

220. As a direct result, Mervilus was wrongfully convicted and spent 1,454 days behind bars.

**Count 2: Conspiracy Claim Related to Unlawful Polygraph Tactics
Against: Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas
42 U.S.C. § 1983**

221. Mervilus repeats and realleges all of the above allegations as if fully restated.

222. The Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas, while acting under color of law, entered into a conspiracy, combination, agreement or understanding for the purpose of depriving, either directly or indirectly, Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments.

223. Upon information and belief, the Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas entered into this conspiracy, at the latest, on or around when Mervilus agreed to the lie detector test and the conspiracy lasted at least as long as the end of Mervilus' second trial.

224. The Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas performed overt acts that resulted in damages to Mervilus.

225. The Union County Prosecutor and Hewette-Guyton got Mervilus to stipulate to a polygraph exam and its admissibility at trial.

226. Lt. Kaminskas administered the polygraph tests and came to the inappropriate conclusion that Mervilus' statements were "untruthful."

227. Mervilus was not afforded a N.J.R.E. 104 hearing.

228. The Union County Prosecutor and Hewette-Guyton presented improper polygraph testimony to the jury.

229. Lt. Kaminskas gave improper testimony designed to falsely convince juries that polygraph exams are infallible and that Mervilus was guilty.

230. After Mervilus successfully reversed his conviction because of improper polygraph tactics, the Union County Prosecutor and Hewette-Guyton chose to continue to prosecute Mervilus, only to then offer him time served for a guilty plea.

231. The Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas entered into an agreement to inflict an injury on Mervilus and performed overt acts that resulted in damage to Mervilus.

232. The Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas did not act in good faith and no immunity should be given to them.

233. Without these unlawful agreements and actions, Mervilus would not have spent 1,454 days behind bars.

Count 3: *Monell* Claim for the Unconstitutional Custom, Policy and Practice and the Failure to Supervise and Train Related to Unlawful Polygraph Tactics
Against: The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth
42 U.S.C. § 1983

234. Mervilus repeats and realleges all of the above allegations as if fully restated.

235. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments.

236. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were supervisory personnel or bodies with oversight responsibilities for screening, hiring, training, instructing, supervising and disciplining other legal and investigative personnel within the UCPO, UCPD and EPD, including polygraphers, and of those who violated Mervilus' constitutional rights.

237. A custom, policy, and practice existed that created an unreasonable risk of a constitutionally cognizable injury. To wit, law enforcement would (1) convince the accused to stipulate to a polygraph exam and its admissibility at trial; (2) conduct trial without a NJRE 104 hearing; (3) despite the scientific research to the contrary, lie to the jurors about the infallibility of the exam; and (4) give testimony designed to inappropriately convince jurors that a polygraph exam has already proven that the accused is guilty.

238. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were aware and should have been aware that this custom, policy and practice was in place.

239. The harm to the accused occurred on numerous occasions. Indeed, the same polygraph examiner that harmed Mervilus—Lt. Kaminskas—harmed many others. At least two others whom Lt. Kaminskas harmed successfully reversed their convictions after periods of incarceration because of his unlawful tactics.

240. Polygraph examinations are particularly sensitive to constitutional violations and the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth should have been on notice that they needed to closely supervise polygraphs and polygraphers.

241. Thus, with the polygraph examination tactics Lt. Kaminskas was employing, the risk of constitutionally cognizable harm to the accused is so great and so obvious that the risk and the failure of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth to respond alone supports the findings of the existence of unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it.

242. As further evidence of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth's failure to train and supervise, Lt. Kaminskas' testimony and polygraph results could not be reconciled with the scientific research and court opinions at the time. No properly trained polygrapher would have (in good faith) given such testimony or submitted such results.

243. By virtue of their acquiescence to the improper tactics, the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were indifferent to that risk.

244. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth demonstrated a deliberate indifference to the rights of the accused.

245. Lt. Kaminskas is a municipal employee that acted under a formal government policy.

246. The A.G., Union County Prosecutor, UCPD Chief and EPD Chief are municipal employees with policy-making authority that ratified the unconstitutional behavior of a subordinate.

247. Upon information and belief, there are a number of other accused persons who have been harmed by these unlawful customs, policies, practices and tactics.

248. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth did not act in good faith and no immunity should be given to them.

