

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET NUMBER 18-1029

OMAR DAVIS,

Appellant,

v.

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

Appellees.

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

APPELLANT'S APPENDIX

VOLUME TWO

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45 River Road
East Brunswick, NJ 08816
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Attorney for Appellant
#000731991



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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	<u>1</u>	PETITION for Writ of Habeas Corpus (Filing fee \$ 5 receipt number NEW022099.), filed by OMAR N. DAVIS. (Attachments: # <u>1</u> Cover Letter,

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		# <u>2</u> Application IFP, # <u>3</u> Envelope)(ej) (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. (ej) (Entered: 03/05/2015)
03/05/2015		***Civil Case Terminated. (ej,) (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)(ej) (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)(ej) (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. (ej) (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. (djn) (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. (ej) Modified on 5/12/2015 (ej,). (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. (ej) (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. (ej) (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. (ej)

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		(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)

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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)

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**General Docket
Third Circuit Court of Appeals**

Court of Appeals Docket #: 18-1029 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	Docketed: 01/10/2018						
Case Type Information: 1) civil 2) private 3) civil rights							
Originating Court Information: District: 0312-3 : <u>3-14-cv-07797</u> Trial Judge: Anne E. Thompson, U.S. District Judge Date Filed: 12/09/2014 <table style="width: 100%;"> <tr> <td style="width: 33%;">Date Order/Judgment:</td> <td style="width: 33%;">Date Order/Judgment EOD:</td> <td style="width: 33%;">Date NOA Filed:</td> </tr> <tr> <td>11/30/2017</td> <td>11/30/2017</td> <td>01/03/2018</td> </tr> </table>		Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	11/30/2017	11/30/2017	01/03/2018
Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:					
11/30/2017	11/30/2017	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)





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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]

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AO 241
(Rev. 06/13)

Page 1

**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.

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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		Docket or Case No.:
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) Stephen M. D'Ilio, et al
The Attorney General of the State of New Jersey		

PETITION

- (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

(b) Criminal docket or case number (if you know): 00-06-192
- (a) Date of judgment of conviction (if you know): March 28, 2003

(b) Date of sentencing: March 28, 2003
- Length of sentence: Life w/ 30 parole ineligibility
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case:
Murder and possession of a weapon for an unlawful purpose
- (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

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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

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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

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(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

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(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):

5/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

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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):

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(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): _____

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(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: ____

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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:

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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:

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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:

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(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

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(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

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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

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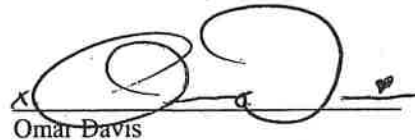
If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.¹

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

¹ 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.

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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

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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.

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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 in 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:

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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 deace. 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 deace 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 decease 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

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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.*

* 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 4TH, 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.

Snoddy
FILED

SEP 08 2006

Stephen T. Lawrence
CLERK

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 T. Lawrence
CLERK OF THE SUPREME COURT
OF NEW JERSEY

Stephen T. Lawrence
CLERK OF THE SUPREME COURT

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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.

Argued October 8, 2013 — Decided October 23, 2013

Before Judges Fisher, Koblitiz 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 ENTITLED 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.¹ During the status conference, the assistant

¹ 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.

(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 or 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

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		3101 SPENDABLE SUB ACCOUNT			
DATE	LOCATION TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE	
		BEGINNING BALANCE:		0.44	
05/14/2014	NJSP	FPAY 049 /PAY CLK /FPAY /RG:3 30 @2.00 04/01/2014-04/30/2014	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 05/01/2014-05/31/2014	62.00	112.02	

9/a

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

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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. OPR. 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 06/01/2014-06/30/2014	60.00	101.06
07/21/2014	NJSP	CRS	COMMISSARY SALE - ORD #7430565	(99.92)	1.14
08/08/2014	NJSP	CRS	COMMISSARY SALE - ORD #7455306	0.00	1.14
08/13/2014	NJSP	FPAY	049 /PAY CLK /FPAY /RG:3 31 @2.00 07/01/2014-07/31/2014	62.00	63.14
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

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 07/01/2014-07/31/2014	62.00	63.14
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 08/01/2014-08/31/2014	62.00	62.30
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

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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 @2.00 09/01/2014-09/30/2014	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 @2.00 10/01/2014-10/31/2014	62.00	92.11

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AO 241
(Rev. 06/13)

Page 1

**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.

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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		Docket or Case No.:	
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) 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

(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)

<input checked="" type="checkbox"/> (1) Not guilty	<input type="checkbox"/> (3) Nolo contendere (no contest)
<input type="checkbox"/> (2) Guilty	<input type="checkbox"/> (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

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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): Upublished

(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

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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

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(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

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(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):

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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

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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):

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(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): _____

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(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: ____

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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:

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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:

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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:

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(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

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(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

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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**

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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.¹

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

¹ 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.

