NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2427

HEMMINGWAY MUKORA SAISI,
Appellant

v.

CAROLYN MURRAY, Essex County Prosecutor; MICHAEL MARUCCI, Esquire, Department of Public Defender, Essex, NJ; ELIZABETH CONNOLLY, Commissioner Human Services, NJ; ALFARO ORTIZ, Department of Corrections, Essex County, NJ

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 2-16-cv-05064)
District Judge: Honorable Claire C. Cecchi

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 18, 2020

Before: JORDAN, BIBAS and PHIPPS, Circuit Judges

(Opinion filed September 22, 2020)

OPINION*

PER CURIAM

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appellant Hemmingway Saisi, proceeding *pro se*, appeals from the District Court's order dismissing his complaint. We will affirm.

Because we write primarily for the benefit of the parties, we will recite only the facts necessary for our discussion. In his first complaint, Saisi alleged that he was incarcerated for eleven years and was "tortured and terrorized" while detained. The only reference to the defendants was that they "maintained/tolerated/supervised" unconstitutional activity. After considering the defendants' motions to dismiss, the district court dismissed the claims without prejudice, and Saisi was given an opportunity to amend his pleading.

Saisi twice amended his complaint, ultimately bringing claims against only four of the original 16 defendants. According to Saisi, he was arrested in 2008 for making terroristic threats against his former counsel. While awaiting trial, Saisi was allegedly transferred between Essex County Jail and Ann Klein Forensic Center, where he was receiving pretrial evaluation and treatment. He alleged that he was beaten and forced to take psychotropic medications because he refused to plead guilty. He stated that the defendants conspired against him by using psychologists to diagnose him with numerous diseases and force him to take medications. Saisi contends that he was held without a trial for seven years and claimed that the deplorable conditions of his confinement in the forensic center and jail were unconstitutional.

The District Court granted the defendants' motions to dismiss. It noted that even if Saisi's claims about the conditions of his confinement could be substantiated, there

were no allegations that the four named defendants were responsible for or involved in the alleged harms. The complaint also did not contain facts sufficient to state a claim for conspiracy.

We have jurisdiction under 28 U.S.C. § 1291 and maintain plenary review over the District Court's grant of the motion to dismiss pursuant to Rule 12(b)(6). See Newark Cab Ass'n v. City of Newark, 901 F.3d 146, 151 (3d Cir. 2018). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The plausibility standard "require[s] a pleading to show more than a sheer possibility that a defendant has acted unlawfully." Connelly v. Lane Const. Corp., 809 F.3d 780, 786 (3d Cir. 2016).

Defendants in civil rights actions "must have personal involvement in the alleged wrongs to be liable and cannot be held responsible for a constitutional violation which he or she neither participated in nor approved." Baraka v. McGreevey, 481 F.3d 187, 210 (3d Cir. 2007). A supervisor can be held liable, but only where "he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations." Santiago v. Warminster Tp., 629 F.3d 121, 129 (3d Cir. 2010); see also Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) ("Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence.").

Saisi asserted that the defendants—including the Essex County Prosecutor, the warden of the Essex County Jail, a public defender, and the New Jersey Commissioner of Human Services—were liable for the unconstitutional conditions of confinement under a theory of respondeat superior or supervisory liability. Though the conditions of his confinement may have been unconstitutional as pleaded, Saisi did not allege any facts showing the defendants' actual knowledge of the alleged violations or participation therein. See Santiago, 629 F.3d at 129; Rode, 845 F.2d at 1207. Saisi asserted that some defendants were "in charge of agencies that allowed this to happen," and that liability stemmed merely from defendants' "belief" that their conduct would be "tolerated." However, a director cannot be held liable "simply because of his position as the head of the [agency]." Evancho v. Fisher, 423 F.3d 347, 354 (3d Cir. 2005). Even accepting the factual allegations as true, there is not enough, without more, to support a claim.[1]

The conspiracy claim fails for the same reason. Conspiracy claims require the plaintiff to, among other things, "demonstrate that the state actors named as defendants in the complaint somehow reached an understanding to deny the plaintiff his rights." Jutrowski v. Township of Riverdale, 904 F.3d 280, 295 (3d Cir. 2018) (internal citation omitted). As the District Court explained, Saisi's conclusory allegations did not contain any specific facts showing that there was an agreement between the parties.[2]

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[1] To the extent that Saisi alleged that the public defender who represented him at trial violated his constitutional rights, those claims are not cognizable under § 1983 because public defenders are not state actors. Polk Cty. v. Dodson, 454 U.S. 312, 325 (1981).

[2] Saisi was instructed by the Clerk to include arguments in his opening brief about any

Accordingly, we will affirm the judgment of the District Court. Saisi's motion to expand the record is denied.

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defendants which were previously dismissed and not named in the final amended complaint if he wished to have them reviewed. As he did not include any such arguments in his brief, we have reviewed only the District Court Order dismissing the operative complaint.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HEMMINGWAY MUKORA SAISI, Plaintiff, v. CAROLYN MURRAY, et al., Defendants	Civil Action No. 16-5064 (CCC) (JBC) **ORDER**

CECCHI, District Judge.

This matter comes before the Court on the complaint filed by Plaintiff Hemmingway Mukora Saisi, asserting claims under 42 U.S.C. § 1983 for alleged violations of Plaintiff's constitutional rights by Defendants. Presently before the Court are two motions to dismiss filed by all remaining Defendants, ECF Nos. 57, and 58. Plaintiff opposes the motions. For the reasons set forth in the Opinion filed on this date, and for good cause shown,

IT IS on this 30 day of May, 2019,

ORDERED that the motions to dismiss, ECF Nos. 57 and 58, are hereby **GRANTED**; and it is further

ORDERED that all claims are hereby **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that the Clerk shall close the Court's file in this matter.

Claire C. Cecchi, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HEMMINGWAY MUKORA SAISI, Plaintiff, v. CAROLYN MURRAY, et al., Defendants.	Civil Action No. 16-5064 (CCC) **MEMORANDUM OPINION AND ORDER**

CECCHI, District Judge.

This matter comes before the Court on the Complaint filed by Plaintiff Hemmingway Mukora Saisi ("Plaintiff"), asserting claims under 42 U.S.C. § 1983 for alleged violations of Plaintiff's constitutional rights by Defendants. Upon motions by Defendants, the Court dismissed all claims except those against Defendant Loretta E. Lynch. (ECF No. 28). The Court allowed Plaintiff to amend the Complaint, and directed Plaintiff to provide proof of service upon Lynch. (*Id.*). Plaintiff filed an Amended Complaint, (ECF No. 35), but did not provide proof of service upon Lynch. Presently before the Court are motions to dismiss by various Defendants, seeking dismissal of claims in the Amended Complaint. (ECF Nos. 37, 38, 43, 44). For the reasons stated below, the motions to dismiss are granted.

Defendants assert that the Amended Complaint fails to state a claim upon which relief may be granted, and the Court agrees. As the Court found in its previous opinion, Plaintiff's claims appear to arise out of state criminal prosecutions that occurred from "March 29[], 2004 thru Oct. 24, 2007, May 9[], 2008 thru Dec. 31[], 2014 and still continuing." (ECF No. 27 at 2). However, Plaintiff provided no factual allegations to support his claims, which necessitated dismissal. (*Id.* at 6). The Court also noted that in a previous complaint Plaintiff filed not before this Court, he asserted similar claims, but those claims were found to be untimely and barred by *Heck v.*

Humphrey, 512 U.S. 477 (1994). (ECF No. 27 at 3 (citing *Saisi v. Jersey City Police Dep't*, No. 15-2021 (SRC), ECF No. 3 at 4-6)).

In the Amended Complaint, Plaintiff explicitly states that his claims arise out of a criminal prosecution that began in March of 2004 and ended in October of 2007 with a conviction, and another criminal prosecution that began in May of 2008 and ended in October of 2014, also with a conviction. He alleges that he was falsely prosecuted, convicted, and imprisoned. To the extent Plaintiff is asserting malicious prosecution claims, his claims fail. Malicious prosecution claims require a showing that the prosecution ended in Plaintiff's favor, *see Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009), which Plaintiff cannot show, as he was convicted in both aforementioned proceedings. To the extent Plaintiff asserts that he was falsely convicted and imprisoned in both cases, the Supreme Court has held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Heck, 512 U.S. at 486-87. Again, Plaintiff cannot make the requisite showing because he was convicted, and he does not assert that either conviction has been invalidated or expunged.

Plaintiff also asserts a claim for ineffective assistance of counsel against his former criminal defense attorney, Defendant Anthony R. Gualano. In his motion to dismiss, Gualano asserts, among other defenses, that the Amended Complaint fails to state a claim against him because it does not explain how Gualano was ineffective.[1] The Court agrees, as the Amended

[1] The Court notes that Gualano does not raise the defense that he cannot be sued under § 1983 as a private attorney. *See Jackson v. City of Erie Police Dep't*, 570 F. App'x 112, 113 (3d Cir. 2014) ("[P]rivate defense attorney cannot be construed as a person acting under the 'color of state law'

Complaint contains no factual allegations regarding Gualano's ineffective assistance. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (citations omitted); *Badia v. Warden, HCCC*, No. 10-5662, 2011 WL 221709, at *3 (D.N.J. Jan. 19, 2011) (finding that a § 1983 complaint should specify "the who, what, when, where, and how: the first paragraph of any newspaper story") (citations omitted). Plaintiff attempts to cure this defect in his reply, by including a list of factual allegations detailing Gualano's errors, (*see* ECF No. 45 at 2-5), but this Court is not obligated to "to accept assertions in a brief without support in the pleadings. After all, a brief is not a pleading." *Chavarriaga v. N.J. Dep't of Corr.*, 806 F.3d 210, 232 (3d Cir. 2015).