249. The unlawful polygraph customs, policies and practices ratified by the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth gravely injured Mervilus.

**Count 4: Failure to Supervise and Train Claim for the Unconstitutional Custom, Policy
and Practice Related to Unlawful Polygraph Tactics
Against: The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief
and Elizabeth
42 U.S.C. § 1983**

250. Mervilus repeats and realleges all of the above allegations as if fully restated.

251. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments.

252. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were supervisory personnel or bodies with oversight responsibilities for screening, hiring, training, instructing, supervising and disciplining other legal and investigative personnel within the UCPO, UCPD and EPD, including polygraphers, and of those who violated Mervilus' constitutional rights.

253. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were aware or should have been aware of the polygraph-related misconduct as alleged in this Complaint, and willfully, deliberately, intentionally, recklessly

and with negligence and gross negligence failed to supervise and take appropriate preventative, remedial or corrective steps.

254. The harm to the accused occurred on numerous occasions. Indeed, the same polygraph examiner that harmed Mervilus—Lt. Kaminskas—harmed many others. At least two published cases reflect others whom Lt. Kaminskas harmed that successfully reversed their convictions after periods of incarceration because of his unlawful tactics.

255. With the polygraph tactics Lt. Kaminskas was employing, the risk of constitutionally cognizable harm is so great and so obvious that the risk and the failure of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth to respond alone supports the findings of the existence of unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it.

256. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth did not act in good faith and no immunity should be given to them.

257. As a result of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth's failure to supervise and train Mervilus was deprived of his constitutional rights and privileges and suffered severe damages.

**Count 5: NJCRA Due Process Claim Relating to Unlawful Polygraph Tactics
Against: Lt. Kaminskas, the Union County Prosecutor and Hewette-Guyton
N.J.S.A. § 10:6-1, et seq.**

258. Mervilus repeats and realleges all of the above allegations as if fully restated.

259. Lt. Kaminskas, the Union County Prosecutor and Hewette-Guyton, while acting under color of law, deprived Mervilus of his clearly established constitutional

rights and privileges secured by the Fourth and Fourteenth Amendments and fundamental New Jersey constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1.

260. Lt. Kaminskas, the Union County Prosecutor and Hewette-Guyton (a) deprived Mervilus of the protections of life, liberty and property constitutional rights and privileges that are secured by the Fourth and Fourteenth Amendments and New Jersey Constitutional Rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I, ¶ 1; and (b) the procedures available to Mervilus did not provide him with due process of law.

261. Lt. Kaminskas wrote an unlawful Polygraph Examination Report designed to convict Mervilus. The Union County Prosecutor and Hewette-Guyton knowingly used this unlawful report to convict Mervilus.

262. Despite the fact that the Axciton cannot determine truth or untruthfulness, the Polygraph Examination Report comes to the inappropriate conclusion that Mervilus “answered the test questions in an untruthful manner.”

263. Any trained polygrapher would know that that conclusion is unattainable from the Axciton device. However, Lt. Kaminskas forwarded this known false evidence to the Union County Prosecutor and Hewette-Guyton anyway.

264. Mervilus was not afforded a N.J.R.E. 104 hearing.

265. Lt. Kaminskas went on to give false testimony designed to convince the jury that the polygraph exam was infallible and that Mervilus was guilty.

266. The Union County Prosecutor and Hewette-Guyton knowingly presented false and improper testimony from Lt. Kaminskas.

267. The Union County Prosecutor and Hewette-Guyton used the polygraph evidence and highlighted the most inflammatory and false portions to the jury: that the test was 100 percent accurate and that law enforcement thought he was guilty.

268. There is a reasonable likelihood that without Lt. Kaminskas' improper Polygraph Examination Report and testimony which was presented and highlighted by the Union County Prosecutor and Hewette-Guyton Mervilus would not have been convicted. His conviction was reversed for that very reason.

269. The right to a fair trial and investigation related to the polygraph exam was clearly established at the time of the investigation and trial of Mervilus. Thus a reasonable official would have understood that the polygraph tactics Lt. Kaminskas, the Union County Prosecutor and Hewette-Guyton performed violated Mervilus' constitutional rights.

270. Lt. Kaminskas, the Union County Prosecutor and Hewette-Guyton deprived Mervilus of his right to a fair investigation and a fair trial.

271. The Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas did not act in good faith and no immunity should be given to them.