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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

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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.

The testimony was potentially devastating because in 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).

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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 deace. 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 deace 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 decease 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.*

* 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 4TH, 2014, is therefore timely.

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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.

FILED
SEP 08 2006

Stephen Williams
CLERK

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 Williams
CLERK OF THE SUPREME COURT
OF NEW JERSEY

Stephen Williams
CLERK OF THE SUPREME COURT

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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.

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.

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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 ENTITLED 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.¹ During the status conference, the assistant

¹ 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.

(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 or 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

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

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AO 241
(Rev. 06/13)

Page 1

**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.

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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		Docket or Case No.:
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) custody of petitioner) 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

(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)

<input checked="" type="checkbox"/> (1) Not guilty	<input type="checkbox"/> (3) Nolo contendere (no contest)
<input type="checkbox"/> (2) Guilty	<input type="checkbox"/> (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

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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): Upublished

(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

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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

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(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

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(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):

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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

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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):

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(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): _____

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(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: ____

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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:

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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:

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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:

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(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

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(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

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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**

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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.¹

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

¹ 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.

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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

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. GAROFALO, 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

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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

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 Petitioner'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)

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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.

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On January 30, 2007, Petitioner filed a *pro se* first Post-Conviction Relief Application (hereinafter 1st 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 un rebutted 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

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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*,

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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. Hire's 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.

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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

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

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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,

DEFENDANT. :

-----STATUS CONFERENCE-----

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

* * * * *

EXHIBIT

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. Q. MOORE, CSR
SUPERVISOR
BOULEVARD-2ND FLOOR
NG, NJ 08330

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P R O C E E D I N G S

THE COURT: This is the matter of State v. Omar Davis for status conference. Appearances.

MS. FORD: Holly Ford on behalf of Omar Davis, the defendant in this matter.

MR. MERZ: William Merz for the State.

THE COURT: Okay. Status is?

MR. MERZ: Judge, we spoke informally with the Court on this matter. And it's been a case where there's been ongoing discovery that has been coming in to my office and I've been providing to the defense within the last couple of weeks. I provided statements that came in. There was more statements -- I mailed out "transcripts" I should say, of statements; the substance of which is contained in police reports, but the actual transcripts have been mailed out, and I believe three more this past Thursday.

The State has made a proffered -- a tentative offer in this case which was discussed with counsel, and my understanding is that there really isn't a meeting of the minds being close to resolving along the terms proposed by the State.

I was instructed by the First Assistant to -- if that offer wasn't accepted today -- that, you know, the case should be placed on the trial list with the

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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.

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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

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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?

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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

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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

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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 * * * * *

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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

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.)

OMAR DAVIS,)

DEFENDANT.)

TRANSCRIPT OF
PCR HEARING

PLACE: Atlantic County Criminal Courthouse
4997 Unami Boulevard
Mays Landing, New Jersey 08330

DATE: October 22, 2012

BEFORE:

HON. ALBERT GAROFALO, J.S.C.

TRANSCRIPT REQUESTED BY:

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APPEARANCES:

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A. HAROLD KOKES,
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SOUND RECORDED

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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

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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

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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

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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

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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

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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 un rebutted 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 un rebutted 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

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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

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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

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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

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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 15th 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.

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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

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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

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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 un rebutted proofs and we've presented a minimum prima
21 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

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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

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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.

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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?

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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.

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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

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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

6/10 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.

6/1a

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

6/2a

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 --

6/3a

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.

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Mr. Kokes - Argument

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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

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Mr. Kokes - Argument

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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.

6/6 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

6/7 a

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

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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 7th. 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 7th, 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

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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

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Mr. Kokes - Argument

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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

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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.

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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 7th,
4 2008, that was addressed to Your Honor initially in
5 response to Mr. Davis's submission. Then August 12th,
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 19th.

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

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Mr. Lipari - Argument

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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 19th.

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 7th 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 --

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Mr. Lipari - Argument

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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.

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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

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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

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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

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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 13th certification. I invite the State or the Court to

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Court Findings

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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 --

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Court Findings

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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.

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Court Findings

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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

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Court Findings

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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

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Court Findings

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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.

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Court Findings

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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.

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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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