?

6           MR. LIPARI: Yes, sir.

7           THE COURT: Okay.

8           MR. KOKES: Thank you, Your Honor.

9           THE COURT: Oh, by the way, Mr. Davis should  
10 be advised of his right to appeal and his --

11           MR. KOKES: Yes, 45 days, Judge.

12           THE COURT: -- 45 days to do so. And, Mr.  
13 Davis, if you miss that deadline, you can seek an  
14 extension of 30 days by showing good reason for missing  
15 that deadline. But then if you are granted that  
16 extension and miss that deadline, you will lose your  
17 right to appeal.

18           MR. KOKES: Judge, --

19           THE COURT: Although he still has perhaps a  
20 window of PCR, I guess -- no, he may be out of time for  
21 a subsequent PCR. So, I'm not sure about that. That's  
22 something you may want to discuss with him, Mr. Kokes.

23           MR. KOKES: Judge, I'm filling out the notice  
24 of right to appeal form as we speak. I think the Court  
25 would like that signed today.

644 a

1 THE COURT: Please.

2 MR. KOKES: I just need the indictment number  
3 again.

4 THE COURT: 00-06-1292. 00-06-1292.

5 (End of recorded proceedings in this matter)

6 \* \* \* \* \*

7 CERTIFICATION

8 I, Regina R. Caldwell, certified transcriber, do  
9 hereby certify that the foregoing transcript of  
10 proceedings of the New Jersey Superior Court, Atlantic  
11 County, on October 22, 2012, Time Index 9:41:54 a.m. to  
12 10:54:47 a.m., is prepared in full compliance with the  
13 current Transcript Format for Judicial Proceedings and  
14 is a true and accurate non-compressed record of the  
15 proceedings as recorded.

16

17 Date: January 11, 2013



18 Regina R. Caldwell, AOC #357

19 Certified Transcriber.

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