272. As a direct result, Mervilus was wrongfully convicted and spent 1,454 days behind bars as a result.

**Count 6: NJCRA Conspiracy Claim Related to Unlawful Polygraph Tactics
Against: Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas
N.J.S.A. § 10:6-1, et seq.**

273. Mervilus repeats and realleges all of the above allegations as if fully restated.

274. The Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas under color of law entered into a conspiracy, combination, agreement or understanding for the purpose of depriving, either directly or indirectly, Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments and fundamental New Jersey constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1.

275. Upon information and belief, the Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas entered into this conspiracy, at the latest, on or around when Mervilus agreed to the lie detector test and the conspiracy lasted at least as long as the end of Mervilus' second trial.

276. The Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas performed overt acts that resulted in damages.

277. The Union County Prosecutor and Hewette-Guyton got Mervilus to stipulate to a polygraph exam and its admissibility at trial.

278. Lt. Kaminskas administered the polygraph tests and came to the inappropriate conclusion that Mervilus' statements were "untruthful."

279. Mervilus was not afforded a N.J.R.E. 104 hearing.

280. The Union County Prosecutor and Hewette-Guyton presented improper polygraph testimony to the jury.

281. Lt. Kaminskas gave improper testimony designed to falsely convince juries that polygraph exams are infallible and that Mervilus was guilty.

282. After Mervilus successfully reversed his conviction because of improper polygraph tactics, the Union County Prosecutor and Hewette-Guyton, chose to continue to prosecute Mervilus, only to then offer him time served for a guilty plea.

283. The Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas entered into an agreement to inflict an injury on Mervilus and performed overt acts that resulted in damage to Mervilus.

284. The Union County Prosecutor, Hewette-Guyton and Lt. Kaminskas did not act in good faith and no immunity should be given to them.

285. Without these unlawful agreements and actions, Mervilus would not have spent 1,454 days behind bars.

**Count 7: NJCRA *Monell* Claim for the Unconstitutional Custom, Policy and Practice
and the Failure to Supervise and Train Related to Unlawful Polygraph Tactics
Against: The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief
and Elizabeth
N.J.S.A. § 10:6-1, et seq.**

286. Mervilus repeats and realleges all of the above allegations as if fully restated.

287. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments and fundamental New Jersey constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1.

288. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were supervisory personnel or bodies with oversight responsibilities for screening, hiring, training, instructing, supervising and disciplining other

legal and investigative personnel within the UCPO, UCPD and EPD, including polygraphers, and of those who violated Mervilus' constitutional rights.

289. A custom, policy, practice and tactic existed that created an unreasonable risk of a constitutionally cognizable injury. To wit, law enforcement would (1) convince the accused to stipulate to a polygraph exam and its admissibility at trial; (2) conduct trial without a NJRE 104 hearing; (3) despite the scientific research to the contrary, lie to the jurors about the infallibility of the exam; and (4) give testimony designed to inappropriately convince jurors that a polygraph exam has already proven that the accused is guilty.

290. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were aware and should have been aware that this custom, policy and practice was in place.

291. The harm to the accused occurred on numerous occasions. Indeed, the same polygraph examiner that harmed Mervilus—Lt. Kaminskas—harmed many others. At least two others whom Lt. Kaminskas harmed successfully reversed their convictions after periods of incarceration because of his unlawful tactics.

292. Polygraph examinations are particularly sensitive to constitutional violations and the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth should have been on notice that they needed to closely supervise polygraphs and polygraphers.

293. Thus, with the polygraph examination tactics Lt. Kaminskas was employing, the risk of constitutionally cognizable harm to the accused is so great and so obvious that the risk and the failure of the A.G., Union County Prosecutor, UCPD Chief,

Union County, EPD Chief and Elizabeth to respond alone supports the findings of the existence of unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it.

294. As further evidence of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth's failure to train and supervise, Lt. Kaminskas' testimony and Polygraph Exam Results could not be reconciled with the scientific research and court opinions at the time. No properly trained polygrapher would have (in good faith) given such testimony or submitted such results.

295. By virtue of their acquiescence to the improper tactics, the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were indifferent to that risk.

296. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth demonstrated a deliberate indifference to the rights of the accused.