As such, the Court finds that the Amended Complaint does not state a claim upon which relief may be granted. Accordingly, Defendants' motions are granted, and all claims against them are dismissed. Furthermore, because Plaintiff did not provide proof of service upon Lynch, the claims against her are also dismissed. *See* Fed. R. Civ. P. 4(m) (stating that if a defendant is not served within time, the Court may on its own, after notice to the plaintiff, dismiss the action against that defendant without prejudice). Having dismissed all claims, the Amended Complaint is dismissed.

In the interest of justice, the dismissal is without prejudice, and Plaintiff shall have 30 days to amend the pleading to cure the defects identified herein. The Court cautions that this is Plaintiff's last chance to amend, and failure to amend or state a valid claim will result in a dismissal

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within the meaning of § 1983.") (citing *Polk Cty. v. Dodson*, 454 U.S. 312, 317-25 (1981)); *Bullock v. Sloane Toyota Inc.*, 415 F. App'x 386, 389 (3d Cir. 2011) (holding that a private attorney was not liable under § 1983 because the plaintiff had not set forth any facts to demonstrate that her attorney was a state actor or acted under the color of state law). Nonetheless, in light of Plaintiff's *pro se* status, the Court cautions Plaintiff to consider this argument in the event he files an amended complaint.

with prejudice. *See Velazquez v. Zickerfoose*, No. 11-2459, 2014 WL 6611058, at * 7 (D.N.J. Nov. 21, 2014) (dismissing with prejudice after having afforded plaintiff three opportunities to perfect pleading); *Donnelly v. Option One Mortg. Corp.*, No. 11-7019, 2014 WL 1266209, at *18 (D.N.J. Mar. 26, 2014) (same); *Thompson v. Keystone Human Servs. Corp.*, No. 09-2558, 2012 WL 398619, at *6 (M.D. Pa. Feb. 7, 2012) (denying leave to amend after three chances); *see also Grayson v. Mayview State Hosp.*, 293 F.3d 103, 112-13 (3d Cir. 2002) (holding that futility of amendment is a proper reason to deny leave to amend).

Accordingly **IT IS** on this 29 day of May, 2018,

ORDERED that the motions to dismiss, ECF Nos. 37, 38, 43, and 44, are hereby **GRANTED**; it is further

ORDERED that all claims in the Amended Complaint are hereby **DISMISSED WITHOUT PREJUDICE**, and the Amended Complaint is hereby **DISMISSED**; it is further

ORDERED that Defendant Loretta E. Lynch is hereby **DISMISSED** from the case; it is further

ORDERED that Plaintiff shall, within 30 days of this Memorandum Opinion and Order, amend his pleading to cure the defects identified herein; failure to amend or otherwise cure the defects will result in a dismissal *with prejudice*; it is further

ORDERED that, for docket management purposes, the Clerk shall **ADMINISTRATIVELY TERMINATE** this case; the Clerk will be directed to reopen the case once an amended pleading is filed; and it is further

ORDERED that the Clerk shall serve a copy of this Memorandum Opinion and Order upon Plaintiff by regular mail and shall **CLOSE** the file.

Claire C. Cecchi, U.S.D.J.

EMBASSY OF THE REPUBLIC OF KENYA WASHINGTON, D.C.

KEW/ADM/G/122/VOL.1

November 18, 2011

Mr. Alfaro Ortiz
Director
Department of Corrections
Essex Correctional Facility
356 Doremus Avenue
Newark, NJ 07105

RE: MR. HEMMINGWAY MUKORA SAISI

Mr. Hemmingway Saisi, a Kenyan national has reached out to the Embassy and informed about his protracted incarceration at the Essex Correctional Facility and the Ann Klein Forensic Centre. He has been in custody since 2004 during which period he alleges that he has been unfairly treated while in custody and claims to have been tortured by officials in the correctional facility.

The Embassy kindly requests that the allegations of torture by Mr. Saisi be investigated and the judicial process be expedited so as to bring this pending case to its logical conclusion. The Embassy would also greatly appreciate to be provided with a status of the case against Mr. Saisi.

D.M. Muhambe
FOR: AMBASSADOR

Cc: Ms. Jacqueline Saisi
Newark, New Jersey

2249 R Street, NW • Washington, D.C. 20008 U.S.A.
Telephone (202) 387-6101 • Fax (202) 462-3829 • Email: Info@kenyaembassy.com • www.kenyaembassy.com

EMBASSY OF THE REPUBLIC OF KENYA WASHINGTON, D.C.

KEW/ADM/G/122/VOL.2

July 13, 2012

The Hon. Michael A. Petrolle
Presiding Judge
Essex County Courts Building (602)
50 W Market Street
Newark New Jersey 07102

RE: MR. HEMMINGWAY MUKORA SAISI

The Embassy of the Republic of Kenya in Washington DC presents its compliments to the Hon. Michael A. Petrolle, Presiding Judge and wishes to inquire about Mr. Hemmingway Saisi, case No. 383875C. Mr. Saisi is a Kenyan national who is facing trial before the Hon. Judge and has reached out to the Embassy expressing concern about his protracted incarceration at the Essex County Jail and the Ann Klein Forensic Centre, as well as the inordinate delay in concluding his trial. He has been in custody since 2004 and is apprehensive that his case has taken too long to determine.

The Embassy would also greatly appreciate if Mr. Saisi's concerns are urgently addressed in order to bring this case to its logical conclusion.

D.M. Muhambe
FOR: CHARGÉ D' AFFAIRES a.i

Cc: Mr. Hemmingway Saisi
Essex County Jail 383875C
Doremus Avenue
Newark, NJ 07105

2249 R Street, NW • Washington, D.C. 20008 U.S.A.
Telephone (202) 387-6101 • Fax (202) 462-3829 • Email: Information@kenyaembassy.com • www.kenyaembassy.com

EMBASSY OF THE REPUBLIC OF KENYA WASHINGTON, D.C.

KEW/ADM/G/122/VOL.1

November 18, 2011

Judge Peter Vasquez
Presiding Judge
Essex County Superior Court
Veterans Court House
50 W Market Street
Newark New Jersey 07102

RE: MR. HEMMINGWAY MUKORA SAISI

Mr. Hemmingway Saisi, a Kenyan national has reached out to the Embassy and informed about his protracted incarceration at the Essex Correctional Facility and the Ann Klein Forensic Centre. He has been in custody since 2004 during which period he alleges that he has been unfairly treated while in custody and claims to have been tortured by officials in the correctional facility.

The Embassy kindly requests that the allegations of torture by Mr. Saisi be investigated and the judicial process be expedited so as to bring this pending case to its logical conclusion. The Embassy would also greatly appreciate to be provided with a status of the case against Mr. Saisi.

D.M. Muhambe
FOR: AMBASSADOR

Cc: Ms. Jacqueline Saisi
Newark, New Jersey

2249 R Street, NW ◦ Washington, D.C. 20008 U.S.A.
Telephone (202) 387-6101 ◦ Fax (202) 462-3829 ◦ Email: Info@kenyaembassy.com ◦ www.kenyaembassy.com

Jacqueline Cole
147 Woodlawn Avenue
Jersey City, NJ 07305
201-936-3660
Representative for claimant Hemmingway Saisi 383875C
(All correspondences to be sent to the aforementioned address)

F

Mr. Glenn Ferguson
CEO
Ann Klein Forensic Center
Sullivan Way, P.O. Box 7717
West Trenton, NJ 08628

Dear Mr. Ferguson,

RE: Notice of claim pursuant to N.J.S.A 59:8-4

I, Jacqueline Cole, sister to and representing the claimant Hemmingway Saisi, do hereby certify as follows:

In numerous occasions, Hemmingway Saisi whilst in your facility was subjected to treatment that bordered on willful negligence, civil and human abuse by staff employed in your facility.

1. He was given potent psychotropic medication without appropriate evaluation or follow-up, placing him at risk for life-threatening consequences. The facility being a psychiatric unit does not negate your responsibility of diagnostic investigation with the patient, family and others to ascertain the cause for their current residence. As a result of the medication mismanagement and treatment failures, he lives with agonizing side effects: not limited to/ but including twitching, facial and body swelling, boils and tongue swelling, racing thoughts, disorientation, depression, and chronic sleep loss. Effects of chemical and medical abuse in the care of a state run institution that are now part and parcel of his remaining adult life.

2. The administration of psychotropic medications that are too potent and reserved for hopeless cases,
   a. Proxilin, or its RX equivalent Fluphenazine
   b. Haldol or its RX equivalent Haloperidol
   Both have activities at all levels of the central nervous system as well as on multiple organ systems. Their resulting severe side effects are not limited to/ but including irreversible life altering and threatening outcomes. Hemmingway has been found competent to stand trial in 2004, whilst facing 7 counts which included Murder, found competent in February 2012, works in your canteen and has exhibited the same responses on his innocence since the very first time he came to your facility. And yet your team without patient medical review, administer these drugs via injection/liquid form by force on Friday proceeding a long holiday weekend.

3. Threated by patients/inmates in your facility yet he has/had no relations to them or to receive threats to his person. He was then restricted to his cells 23 hours a day, with inadequate health care and nourishment which led to respiratory infections, and skin boils and deprived of rights given to other patients, and yet he was not the aggressor/agitator.

Jacqueline Cole
147 Woodlawn Avenue
Jersey City, NJ 07305
201-936-3660
Representative for claimant Hemmingway Saisi 383875C
(All correspondences to be sent to the aforementioned address)

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4. While in restrictive custody he was subjected to abuse from staff, some using very racial slurs others calling him mental, taunting him about dying in the unit and his body being buried in some African jungle. The conditions not limited to jail cell without a mattress, working toilet, drinking water, and the slamming of his cell door in the middle of the night with calls for mental health. He is reprimand for asking for his basic rights civil, human and health- instead he is administered more psychotic medication.

5. On his reporting any of the above to the medical team/staff, excessive force and forceful psychotic medication is prescribed and administered. The staff have instigated/use of provocative innuendoes to solicit a negative reaction which in turn lead to assault /threat to his person or threat to instigate a chargeable offense on Hemmingway while the others covered it up.

6. Despite Hemmingway never being charged with a crime, your healthcare institution didn't/has not done anything or follow through / not limited to speaking to the patient himself to determine why he was/is being improperly detained at your facility courtesy of the courts. Instead you have had a gainful arrangement of moving him conveniently between your facility and Essex Correctional Jail thus further enabling the abuse and denial of his judicial, human and civil rights.

7. Pursuant to the New Jersey Tort Claims Act N.J.S.A 59:8-4, I am filing a notice of claim of an undisclosed amount.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the following statements made by me are willfully false, then I am subject to punishment.

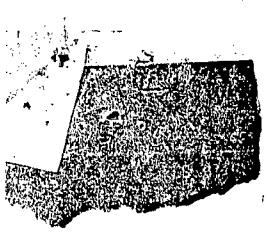
Date: November 18th 2013

Respectfully Submitted,

Jacqueline Cole
On behalf of Hemmingway Saisi 383875C

cc.
Amina Mohammed – Ministry of Foreign Affairs
The Republic of Kenya, Nairobi, Kenya

Governor State of New Jersey
Chris Christie
Trenton, New Jersey



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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
INDICTMENT NO. 04-06-1077-I

STATE OF NEW JERSEY, Plaintiff, vs. HEMMINGWAY SAISI Defendant	**CRIMINAL ACTION** Petition for Post-Conviction Relief

BRIEF IN SUPPORT OF DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF

YVONNE SEGARS SMITH
PUBLIC DEFENDER
Attorney for Defendant
31 Clinton Street, 9th Floor
Newark, New Jersey 07101

John P. Monaghan, Esq.
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Designated Counsel
and on the Brief

DEFENDANT PRESENTLY CONFINED

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CONSTITUTIONAL PROVISIONS

PROCEDURAL HISTORY

On June 30,2004, the Hudson County Grand Jury returned Indictment No. 1077-06-04, which charged defendant, Hemmingway Saisi with : (count 1) murder, a first degree crime, contrary to the provisions of N.J.S.A. 2C:11-3(a)1; (count 2) purposely causing serious bodily injury contrary to N.J.S.A. 2C:12-1(b)1; (count 3) purposely causing serious bodily injury with a deadly weapon contrary to N.J.S.A. 2C:12-1(b)1; (count 4) attempting to cause serious bodily injury contrary to N.J.S.A. 2C:12-1(b)1; (count 5) purposely causing serious bodily injury with a deadly weapon contrary to N.J.S.A. 2C:12-1(b)1; and possession of a weapon for an unlawful purpose contrary to N.J.S.A. 2C:39-4(D). (Da-1).

The trial was conducted before the Honorable Peter J. Vasquez, J.S.C. and a jury on March 15,17,22,23,29 and 30,2005.

On March 30,2005, the jury found defendant guilty of second degree manslaughter contrary to N.J.S.A. 2C:11-4(B)1; Defendant was found not guilty of the remaining charges. (Da-3).Defendant moved for Judgment Non-Obstante Verdicto which was denied. (Da-4).

On July 19,2005, the trial court granted defendant's motion to sentence defendant to one degree lower than a second degree crime.(8T9-20; DA-5)and imposed a term of four years incarceration subject to the 85% No Early Release Act (NERA) period of parole eligibility. (Da5-Da8). On July 26,2005, Judgment of Conviction was entered. (Da-5).

Defendant filed a Notice of Appeal on August 19,2005(Da-8). The appellate division affirmed the trial court's rulings. Thereafter, defendant filed a Petition for Certiori to the Supreme Court, which was denied. (Da-9 to Da-10)

On January 13, 2009, the Hon. Sheila A. Venable, P.J.,Crim., entered an Order assigning counsel for Post-Conviction Relief.(Da-11 to Da-20).

**Transcript Reference:
1T: (Trial, March 15,2005)
2T: (Trial, March 17,2005)
3T: (Trial, March 22,2005)
4T: (Trial, March 23,2005)
5T: (Trial, March 29,2005)
6T: (Trial, March 30,2005)
7T: (Motion, May 17,2005)

STATEMENT OF FACTS

Corey Denis is the cousin of the victim, Jeff Sheppard.(2T41:24). Defendant, Hemmingway Saisi is married to his cousin, Shamika Denis (Saisi). (2T42:8). On March 29,2004, Mr. Denis was with Jeffrey Sheppard on the day he was killed. (2T43:9). Jeff Sheppard called defendant's wife, Shamika. (2T43:25). Sheppard requested that Denis take him to Shamika's house.(2T44:26).

James Clark at the time of defendant, Saisi's trial, was in jail for possession of C.D.S. with intent to distribute. (3T3:21). On the date of the killing, he was with Jeff Sheppard who had just been let out of jail. (3T5:1-5). Jeff Sheppard was fussing (arguing) with Hemmingway Saisi about his wife, Shamika. (3T9:18-25). Defendant followed the victim across the street saying "you don't have the right to come to my house".(3T17:6-10). In addition to the conviction for possession of C.D.S., James Clark had two other convictions for possession of a weapon and for possession of hollow point bullets. (3T24). Clark indicated that Jeff Sheppard knew Sheppard was not welcome at Hemmingway Saisi's residence; Saisi did not want him talking to Saisi's family. (3T30). Despite this, Sheppard wrote to Saisi's wife, Shamika, while he was in jail.(3T30:16).

Sheppard arrived at the residence of defendant. The men had walked up the stairs to the Saisi apartment and Sheppard walked right by Saisi, straight into the living room without even acknowledging Saisi. (3T44 to 3T45:5). Sheppard was trying to

provoke Saisi. (3T48:6-9).

Corey Denis and Jeff Sheppard entered the residence of defendant.(2T73:1-3). Sheppard was a big man, approximately six foot four inches, three-hundred twenty pounds with a muscular, not fat frame. (3T32-3T33).

Sheppard and Saisi started fighting. (2T47:12).They grabbed each other and started wrestling. (2T50:1-3). Denis testified that Saisi had a knife, did not reach for it, but it dropped out of his back-side. (2T50). At the time Saisi's body was under Jeff Sheppard's body. (2T52:9-10). Saisi was waiving the knife and cut both Corey Denis and Jeff Sheppard. (2T53). Jeff Sheppard then fell to the ground(2T54:1). Saisi was chasing all of the men(Denis, Sheppard and James Clark). (2T65:1-6). Defendant then stabbed Sheppard in the chest. (2T57:10). Defendant stabbed the victim in the chest a second time. (2T60).

Dr. Shaikh testified that he performed an autopsy on Jeff Sheppard. (4T52:25). Sheppard sustained three stab wounds, two in the chest. The third stab wound was in the thigh which cut the femoral artery and was a fatal wound. (4T55;4T86:13 to 4T87:10).

At the time of the incident, Sheppard had just been released from prison. (2T70:1-3). Just after his release, Sheppard wanted to see Shamika Saisi.(2T71:16-20). Just one week before the stabbing, Denis and Sheppard visited the Saisi residence when Sheppard walked right by defendant not even acknowledging him. (2T76:19-23).

James Clark told the police that Sheppard started the fight by jumping Saisi and hitting him first. (3T63:22-25). Sheppard pulled Saisi down three steps, falling to the ground. (3T64:21-25). Saisi's body was under Sheppard who was six foot four, three hundred twenty pounds. (3T65:20-22). Sheppard threw the first punch. (3T65:25).

Ingrid Gaynor also testified. She was engaged to the victim. (2T27:5). She acknowledged that she had to identify the victim to the police on a different date because Jeff Sheppard had attempted to strangle her. (2T29:18-21).

LEGAL ARGUMENT

The Petitioner asserts that his attorneys failed to provide him with effective assistance of counsel. He further asserts that because he was prejudiced by these failures, the Court should grant his motion for post-conviction relief.

POINT I

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL (U.S. CONST., (Amend. VI, XIV: N.J. CONST., (1947), Art. I, par. 10) WHEN TRIAL COUNSEL STIPULATED STATE'S EVIDENCE.

The right to counsel is guaranteed by both the State and Federal Constitutions. U.S. Const., (Amend. VI, XIV: N.J. Const., (1947), Art. I, par. 10). The right to counsel "is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (1984), quoting McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449 (1970); State v. Davis, 116 N.J. 341, 351 (1989). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient as measured by "an objective standard of reasonableness" under prevailing professional norms, and that defendant was prejudiced thereby. Strickland, 466 U.S. at 687-88, 104 S.Ct. at 2064-65; State v. Fritz, 105 N.J. 42, 58 (1987). The defendant or petitioner must demonstrate as well that there exists a "reasonable probability" that the outcome would have been different, which exists if it is "sufficient to undermine

confidence in the outcome" of the proceedings. Strickland at 696. The defendant must also overcome the "strong presumption" that counsel's actions "might be considered sound trial strategy." Id. at 689, 104 S.Ct. at 2065.