297. Lt. Kaminskas is a municipal employee that acted under a formal government custom, policy and practice.

298. The A.G., Union County Prosecutor, UCPD Chief and EPD Chief are municipal employees with policy-making authority that ratified the unconstitutional behavior of a subordinate.

299. Upon information and belief, there are a number of other accused persons who have been harmed by these unlawful customs, policies, practices and tactics.

300. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth did not act in good faith and no immunity should be given to them.

301. The unlawful polygraph customs, policies and practices ratified by the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth gravely injured Mervilus.

**Count 8: NJCRA Claim for the Failure to Supervise and Train Related to the
Unconstitutional Custom, Policy and Practice of Unlawful Polygraph Tactics
Against: The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief
and Elizabeth
N.J.S.A. § 10:6-1, et seq.**

302. Mervilus repeats and realleges all of the above allegations as if fully restated.

303. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments and fundamental New Jersey constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1.

304. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were supervisory personnel or bodies with oversight responsibilities for screening, hiring, training, instructing, supervising and disciplining other legal and investigative personnel within the UCPO, UCPD and EPD, including polygraphers, and of those who violated Mervilus' constitutional rights.

305. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were aware and should have been aware of the polygraph-related misconduct as alleged in this Complaint, and willfully, deliberately, intentionally, recklessly and with negligence and gross negligence failed to supervise and take appropriate preventative, remedial or corrective steps.

306. The harm to the accused occurred on numerous occasions. Indeed, the same polygraph examiner that harmed Mervilus—Lt. Kaminskas—harmed many others. At least two published cases reflect others whom Lt. Kaminskas harmed that successfully reversed their convictions after periods of incarceration because of his unlawful tactics.

307. As discussed above, with the polygraph examination tactics Lt. Kaminskas was employing, the risk of constitutionally cognizable harm is so great and so obvious that the risk and the failure of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth to respond alone supports the findings of the existence of unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it.

308. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth did not act in good faith and no immunity should be given to them.

309. As a result of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth's failure to supervise, Mervilus constitutional rights were violated.

PHOTO IDENTIFICATION RELATED CLAIMS:

**Count 9: Due Process Claims Related to an Unlawful Photo Identification Procedure
Against: Benenati, Perez, Barros, Martinez, John Doe Identification Officers, the Union
County Prosecutor and Hewette-Guyton
42 U.S.C. § 1983**

310. Mervilus repeats and realleges all of the above allegations as if fully restated.

311. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton, while acting under color of law,

deprived Mervilus of his clearly established constitutional rights and privileges under the Fourth and Fourteenth Amendments by administering and/or causing to be administered an unlawfully suggestive Photo Identification Procedure to identify Mervilus by only showing photographs of two Black suspects (which were clearly arrest photos) to the only eyewitness.

312. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, the Union County Prosecutor and Hewette-Guyton (a) deprived Mervilus of the protections of life, liberty and property constitutional rights and privileges that are secured by the Fourth and Fourteenth Amendments; and (b) the procedures available to Mervilus did not provide him with due process of law.

313. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, forwarded the results of this unlawful Photo Identification Procedure to the Union County Prosecutor and Hewette-Guyton while the Union County Prosecutor and Hewette-Guyton were still contemplating whether and what charges against Mervilus they were going to present to the Grand Jury.

314. Mervilus' right to a fair Photo Identification Procedure was clearly established in 2006.

315. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton administered and/or caused to be administered a Photo Identification Procedure that failed to follow at least five provisions of the A.G.'s Guidelines. The A.G.'s Guidelines have been in place since 2001, five years before the photo identification procedure in question.

316. The constitutional right to a fair Photo Identification Procedure and the A.G.'s Guidelines were clearly established when Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton performed and/or caused to be performed the unlawful Photo Identification Procedure.

317. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton performed and/or caused to be performed a Photo Identification Procedure which failed to document the lineup procedure in writing in clear violation of New Jersey (and Supreme Court) law at the time the unlawful procedure was conducted. *See State v. Delgado*, 188 N.J. 48 (2006); *see also Kirby v. Illinois*, 406 U.S. 682 (1972).

318. The constitutional right to a fair Photo Identification Procedure and to have such procedure documented in writing was clearly established when Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton, performed and/or caused to be performed the unlawful Photo Identification Procedure.

319. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton deprived Mervilus of his right to a fair investigation and to a fair trial.

320. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton were acting under color of state or territorial law when they presented and/or caused to be presented the unlawfully suggestive Photo Identification Procedure to Abreu, the Defendants' sole eye-witness.

321. The Union County Prosecutor and Hewette-Guyton used the ill-gotten evidence at trial.

322. Mervilus was convicted at trial.

323. Given that the only eye-witness Abreu identified a different Black male sitting in the gallery at trial and admitted that he could not positively identify Mervilus, there can be little doubt that the unlawfully gotten out-of-court identification obtained by Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton influenced the jury in favor of a guilty verdict. Indeed, after Abreu's identification fell apart, the Union County Prosecutor and Hewette-Guyton used the results of the manufactured Photo Identification Procedure to save their case and to convict Mervilus.

324. Any later identification of Mervilus by Abreu—albeit unreliable—was tainted by the unlawfully suggestive out-of-court Photo Identification Procedure.

325. Thus, there was no probable cause to prosecute Mervilus because Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton poisoned any identification of Mervilus by utilizing or causing to be utilized unlawful Photo Identification Procedure tactics.

326. There was a meaningful connection between Abreu's unreliable and tainted "identification" and Mervilus' conviction and this connection is so significant that it affected the outcome of the criminal case. "The State's case hinged to a great degree on the victim's testimony." *Mervilus*, 418 N.J. Super. at 147.

327. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, by virtue of them forwarding the Union County Prosecutor and Hewette-Guyton the results

of this known unlawfully-gotten evidence is an unacceptable corruption of the truth-seeking function of the trial process.

328. The complete disregard of clearly established law, including the failure to keep a record, is persuasive evidence that Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton were aware that the identification was incorrect and nevertheless, offered the evidence in bad faith.

329. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton did not act in good faith and no immunity should be given to them.

330. Without the use of this unlawful Photo Identification Procedure, there is a reasonable likelihood that Mervilus would not have been convicted and would have never spent nearly four years behind bars fighting for—and ultimately regaining—his freedom.

Count 10: Malicious Prosecution in Relation to the Unlawful Photo Identification Procedure Which Caused the Initiation of Charges that Should Not Have Been Brought Against: Benenati, Perez, Barros, John Doe Identification and the Union County Prosecutor and Hewette-Guyton
42 U.S.C. § 1983

331. Mervilus repeats and realleges all of the above allegations as if fully restated.

332. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton, while acting under color of law, deprived Mervilus of his clearly established rights and privileges secured by the Fourth and Fourteenth Amendments of the Constitution.

333. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton initiated and/or caused the initiation of a criminal proceeding against Mervilus.

334. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton deprived Mervilus of his constitutional rights by administering and/or causing to be administered an unlawfully suggestive Photo Identification Procedure to identify Mervilus by only showing photographs of two Black suspects (which were clearly arrest photos) to the only eyewitness and then forwarding the results to the Union County Prosecutor and Hewette-Guyton to bring charges against Mervilus that would otherwise have not been initiated.

335. The constitutional right to a fair Photo Identification Procedure was clearly established at the time of the wrongful identification because of the A.G.'s Guidelines and a number of New Jersey and United States Supreme Court cases. Indeed, a reasonable official at the time would understand that conducting and forwarding the results of the Photo Identification Procedure conducted here violated Mervilus' constitutional rights.

336. Benenati, Perez, Barros, Martinez and John Doe Identification Officers were acting under color of state law when they performed the unlawful Photo Identification Procedure.

337. The Union County Prosecutor and Hewette-Guyton were acting under color of state law when they caused the unlawful Photo Identification Procedure and despite its shortcomings, and lack of documentation, used the ill-gotten results to prosecute Mervilus.

338. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton caused the initiation of a criminal proceeding against Mervilus without probable cause. Significantly, since they tainted the already weak identification by Abreu, they had no reasonably trustworthy information to believe that Mervilus committed the crime.

339. After Benenati, Perez, Barros, Martinez and John Doe Identification Officers forwarded the Union County Prosecutor and Hewette-Guyton the results of the unlawful Photo Identification Procedure, a criminal proceeding was initiated against Mervilus.

340. The results of the unlawful Photo Identification Procedure obtained by Benenati, Perez, Barros, Martinez and John Doe Identification Officers and forwarded to the Union County Prosecutor and Hewette-Guyton was a significant cause of the decision to prosecute Mervilus.