A criminal defendant is guaranteed effective representation of trial counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985); State v. Mitchell, 126 N.J. 565 (1992); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2051 (1984). It is fundamental that the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee a person accused of a crime the assistance of an attorney for his defense. Kimmelman v. Morrison, 477 U.S. 365, 376, 106 S.Ct. 2574, 2583 (1986); State v. Davis, 116 N.J. 341, 351 (1989). The "core purpose" of the constitutional right to counsel is as follows:

> [T]o assure 'Assistance' at trial... If no actual 'Assistance' 'for' the accused's 'defense' is provided then the constitutional guarantee has been violated. (United States v. Cronic, 466 U.S. 648, 654 (1984) (citation and footnote omitted).

To satisfy the Sixth Amendment requirement, "counsel must function as an advocate for the defendant." Jones v. Barnes, 463 U.S. 745, 758, 103 S.Ct. 3308, 3316 (1983) (Brennan, J., dissenting). The very premise of our adversarial system of criminal justice "is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." United States v. Cronic, 466 U.S. 648, 655, 104 S.Ct. 2039, 2045-2046 (1984) (citations

omitted).

The measure of the constitutional guarantee is "the fairness of the proceeding--the measure of its adversarial balance." State v. Davis, 116 N.J. at 353. The issue of effectiveness of counsel is not the culpability of the lawyer, but the constitutional right of the client. People v. Lee, 541 N.E. 2d 747, 764 (Ill. App. 5 Dist. 1989). In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2051 (1984), the United States Supreme Court established a two-prong test to identify whether counsel's assistance was adequate:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless, a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversary process that renders the result unreliable.
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> 466 U.S. at 687.

New Jersey adopted the Strickland standard in State v. Fritz, 105 N.J. 42, 58 (1987), with respect to the State Constitution, though the Court phrased the prejudice prong slightly differently:

> [I]f counsel's performance has been so deficient as to create a reasonable probability that these deficiencies materially contributed to the defendant's conviction the [State] constitutional right will have been violated. [105 N.J. at 58]

With respect to deficient performance, the test is "whether counsel's conduct fell below an objective standard of

reasonableness." Strickland v. Washington, 466 U.S. at 688. The proper measure of an attorney's conduct in the case is "reasonable under prevailing professional norms." Id. A reviewing court must ordinarily presume "that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. However, the defendant may rebut this presumption by proving that the attorney's representation "was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. at 384, 104 S.Ct. at 2064.

In State v. Davis, the New Jersey Supreme Court noted that "the measure of an advocate's competence depends on the task to be accomplished." Id at356. Accordingly, an analysis of whether trial counsel has rendered "reasonably competent" representation must take into consideration the nature of the issues which should have been addressed. Petitioner has presented **prima facie** claims of ineffective assistance of trial counsel which should be resolved at an evidentiary hearing. State v. Preciose, 129 N.J. 451, 462 (1992).

The right to post-conviction relief must be established by the petitioner by a preponderance of the credible evidence. State v. Preciose, 129 N.J. at 459. While not all post-conviction claims require an evidentiary hearing for their resolution, see State v. Flores, 228 N.J. Super. 586, 589-590 (App. Div. 1988), certif.

denied, 115 N.J. 78 (1989), many ineffective assistance of counsel claims do. Post-conviction relief is the appropriate forum for raising ineffectiveness claims of counsel. See State v. Preciose, 129 N.J. at 462. In order to prevail on a claim of ineffective assistance of trial counsel, a petitioner must show that counsel's performance was deficient as measured by an objective standard of reasonableness under prevailing professional norms, and that the deficiencies materially contributed to his conviction. Strickland v. Washington, 466 U.S. at 687-688, 104 S.Ct. at 2064-2065; State v. Fritz, 105 N.J. at 58 (1987). Satisfaction of both prongs of the Strickland/Fritz test often requires evidence outside the trial record. Therefore, ineffective assistance of counsel claims are "particularly suited for post-conviction review," and the development and resolution of such claims usually require an evidentiary hearing. State v. Preciose, 129 N.J. at 460-462; State v. Sparano, 249 N.J. Super. 411, 419 (App. Div. 1991). See also Smith v. United States, 608 A.2d 129 (D.C. App. 1992); Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987); Randall v. State, 609 A.2d 949 (R.I. 1992).

The deficient performance prong of the test for ineffective assistance of counsel claims requires a showing that counsel was not reasonably competent, that counsel failed "to make the adversarial testing process work" and thus was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 690, 687, 104 S.Ct. at 2066, 2064; State v. Fritz, 105 N.J. at 58. Informed strategic choices made by counsel after thorough

investigation of the relevant law and facts and consideration of all possible options are "virtually unchallengeable." Strickland, 466 U.S. at 689-691 104 S.Ct. at 2065-2066; State v. Savage, 120 N.J. 594, 617, 621 (1990). However, "strategy decisions made after less than complete investigation [of law and facts] are subject to closer scrutiny," and may be found to sustain a claim of ineffective assistance of counsel. Id. at 617-618. Indeed, "not all strategic decisions are sacrosanct." Quartararo v. Fogg, 679 F. Supp. 212, 247 (E.D.N.Y.), aff'd, 849 F.2d 1467 (2d Cir. 1988). "[C]ertain defense strategies or decisions may be 'so ill chosen' as to render counsel's overall representation constitutionally defective." Id., quoting Willis v. Newsome, 771 F.2d 1445, 1447 (11th Cir. 1985), cert. denied, 475 U.S. 1050, 106 S.Ct. 1273 (1986). The Sixth Circuit Court of Appeals has stated:

> Under the analysis set forth in Strickland, even deliberate trial tactics may constitute ineffective assistance of counsel if they fall 'outside the wide range of professionally competent assistance.' 104 S.Ct. at 2066. This accords with the earlier holding of the Sixth Circuit that '[d]efense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected a defendant and was reasonably foreseeable as such before trial.'
> Martin v. Rose, 744 F.2d 1245, 1249 (6th Cir. 1984).

The facts upon which a determination can be made whether counsel's actions were informed and reasonable, that is, based on a thorough investigation of law and facts and consideration of all plausible options, seldom appear in the trial record. See State v. Sparano, 249 N.J. Super. at 419 ("Generally, a claim of ineffective

assistance of counsel cannot be raised on direct appeal [because] defendant must develop a record at a hearing at which counsel can explain the reasons for his conduct and inaction.")

In the matter *sub judice*, trial counsel stipulated evidence for no reason, specifically, the knife found in a street sewer, (Da-21).

POINT II

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO FILE A PROBABLE CAUSE MOTION TO CHALLENGE THE STATE'S CLAIM THAT POLICE HAD PROBABLE CAUSE TO ARREST DEFENDANT.

Claims of ineffective assistance of counsel are generally governed by the standards set forth in Strickland v. Washington, First, defendant must show that counsel's performance was deficient, . . . second, defendant must show the performance prejudiced the defense. State v. Arthur, 184 N.J. 307,318 (2005).

Part of an attorney's duty to his client is to conduct a prompt investigation of the circumstances of the case, and explore all avenues leading to facts bearing upon guilt as well as the degree of guilt or penalty. State v. Russo, 333 N.J.Super.119, (App. Div. 2000). Accordingly, a defendant is entitled to a complete and vigorous defense, requiring that counsel, at the very least, investigate all defenses. United States v. Baynes, 687 F. 2d. 659 (3rd. Cir. 1982). As a result, inadequate pre-trial investigation may form the basis of an ineffective assistance of counsel claim.

An attorney's ineffectiveness may be apparent within the context of a complete failure to investigate, because counsel can hardly be said to have made a strategic choice against pursuing a certain line in the investigation when he has not yet obtained the facts on which such a decision can be made. United States v. Gray, 878 F. 2d. 702,711(3rd. Cir.1989). Accordingly, the complete

failure to investigate potentially corroborating witnesses cannot be attributed to trial strategy. State v. Arthur, 184 N.J. 307,342 (2005).

The Fourth Amendment of the United States Constitution protects all persons from unreasonable search and seizure, providing that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The New Jersey Constitution provides similar protection. N.J. Const. art. I, ¶ 7. Except in limited circumstances, police officers must obtain a warrant from a neutral judicial officer prior to conducting a search or seizure of property. See State v. DeLuca, 168 N.J. 626, 631 (2001),explaining that police officers must obtain warrant before search of property unless search "'falls within one of the recognized exceptions to the warrant requirement; and see State v. Cooke, 163 N.J. 657, 664 (2000).

There is a constitutional preference for a judicial determination of whether there is probable cause to issue a warrant. State v. Demeter, 124 N.J. 374, 381 (1991). This preference accounts for the difference in result in a "marginal case [where] a search with a warrant may be sustainable [and] where a search without a warrant would fail." *Ibid.*

When no warrant is sought, the State has the burden to demonstrate that "'[the search] falls within one of the few well-

delineated exceptions to the warrant requirement.'" State v. Maryland, 167 N.J. 471, 482 (2001); see also Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed. 2d 854, 858 (1973)).

In State v. Piniero, 181 N.J.13 (2004), the Court declared "We evaluate the evidence presented at the suppression hearing in light of the trial court's findings of fact to determine whether the State met its burden. "The State must demonstrate by a preponderance of the evidence that there was no constitutional violation (citing State v. Wilson, 178 N.J. 7, 13 (2003)."

Probable Cause exists where the facts and circumstances within... [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." Schneider v. Simonini, 163 N.J. 336, 361 (2000)

When determining whether Probable Cause exists, courts must consider the totality of the circumstances, and they must deal with probabilities." Schneider v. Simonini, 163 N.J. 336, 361 (2000).

A determination of reasonable suspicion is fact-sensitive. The totality of the circumstances must be considered in evaluating whether an officer had a reasonable suspicion to conduct a brief investigatory stop. State v. Davis, 104 N.J. 490, 504 (1986).

In State v. Ercolino, 79 N.J. 25,41 (1979) , the court explained "The test of probable cause is not the articulation of the policeman's subjective theory but the objective view of the facts." We would not disagree that where police officers are conducting a search under an appropriate exception to the warrant requirement the existence of probable cause will be judged by a reviewing court on the basis of an objective view of the facts as they would appear to a man of reasonable caution; (citing Terry v. Ohio, supra, 392 U.S. at 21, 88 S. Ct. 1868; Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); State v. Sims, 75 N.J. at 354".

With respect to a search conducted without a warrant, the Court further re-affirmed the principle that warrantless searches are presumed unlawful, "the most soundly reasoned of the judicial opinions in this area are those which are most faithful to and consistent with the basic precept of the Fourth Amendment that any warrantless search is prima facie invalid and gains validity only if it comes within one of the specific exceptions created by the United States Supreme Court. There can be no doubt as to the current authoritativeness of that concept. Marshall v. Barlow's Inc., 436 U.S. 307, 313, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978); Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)." Id at 42.

In State v. Pineriro, supra, the New Jersey Supreme Court ruled that the following fact pattern did not give rise to probable

cause justifying arrest

> Wildwood Police Officer Elias Aboud was the sole witness at the suppression hearing. On December 8, 2000, at around 6:15 p.m., he was in his patrol vehicle in the area of Roberts and Pacific Avenue in Wildwood. Aboud characterized this area as a high drug, high crime area. Aboud observed Jose Pineiro and co-defendant Jorge Rodriguez standing on the corner, with a bicycle nearby. Aboud recognized both individuals. He previously had encountered Pineiro while clearing corners in that same area, and had received intelligence reports indicating Pineiro way a suspected drug dealer. Aboud had arrested Rodriguez for child support and possibly for possession of CDS. He also was aware that Rodriguez was a drug user. The overhead lights in the area allowed Aboud to observe Pineiro give Rodriguez a pack of cigarettes. Aboud was aware that a cigarette pack sometimes is used to transport drugs. Neither man was smoking at the time. Immediately after the transfer, the two men noticed Aboud. They looked at him with shock and surprise and turned to leave the area. Pineiro walked down Pacific Avenue while Rodriguez mounted the bicycle and started riding down Roberts Avenue. Aboud called for assistance to detain Pineiro while he pursued Rodriguez.

In State v. Smith, 155 N.J. 83 (1998), the New Jersey Supreme Court re-visited the quantum of evidence necessary to constitute probable cause vis-à-vis "street searches". " Our analysis of (defendant)Smith's suppression motion begins with a consideration of whether the on-the-street search which yielded the keys was constitutional. Probable Cause is ordinarily needed in order to justify a search. See State v. Novembrino, 105 N.J. 95, 106 (1987). "The Probable Cause requirement is the constitutionally-prescribed standard for distinguishing unreasonable searches from those that

can be tolerated in a free society.". The Supreme Court reversed the appellate courts' decision finding that probable cause existed,

> We note that Hilongos's extensive experience with drug transactions did not contribute to the existence of probable cause in this case. Certain suspicious behavior may lead an experienced police officer to suspect that a person is engaged in criminal activity. See, e.g., Arthur, supra, 149 N.J. at 9. An officer's experience may enable the officer to draw inferences that an untrained, inexperienced person could not. . . .However, the mere fact that an officer is experienced does not lower the quantum of evidence needed to establish probable cause. An officer's experience is only useful in establishing probable cause if the officer uses the experience to infer that a suspect is engaged in criminal activity. In this case, there was no suggestion that Hilongos used his experience to infer that defendant was selling drugs. . .
>
> In sum, we conclude that in the totality of the circumstances, Hilongos did not have probable cause when he searched defendant. . . Taken as a whole, these circumstances did not amount to probable cause. Therefore, the personal search of defendant and seizure of the keys from defendant were unlawful.

In the present matter, defense counsel failed to file a motion to challenge whether probable cause existed in light of the fact that there was compelling evidence that defendant was defending himself at the time of the incident. A violent fight ensued between an approximate one-hundred sixty pound man, (Saisi) and an approximate six-foot-four, three-hundred twenty pound man who came to defendant's residence to see defendant's wife. Such conduct was prejudicial to defendant. The evidence was weak and should have been challenged by defense counsel.

POINT III

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ARGUE SELF-DEFENSE DURING ITS SUMMATION.

In State v Moore, 158 N.J. 292(1999), the Supreme Court articulated the law of self-defense, " A claim of self-defense is based on N.J.S.A. 2C:3-4. Subsection (a) provides that "the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." N.J.S.A. 2C:3-4a. A person using protective force may estimate the necessity of its use without retreating. N.J.S.A. 2C:3-4b(3). Because deadly force, rather than protective force, was used in this case, its use "is not justifiable . . . unless the actor reasonably believes that [it] is necessary to protect himself against death or serious bodily harm." N.J.S.A. 2C:3-4b(2).

In State v. Jenewicz, **need cite**, the New Jersey Supreme Court articulately explained the law of self defense. " New Jersey's Code of Criminal Justice shields a defendant from criminal liability when the defendant is found to have acted in self-defense. See State v. Kelly, 97 N.J. 178, 197-98 (1984). The legal justification for the protection of one's person is codified at N.J.S.A. 2C:3-4(a), which states that s]ubject to the provisions of this section

and of section 2C:3-9, the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. When deadly force is used, the justification of self-defense exculpates a defendant when he "reasonably believes that such force is necessary to protect himself against death or serious bodily harm." N.J.S.A. 2C:3-4(b)(2). A self-defense claim therefore requires a jury (1) to discern whether the defendant had a subjective belief at the time that deadly force was necessary and then (2) to determine whether that subjective belief was objectively reasonable. See State v. Williams, 168 N.J. 323, 332-33 (2001); Kelly, supra, 97 N.J. at 199-200.

A person need not retreat if the person is attacked in his or her home by someone who is not a cohabitant. N.J.S.A. 2C:3-4b(2)(b)(i); State v. Gartland, 149 N.J. 456, 467 (1997). See also State v. Blanks, 313 N.J.Super. 55 (App. Div. 1998). In the instant matter, Jeff Sheppard did not reside at defendant's residence; moreover, the only reason he was there was to intimidate defendant and interfere with defendant's wife.

Moreover, it is not encumbent on defendant to testify/admit the killing in order to receive the benefit of a self-defense charge. "The trial Judge must charge the jury on self-defense "if there exists evidence in either the State's or the defendant's case sufficient to provide a `rational basis' for [its] applicability."

State v. Bryant, 288 N.J. Super. 27, 35 (App. Div.) (citing State v. Martinez, 229 N.J. Super. 593, 560 (1989)), certif. denied, 144 N.J. 589 (1996); see also Johnston, supra, 257 N.J. Super. at 192. That the defendant failed to admit to intentionally killing Massey is not fatal to a claim of self-defense when the State's version supplied that intent". State v. Blanks, 313 N.J.Super. 55 (App. Div. 1998).

In State v. Rodriguez, 392 N.J.Super. 101 (App Div. 2007), is a case remarkably similar to the matter *sub judice*. The issue examined was whether self-defense was available to a defendant with respect to manslaughter charges. In Rodriquez, defendant, similar to the matter *sub judice*, involved the death of an individual by a knife.

It is readily inferrable from defendant's statement to the police that he "hit" Hobbs with the knife, not intending to kill or seriously injure him but only intending to make Hobbs leave him alone. Absent the justification of self-defense, defendant's statement was a confession to manslaughter, because he acted recklessly but with no intent to kill or seriously injure Hobbs. On the other hand, if the jury believed that defendant acted to save himself from an imminent threat from Hobbs of death or serious injury, and that defendant could not retreat in complete safety, defendant's conduct constituted self-defense and he should have been acquitted. Defendant was therefore entitled to a self-defense

charge as to manslaughter as well as murder, and the trial court's repeated instruction to the jury that self-defense did not apply to manslaughter was prejudicial error. Id at.

Importantly, the evidence revealed that Jeff Sheppard intended to have a sexual relationship with defendant's wife. The Rodriquez court explained, " The Model Jury Charge on self-defense includes, where appropriate, an explanation that sexual assault is a form of serious bodily injury, the threat of which would justify the use of deadly force in self-defense. Model Jury Charge (Criminal), § 2C:3-4.". Defendant was protecting himself and his wife at the time of the incident. Similar to the matter sub judice, the verdict sheet in Rodriquez did not call for a jury determination whether defendant acted in self-defense. Id at. The appellate division found this omission to be confusing. The Court ruled, "If defendant possessed the knife for purposes of self-defense and was attempting to defend himself at the time he used the knife, albeit in an honest but unreasonable belief that he needed to use deadly force, he should have been acquitted of unlawful weapons possession and possession for an unlawful purpose. Moreover, since we are also reversing the reckless manslaughter conviction, the fact that the weapons convictions merged with the manslaughter conviction for sentencing purposes does not render the error harmless. Cf. State v. Johnson, 287 N.J. Super. 247, 263 (App. Div.), certif. denied, 144 N.J. 587 (1996). Reversed and remanded. "

I was or did not understand why I was on trial in the first place!!

// ?? // Not the morons arguments!

To the dismay of defendant, from a reading of the transcript, defense counsel not only did not argue vigorously, but did not argue self-defense at all. Same was prejudicially harmful to defendant. The effect of defense counsel's summation was the same as if it were not given at all. More possibly, the failure to argue self-defense could have given the jury the impression that the advocate for defendant did not believe that self defense was a true justification for defendant's conduct thus leaving the jury with the impression that the defense was not real.

POINT IV

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN CUMULATIVE EFFECT OF ERRORS DENIED DEFENDANTS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The issues submitted above, either individually or cumulatively, served to deny petitioner his right to a fair trial. State v. Orecchio, 16 N.J 125 (1954). Trial counsel's failures amount to ineffective assistance, as each had the capability to materially contribute to petitioner's conviction. Likewise appellate counsel's failure to raise these issues constituted ineffective assistance of counsel as well, since it is argued that an appellate court would have reversed on one or all of these issues and ordered a new trial.

In State v.Orecchio, 16 NJ 125 (1954), the New Jersey Supreme Court upheld the Appellate Division's reversal of the defendant's convictions on three counts of a 35 count indictment. The reversal was based on the cumulative effect of numerous errors made throughout the trial. In affirming the Appellate Division, the Court observed,

> The sound administration of criminal justice in our democracy requires that both the end and the means be just. The accused, no matter how abhorrent the offense charged not how seemingly evident the guilt, is entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty in English speaking countries. This, of course, does not mean that the incidental legal errors, which creep into the trial but do not prejudice the rights of the accused or make the proceedings unfair, may be invoked to upset an otherwise valid conviction . . . [citations omitted]. Where, however, the legal errors are of such magnitude as to prejudice the defendant's rights,

> or *in their aggregate* have rendered the trial unfair, our fundamental constitutional concepts dictate the granting of a new trial before an impartial jury. [Emphasis *added*]. Id. at 129.

More recently, in State v. Allen, 308 NJ Super 421 (App. Div. 1998), the Appellate Division found that the cumulative effect of errors in the charge to the jury warranted reversal of the defendant's conviction for drug charges. The court noted that although simple errors may be harmless, the cumulative nature of them may render a result unfair. Id. at 427.

Appellant submits asserts that Defense Counsel failed to adequately insure that defendant was adequately represented. Defense counsel's trial strategy decisions must be made after thorough investigation of the law and facts, considering all possible options. State v. Savage, 120 N.J. at 594. For example, in Savage, defense counsel failed to pursue a diminished capacity or an insanity defense, despite numerous indications of defendant's bizarre behavior and delusions, plus a history of mental health illness and drug abuse. The court found this failure to obtain a psychiatric examination of the defendant was "contrary to professional norms of competent assistance". Id. at 619. He also failed to inquire about defendant's mental state and prior drug use in conversation with defendant's family. Id. at 621.

In addition, defense counsel failed to pursue any "independent areas of investigation" in developing his defense strategy: none of the State's witnesses were interviewed, and counsel relied strictly on statements that were provided to him by the State. Id. at 621. The Supreme Court concluded: "In sum, his pre-trial investigation

was no investigation at all." Id. Similarly, in State vs. Davis 116 N.J. 341, 357 (1989), the court held that "an inadequate investigation of law and facts robs a strategic choice of any presumption of competence." The Petitioner asserts that a comparable situation is present in his case, since, defense counsel failed to investigate the matter at all.

In State v. Deutsch, 229 N.J. Super. 374, 385-87 (App.Div 1988), the Court examined whether the defense attorney should have called certain witnesses. The Appellate Division found that the testimony of witnesses who would have testified that the alleged victim's behavior was inconsistent with that of someone being kidnapped was significant, and that the failure to present this evidence as a result of the failure to investigate deprived the defendant of a fair trial on the kidnapping issue. Similarly here, there is a reasonable probability that, but for counsel's failure to offer evidence in support of the defense theory, the result of the proceedings would have been different. See Strickland, 466 U.S. at 690, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Defense counsel's errors cumulatively were as follows:

(1) misguiding defendant as to testifying;

(2) failing to challenge he medical examiner's findings as to cause of death;

(3) failing to object to hearsay evidence;

(4) failing to object/correct the Pre-Sentence Investigation report indicating that defendant had committed a serious crime;

(5) failing to rebut testimony that defendant had committed the killing;

(6) failing to raise Brady violations, to wit, the failure to receive the Monahan report; see certification of defendan indicating same was not provided in discovery. (Da12to Da20).

(7) failing to move to dismiss the indictment at the end of State's case because a prima facie case had not been presented;

(8) failing to argue that the verdict was against the weight of evidence. (Da12-20). These errors individually and cumulatively denied the defendant the right to a fair trial due to his attorneys' errors.

Petitioner seeks relief from the judgment of conviction on the grounds that he was denied the effective assistance of counsel at the trial level because due to the cumulative errors which include.

POINT V

DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF IS NOT PROCEDURALLY BARRED BY RULE 3:22-4 OR RULE 3:22-5

It is asserted that the procedural bars contained in Rule 3:22-4 and Rule 3:22-5, should not be applied to this case. Rule 3:22-4 sets forth a general bar to raising issues on post-conviction relief which were not raised in prior proceedings, and then delineates exceptions to that general bar. Specifically, Rule 3:22-4 provides:

> Any ground for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds (a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

The Petitioner's claim of ineffective assistance of counsel is certainly cognizable under at least two of the rule's exceptions. First, defendant satisfies exception (a), the ground for relief could not reasonably have been raised in any prior proceeding: he could not have raised the ineffective assistance of counsel claims made in this Petition on direct appeal because his claims require

substantiation beyond the record.

While it is well-settled that "post-conviction proceedings are not a substitute for direct appeal," State v. Cerbo, 78 N.J. 595, 605 (1979), it is also clear that a defendant is in no position to challenge the effectiveness of his trial counsel where key information regarding counsel's performance is not in the record. State v. Mitchell, 126 N.J. 565, 584-85. Accordingly, the matter at bar falls within the exception of Rule 3:22-4(a). Furthermore, the denial of relief in this case would result in the violation of the Petitioner's federal and state constitutional right to counsel, and a fair trial and due process, and therefore, the exception contained in subsection (c) also applies. Indeed, the Supreme Court has interpreted this exception "to allow courts to consider petitions for post-conviction relief when the defendant alleges that his constitutional rights were seriously infringed during the conviction proceedings." Mitchell, 126 N.J. at 586. The right to effective assistance of counsel and the right to a fair trial are fundamental constitutional rights, so the Petitioner's arguments fall within exception (c) to the bar against grounds not raised in prior proceedings. State v. Sloan, 226 N.J. Super. 605, 612 (App. Div.), certif. denied, 113 N.J. 647 (1988).

The Petitioner further argues that the bar of Rule 3:22-5 should not apply in his case since the issues raised were not previously adjudicated. Furthermore, the Petitioner asserts that the arguments raised are of substantial import, and the rule should

be relaxed in the interest of justice. State v. Johns 111 N.J. Super. 574, 576 (App. Div. 1970). The Judgment of Conviction in this matter was entered on or about July 26,2005; further, defendant filed an appeal and Petition for Certification to the New Jersey Supreme Court, which was denied. Thus, defendant has prosecuted this matter without undue delay. As such, the time bar of court rules does not bar this petition for relief.

CONCLUSION

Petitioner respectfully submits that the court should find that the Petitioner has met his burden of proving that counsel failed to provide him with adequate representation for the reasons cited above, and grant him post-conviction relief.

In the alternative, it is argued that the Petitioner has presented the Court with much stronger evidence of ineffective assistance of counsel than the minimum requirement of a prima facie case and that he is entitled to an evidentiary hearing:

> [A] defendant's claim of ineffective assistance of trial and appellate counsel is more likely [than other types of claims] to require an evidentiary hearing because the facts often lie outside the trial record and because the attorney's testimony may be required .... Thus, trial courts ordinarily should grant evidentiary hearings to resolve ineffective-assistance-of-counsel claims if a defendant has presented a prima facie claim in support of post-conviction relief. As in a summary judgment motion, courts should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim.
> State v. Preciose, 129 N.J. 451, 462-63 (1992).

For all the reasons cited above, and in his pro se submission, the Petitioner asserts that he was denied effective assistance of counsel in violation of U.S. Const. Amend. V, VI, XIV; N.J. Const. Art. I, Par. 1, 10. Such inadequacies cannot be explained away as a reasonable exercise of trial strategy. Rather, it is argued, they cannot plausibly be interpreted as anything other than the ineffective assistance of counsel.

Petitioner submits that he has also demonstrated that the second prong of the Strickland test has been met. The prejudice to him resulting from his attorney's ineffectiveness is clear. A motion to suppress illegally seized evidence should have been filed and argued in this case, and if it had been the outcome of the trial would certainly have been different for Petitioner.

In sum, for the reasons cited above, it is asserted that the motion for post-conviction relief should be granted. Alternatively, because the Petitioner alleged facts which may be in dispute between himself and his trial counsel and the dispute may not be resolved by reference to the trial record, and because he has presented at least a prima facie claim in support of post-conviction relief, an evidentiary hearing is required. See Preciose, 129 N.J. at 462; State v. Marshall, 148 N.J. 89 (1997).

Respectfully submitted,

YVONNE SMITH SEGARS
Public Defender
Attorney for Defendant

Dated: February , 2009

BY: _____
JOHN P. MONAGHAN, ESQ.
Assigned attorney

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case Number: 19-2427

Case Name: HEMMINGWAY SAISI V. CARLY MURRAY, et al.
2-16-CV-05064

INFORMAL BRIEF

DIRECTIONS: ***Answer the following questions about your appeal or petition for review to the best of your ability. Use additional sheets of paper if necessary. You need not limit your brief solely to this form, but you should be certain that any brief you file contains answers to the questions below. The Court prefers short and direct statements.***

1. **Jurisdiction:** What order(s) of the district court or agency are you appealing?
U.S. DISTRICT COURT NEW JERSEY - CLAIRE C. CECCHI U.S.D.C.J.

What is the date of the order(s)?
MAY 30TH. 2019

When did you file your notice of appeal or petition for review?
JUNE 28TH. 2019

2. **Statement of the case:** Explain the proceedings in the district court or before the agency (i.e. what the district court or the agency did in deciding your case).

The CLAIRE C. CECCHI court imposed a heightened Quasi summary judgement at this stage of litigation. In essence, the court continued the INJUSTICE commenced by NJ with my arrest on March 29th. 2004. Civil rights actions are not subject to a heightened pleading standard - SBT Holdings, LLC v. Town of Westminster, 547 F 3d. 28, 34 (1st Cir. 2008).

(A)

U.S. COURT OF APPEALS
THIRD CIRCUIT.

CASE # 19-2427 : HEMMINGWAY SAISI V. MURRAY et al

Statement of the case:

The court should have reviewed the facts as alleged in the complaint to determine whether my claims were supported by factual content that would allow the court to draw the reasonable inference that defendants are liable for alleged misconduct.

It defies logic that defendants would feign innocence considering the numerous letter's from the KENYAN GOVERNMENT including letter's from my family from 2004 until then. I have submitted the correspondence to the court and I submit that the TORTURE I was subjected to got worse after the death of my dad in 2009 in Kenya after leaving the U.S. in 2008. I submit to the court that for SEVEN (7) years, I was held without trial and I was tortured to force me to plead guilty or confess to crimes I didn't commit. Their actions made this possible.

D.J.

THIRD CIRCUIT.

CASE # 19-2427 : HEMMINGWAY SAISI V. MURRAY et al.

Statement of the case:

The United states court of Appeals for the second circuit has decided a case with a 7 year (SEVEN) delay before trial and the opinion of the court is telling:

United states V. Tigano (2nd Circuit 15-3073) Decided January 23rd 2018.

I was made to suffer just because I invoked my constitutional right to a speedy trial. "It is a system that has gutted the right to a speedy trial and trial by jury and given vast and virtually unaccountable power to prosecutors, only the "crazy" would dare exercise their sixth Amendment rights. (BELL V. WOLFISH 441 U.S. 520, 535 (1979)

I respectfully ask the court to review the actions pertaining to this case since I commenced suit on 08/18/2016. RILEY V. OLK-LONG 282 F.3d 592, 595-97 (8th Cir 2002) where prison Warden was liable for the rape of prisoner by corrections officer upon showing of deliberate indifference.

(6): ... 2nd CIRCUIT.

CASE # 19-2427

Hemmingway Saisi V. Cassy Murray et al.

The SUPREME COURT has held that actions taken with deliberate indifference may impose liability (FARMER V. BRENNAN, 1994) notwithstanding immunity.

A private party can be fairly said to be a state actor for purposes of section 1983 under four tests:

1. The close nexus test - BLUM V. YARETSKY 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d. 534 (1982).

2. Symbiotic relationship test: BURTON V. WILMINGTON PARKING AUTHORITY 365 U.S. 175, 725, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961).

3. Joint action test: LUGAR, 457 U.S. at 941, 102 S. Ct. 2744 (1982)

4. Public Function test: TERRY V. ADAMS 345 U.S. 461, 468-470, 73 S. Ct. 809 97 L. Ed 1152 (1953).

The supreme court in DOGGETT V. U.S. 505, U.S. 647 (1992) held that an 8 1/2 delay violated defendants trial to a speedy trial even absent affirmative proof of prejudice.

Case # 19-2427
Hemmingway Saisi v. Carolyn Murray et al.

3. **Statement of facts**: Explain the facts and events that led to the complaint in the district court or the action before the agency.

(A) On the afternoon of March 29th 2004, I was attacked brutally outside my home by three criminals; Jeffrey Sheppard, Corey Dennis and James Clark without provocation. I had just brought back my son from the hospital and I was leaving for work. Corey Dennis who is currently serving multiple life sentences in the State of Georgia and the late Jeffrey Sheppard who had just been released from State prison were my ex-wifes cousin's. James Clark was on probation for possession of drugs, guns and hollow point bullets. My ex-wife Shanekia Hunt had an affair with her cousin Jeffrey Sheppard and they conspired to kill me. On March 28th 2004 - a day before I was attacked, she called my cousin Edson Marita and told him I was going to die. My cousin didn't inform me for he thought it was a joke.

B)

CASE # 19-2427

Hemmingway Saisi V. Carolyn Murray et al.

Statement of Facts:

During the assault, I gained consciousness and gained hold of a big knife that fell from my assailants and swang it desperately in self defense to save my life. Jeffrey sheppard sustained a stab wound on his thigh which led him to bleed to death, while the other two assailants fled from the scene. I was arrested and charged with murder and aggravated assault on my assailants! My parents and family in Kenya were shocked to read about my arrest in the dailies and my mother immediately came to the U.S. and my sister JACQUELINE too from the U.K. They retained the services of ANTHONY R. GUALANO who indicated that my arrest was a mistake as it was self defense. After being paid $ 15,000, Mr. Gualano changed and he started telling me to plead guilty - to take a plea deal. NOW, I was more confused.

U.S. Court of Appeals 3rd Cir.

(C)

CASE # 19-2427

Hemmingway Saisi V. Carolyn Murray et al

Statement of facts:

I refused to plead guilty and I was brutally attacked twice by gang member's while in Hudson county jail - Kearny NJ. Finally, I was 'tried' on March 2015 and the trial was a farce. Mr. Guaglano never argued self defense and he told me not to testify. I was convicted of Reckless manslaughter and acquitted of all other charges including weapons offenses.

I submit to the court that the trial error's in my case are similar to a similar self defense case in the same county - Hudson; STATE V. RODRIGUEZ 392 N.J. Super 101, 920 A. 2d 101. Mr. RODRIGUEZ conviction of Reckless Manslaughter was reversed on direct appeal and affirmed by the NJ supreme court.

How can NJ explain why MY conviction was not reversed vis a vis the doctrine of STARE DECISIS?

(2)

CASE # 19-2427

Hemmingway Saisi V. Carolyn Murray et al

Statement of Facts:

I filed an Ethics complaint against Mr. Guglano which I have enclosed marked exhibits 1 and 2. I had also contacted the FBI.

I was sentenced to state prison as Mr. Guglano had said to me and my family that I was a stupid and ungrateful African and that I was going to be deported!

My late dad came to the U.S. on Aug. 2007 and I was released from state prison in Trenton NJ on October 24th 2007.

Shortly after there was a brazen attempt to kill my dad on Orient Avenue and Kennedy Boulevard in Jersey city NJ.

In 2008, I received a letter that my parole was terminated which is enclosed marked exhibit 3 and we moved to the state of Delaware.

My sister JACQUELINE found out that Mr. Guglano was calling the parole office demanding to know why I wasn't deported.

F.N.

CASE # 19-2427
Hemmingway Saisi V. Carolyn Murray et al

Statement of facts:

My late dad left the U.S. on March 2008, and on April 2008, the U.S Marshalls raided a relative's house in Newark Delawase looking for me on a parole violation! My family drove me to Jersey city and I reported to the parole officer Ms. Mary Lyons. I was put in a rooming house paid for by parole and on May 9th 2008, I was arrested when I reported to the parole office and charged with making terrostic threats to Mr. Gualand over the phone.

My SEVEN YEARS of detention and TORTURE without trial commenced. The shock and pain coupled with the humiliation was too much for my dad, and he died on Dec. 28th 2009. I was then subjected to enhanced TORTURE as I outlined in my pleadings before the District court. I have enclosed it Marked exhibit 4.

(F)

CASE # 19-2427
Hemmingway Saisi V. Carolyn Murray et.

Statement of facts:

I have enclosed also; letters from the Kenyan Embassy - Washington DC to

1. Judge PETER VASQUEZ - exhibit 5
2. Judge MICHAL PETRELLE - exhibit 6
3. ALFARO ORTIZ - Director Essex county Jail - exhibit 7

4. A letter of claim to Mr. GLEN FERGUSON former Director Ann Klein forensic center Trenton NJ which was also sent to Governor CHRIS CHRISTIE — exhibit 8

5. Docket entries civil case — exhibit 9
2:16-CV-05064 CCC-JBC

6. — Proof of service — exhibit 10

While in custody, I did file a habeas corpus petition and the state frustrated my efforts by moving me around between Essex County Jail and Ann Klein forensic center. Why were state officials afraid of the Federal court being involved? The state denied my post conviction petition too.

(4)

U.S. Court of Appeals - 3rd. Circuit.

CASE # 19-2427

Hemmingway Saisi V. Carolyn Murray et al.

On September 2014, I was finally tried in another farcical trial before Judge MICHAEL PETRELLE - ESSEX COUNTY NJ and convicted.

I was kept in jail until Dec. 31st 2014, when I was released after being taken to Mount Sinai Hospital in Newark NJ.

Before my release, I received a visit from a federal agent (Homeland Security) who informed me that he had been sent by the Director of Homeland Security to tell me that the federal Government had nothing to do with my INCARCERATION and TORTURE. This is a scandal with political implications because my fellow Kenyans do NOT know the truth.

CASE # 19-2427
Hemmingway Saisi V. Caselyn Murray et al.

4. Statement of related cases: Have you filed an appeal or petition for review in this case before? If so, give title of case and docket number.

NO.

Do you have any cases related to this case pending in the district court, in the court of appeals or before the agency? If so give title of case and docket number.

YES. A pattern of Discrimination and harassment.
HEMMINGWAY SAISI V. BESTBUY, PEDRO ACEVEDO
CIVIL CASE # 2:16-CV-13262-CCC-JBC

5. Did the district court or the agency incorrectly decide the facts of your case? YES. If so, what facts?

(7) The District court decided that for SEVEN years I was held without trial and subjected to TORTURE that included Forced taking of psychotropic drugs, the letter's and phone calls to defendants from the Kenyan Government to even Governor CHRIS CHRISTIE and the Attorney General, that I presume because I am African; a monkey, shithole etc., they did not know or sanction what was being done to me. I have already submitted the correspondence that includes NOTICE of SUIT filed by my sister JACQUELINE COLE.

6. Did the district court or the agency apply the wrong law (either cases or statutes)? ___
If so, what law do you want applied?

Federal rule of civil procedure 8(a) states that a complaint should contain a short and plain statement of the claim showing that the pleader is entitled to relief, Fed R. civ. p 8(a)(2), and that each allegation must be simple, consise and direct Fed. R. civ. p 8 (d)(1).

The Supreme court has explained that a complaint need only give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Swierkiewics V. Sorema N.a., 534 U.S. 506, 512 (2002). Specific facts are NOT necessary in a complaint; instead, the statement need only give defendant fair notice of what the claim is and the grounds upon which it rests. Epos Tech, 636 F. Supp. 2d 57, 63 (D.D.C 2009) Quoting Bell Atlantic V. Twombly, 550 U.S. 544, 555 (2007).

CASE # 19-2427
Hemmingway Sai'si V. Cassidy Murray et al.

7. Are there any other reasons why the district court's judgment or the agency's decision was wrong? ____

If so, briefly state these reasons.

I was imprisoned and TORTURED from March 29th 2004 until Dec. 31st 2014. A decade of terror propagated by NJ officials acting under the color of law. The District court has looked past these allegations and decided that aliens are responsible.

8. What action do you want the Court of Appeals to take in this case?

I am NOT an attorney by training and I am having nightmares reliving my horrid experience. The District court has subjected my suit since 8/18/2016 to a heightened pleading standard and denied my quest for Justice.

Signature

You may attach any documents filed in the district court or before the agency that you think the court of appeals must see in order to decide your appeal or your petition for review. For appeals from the district court, please keep in mind that the entire district court record is transmitted to the court of appeals and is available for the court's review. You must attach copies of the district court docket entries, the opinion and order appealed, and the notice of appeal. Documents not admitted in the district court may not be submitted to the court of appeals without permission of the court.

IMPORTANT: IF YOU ARE PROCEEDING PROCEEDING IN FORMA PAUPERIS, YOU MUST FILE AN ORIGINAL AND THREE (3) COPIES OF THIS BRIEF AND ANY ATTACHMENTS WITH THE CLERK. IF YOU HAVE PAID THE DOCKETING FEE, YOU MUST FILE AN ORIGINAL AND TEN (10) COPIES OF THIS BRIEF AND ANY ATTACHMENTS WITH THE CLERK. A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST ALSO BE SENT TO ALL OPPOSING PARTIES. YOU MUST CERTIFY ON THE ATTACHED PROOF OF SERVICE THAT A COPY OF THIS BRIEF AND ANY ATTACHMENTS WERE SENT TO ALL OPPOSING PARTIES.

IN THE UNITED STATES DISTRICT COURT OF NJ

HEMMINGWAY M. SAISI

plaintiff,

V.

CAROLYN MURRAY ET AL.

CIVIL CASE: 2:16-CV-05064-CCC-JBC.

This is an amended petition against defendants;

1. CAROLYN MURRAY.
2. MICHAEL MARUCCI.
3. ELIZABETH CONNOLLY.
4. ALFARO ORTIZ.

Their actions violated my eighth amendment and fourteenth amendments by subjecting me to excessive bail, discrimination on the basis of my African origin and cruel and unusual treatment.

I bring this suit under the doctrine of RESPONDENT SUPERIOR For their failure to train and supervise their employees and in essence creating a custom of willful negligence and disregard for the law. Their employees believed that their actions would not be sanctioned or investigated but would be tolerated.

BACKGROUND

On May 9th 2008, I was arrested by officer's from the West Orange NJ police department when I reported to the parole office in Jersey city and I was charged with making a terroristic threat to an attorney MR. ANTHONY R. GUALANO who had represented me in a previous matter in Hudson county of which the court is aware and the genesis of all my misfortune.

My bail was set at $ 25,000 but when I was arraigned in court, my bail was raised to $ 85,000.

My sister JACQUELINE STUCKEY indicated that she had called and indicated that she was going to post my bail and I believe that this triggered the bail increase.

I was obviously shocked as was my family in Kenya. My late dad had just left the country and went back to Kenya.

I made it clear that I wanted a jury trial for I thought that an impartial jury would finally hear my predicament. And this marked the beginning of incessant TORTURE until December 31st 2014.

I Waited for SEVEN YEARS as a pre-trial detainee while I was shuffled between ESSEX COUNTY JAIL headed by defendant ALFARO ORTIZ and ANN KLEIN FORENSIC CENTER - N. TRENTON NJ which falls under the department of human services headed by defendant ELIZABETH CONNOLLY.

During this period between May 9th 2008 through December 31st 2014, my family complained and even the Kenyan government wrote letters demanding to know how I became mentally sick and why there was an unexplained delay in adjudicating the matter.

Defendants CAROLYN MURRAY and MICHAEL MARUCCI conspired with the other defendants by using psychologists to diagnose me with mental diseases that I dont and have never suffered from and I was forced to take psychotropic medications with debilitating and life threatening consequences.

I filed a habeas corpus petition during this period and it was dismissed because the court stated that I could not be found.

While in Ann Klein forensic center, I received a visit from a representative of JOHNSON and JOHNSON who indicated that the company had been informed of their drugs being used on a sane person and I was in essence being used as a guinea-pig.

I was forced to take:

1. PROXILIN or its RX equivalent FLUPHENAZINE.

2. HALDOL or its RX equivalent HALOPERIDOL.

I was forced to take other drugs that I have not indicated.

I was attacked by patients and restricted to my cell for 23 hours per day.

I was subjected to excessive force and abuse from staff who called me a sick African monkey that I would die and be buried in the jungle.

I was subjected to sleep depravation by lights being kept on, door slammed and walls kicked.

I was put in cells without a mattress, blanket, working toilet and no water and I drank my own urine etc.

No one at the facility bothered to determine why I was being improperly detained courtesy of the court(s). Instead they had a gainful arrangement by moving me conveniently between ANN KLEIN FORENSICS and ESSEX COUNTY JAIL, thus further enabling the abuse and denial of my judicial, human and civil rights.

While in the custody of Essex county Jail - Newark NJ, I was subjected to the same treatment and it got worse after the death of my dad JOHN A.O. SAISI on December 28th 2009.

I was kept in solitary confiment in a cell for 23 hours a day.

I was beaten by inmates and guards.

I was placed in cells with everything covered in feces and the water cut off.

I was denied medication, toilet paper, soap, food, recreation, showers, blanket, mattress and the sleep deprivation by use of banging doors and lights being kept on

I want to bring to the attention of the court that I was charged with Murder etc. in Hudson county and at no point did the state claim that I was mentally sick.

I submit that this was intentional conduct because I refused to plead guilty and I was only deemed crazy because I assested my right to a speedy trial. I had nothing to hide, but defendants had reason to forestall inquiry into my horrid circumstances.

After receiving a visit by an agent from Homeland security who made it clear that the federal government had nothing to do with my detention, I was released by being taken to MOUNT SINAI HOSPITAL for another psychological evaluation.

It is clear that defendants CAROLYN MURRAY and MICHAEL MARUCCI engaged in conduct with a conscious disregard and deliberate indifference that they cannot claim immunity.
Defendant MARUCCI was acting as an agent of the state but not as my advocate

Defendants ELIZABETH CONNOLLY and ALFARO ORTIZ were in charge of agencies that allowed this to happen. This was NOT an accident, but rather deliberate conduct.

PRAYER FOR RELIEF.

1. Enter judgement in my favor.
2. Enter order declaring defendants conduct unconstitutional.
3. Award me compensatory and punitive damages against defendants.
4. Grant me such other and further relief as it may be JUST and PROPER under the circumstances.

SAISI V. MURRAY

JURY TRIAL DEMAND.

I demand a jury trial pursuant to the seventh Amendment to the U.S. constitution.

Respectfully submitted,
HEMMINGWAY MUKORA SAISI.

JUNE 1ST 2018.

NOTE: ① I have enclosed a copy of the letter I sent to the federal court after my release, asking to re-open my habeas corpus petition.

② Letter to Governor PHIL MURPHY requesting clemency.