341. Mervilus was not indicted by a grand jury until March of 2007, four months after his arrest and the unlawful Photo Identification Procedure. Thus the decision of whether and what crimes to attempt to indict Mervilus with were still being contemplated when the results of this unlawful procedure were forwarded from Benenati, Perez, Barros, Martinez, John Doe Identification Officers to the Union County Prosecutor and Hewette-Guyton.

342. The indictment by the grand jury was tainted because of the unlawful out of court identification.

343. The proceeding ended favorably to Mervilus because he was eventually acquitted.

344. Mervilus suffered a deprivation of liberty consistent with the concept of seizure as a consequence of the legal proceeding, to wit, he spent nearly four years behind bars.

345. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton acted maliciously or for a purpose other than bringing Mervilus to justice, indeed, they maliciously and inexplicably, violated multiple provisions of the A.G.'s Guidelines and clear New Jersey law in order to have charges brought against Mervilus.

346. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton did not act in good faith and no immunity should be given to them.

347. Mervilus was innocent of the crime for which he was incarcerated.

**Count 11: Conspiracy to Violate Mervilus' Constitutional Rights In Relation to the
Unlawful Photo Identification Procedure
Against: Benenati, Barros, Perez and John Doe Identification Officers and the Union
County Prosecutor and Hewette-Guyton
42 U.S.C. § 1983**

348. Mervilus restates and realleges the above allegations as if fully restated.

349. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton, acting under color of law, entered into a conspiracy, combination, agreement or understanding for the purpose of depriving, either directly or indirectly, Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments.

350. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton performed acts in furtherance of the

conspiracy including: (1) conducting or causing to conduct an unlawful and prejudicial Photo Identification Procedure; (2) failing to document the Photo Identification Procedure in violation of clear New Jersey and Supreme Court law; (3) presenting or causing to present this ill-gotten identification to the Union County Prosecutor and Hewette-Guyton while they were still contemplating whether and what charges to attempt to indict Mervilus with; (4) presenting or causing to present the results of the unlawful Photo Identification Procedure to the grand-jury, thus procuring an indictment by fraud; and (5) presenting or causing to present the results of this knowingly unlawful Photo Identification Procedure to the jury once the eye-witness testimony fell apart because he identified the wrong Black male at trial.

351. Upon information and belief, Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton entered into this conspiracy, at the latest, on or around when Mervilus agreed to the lie detector test and the conspiracy lasted at least as long as the end of Mervilus' second trial.

352. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton did not act in good faith and no immunity should be given to them.

353. Because of the conspiracy between Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton Mervilus was injured, and he was deprived of the rights and privileges of a citizen of the United States and as a result, he spent 1,454 days behind bars as an innocent man.

Count 12: *Monell* Claim for the Unconstitutional Custom, Policy and Practice and the Failure to Supervise and Train Related to Unlawful Photo Identification Procedures Against: The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth
42 U.S.C. § 1983

354. Mervilus repeats and realleges the above allegations as if fully restated.

355. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments.

356. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth have a long-standing custom and practice of denying the accused their constitutional rights by virtue of the unconstitutional administration and subsequent use of Photo Identification Procedures.

357. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth are supervisory personnel or bodies with law enforcement oversight responsibilities for screening, hiring, training, instructing and disciplining those responsible for conducting criminal investigations at the UCPO, UCPD and EPD, including Photo Identification Procedures, and of those who deprived Mervilus of his constitutional rights.

358. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth endorsed these unlawful Photo Identification Procedures that denies the accused their constitutional rights.

359. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth have developed Photo Identification Procedure customs, policies

and practices that represent official policy that are inflicting injuries to the accused, including Mervilus.

360. Although the A.G. has issued a Guidance, the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth have established a course of conduct to disregard the A.G.'s Guidance and other state, federal, and constitutional laws when administering and using Photo Identification Procedures in a way that is so well-settled and permanent as to virtually constitute law.

361. The A.G., Union County Prosecutor, UCPD Chief and EPD Chief are municipal employees that acted under a formal government customs, policies and practices.

362. The A.G., Union County Prosecutor, UCPD Chief and EPD Chief are municipal employees with policy-making authority who ratified the unconstitutional behaviors of their subordinates, Benenati, Perez, Barros, Martinez, John Doe Identification Officers, Union County Prosecutor and Hewette-Guyton.

363. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth did not act in good faith and no immunity should be given to them.

364. Upon information and belief, there are number of other accused persons who have fell victim to the same constitutional violations described herein.

**Count 13: Failure to Supervise and Train Claim for the Unconstitutional Custom, Policy and Practice Related to Unlawful Photo Identification Procedure Tactics Against: The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth
42 U.S.C. § 1983**

365. Mervilus repeats and realleges all of the above allegations as if fully restated.

366. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments.

367. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth are supervisory personnel or bodies with law enforcement oversight responsibilities for screening, hiring, training, instructing and disciplining those responsible for conducting criminal investigations at the UCPO, UCPD and EPD, including Photo Identification Procedures, and of those who deprived Mervilus of his constitutional rights.

368. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were aware and should have been aware of the Photo Identification Procedure misconduct alleged in this Complaint, and willfully, deliberately, intentionally, recklessly and with negligence and gross negligence failed to supervise and take appropriate preventative, remedial or corrective steps.

369. Upon information and belief, the harm to the accused occurred on numerous occasions.

370. As discussed above, with the Photo Identification Procedure tactics that Benenati, Perez, Barros, Martinez and John Doe Identification Officers were employing, the risk of constitutionally cognizable harm to the accused is so great and so obvious that the risk and the failure of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth to respond alone supports the findings of the

existence of unreasonable risk, of knowledge of that unreasonable risk and of indifference to it.

371. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth did not act in good faith and no immunity should be given to them.

372. As a result of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth's failure to supervise, Mervilus' constitutional rights were violated.

Count 14: NJCRA Due Process Claims Related to an Unlawful Photo Identification Procedure
Against: Benenati, Perez, Barros, Martinez, John Doe Identification Officers, the Union County Prosecutor and Hewette-Guyton
N.J.S.A. § 10:6-1, et seq.

373. Mervilus repeats and realleges all of the above allegations as if fully restated.

374. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, the Union County Prosecutor and Hewette-Guyton, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments and fundamental New Jersey Constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1 by administering and/or causing to be administered an unlawfully suggestive Photo Identification Procedure to identify Mervilus by only showing photographs of two Black suspects (which were clearly arrest photos) to the only eyewitness.

375. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton (a) deprived Mervilus of the

protections of life, liberty and property constitutional rights and privileges that are secured by the Fourth and Fourteenth Amendments and New Jersey Constitutional Rights under N.J. Const. art. I, ¶ 1 and N.J. Const. art. I ¶ 7; and (b) the procedures available to Mervilus did not provide him with due process of law.

376. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, forwarded the results of this unlawful Photo Identification Procedure to the Union County Prosecutor and Hewette-Guyton while the Union County Prosecutor and Hewette-Guyton were still contemplating whether and what charges against Mervilus they were going to present to the Grand Jury.

377. Mervilus' right to a fair Photo Identification Procedure was clearly established in 2006.

378. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton administered and/or caused to be administered a Photo Identification Procedure that failed to follow at least five provisions of the A.G.'s Guidelines. The A.G.'s Guidelines have been in place since 2001, five years before the Photo Identification Procedure in question.

379. The constitutional right to a fair Photo Identification Procedure and the A.G.'s Guidelines were clearly established when Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton performed and/or caused to be performed the unlawful Photo Identification Procedure.

380. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton performed and/or caused to be performed a Photo Identification Procedure which failed to document the lineup procedure

in writing in clear violation of New Jersey (and Supreme Court) law at the time the unlawful procedure was conducted. *See State v. Delgado*, 188 N.J. 48 (2006); *see also Kirby v. Illinois*, 406 U.S. 682 (1972).

381. The constitutional right to have a fair Photo Identification Procedure and to have such procedure documented in writing was clearly established when Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton, performed and/or caused to be performed the unlawful Photo Identification Procedure.

382. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton deprived Mervilus of his right to a fair investigation and to a fair trial.

383. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton were acting under color of state or territorial law when they presented and/or caused to be presented the unlawfully suggestive Photo Identification Procedure to Abreu, the Defendants' sole eye-witness.

384. The Union County Prosecutor and Hewette-Guyton used the ill-gotten evidence at trial.

385. Mervilus was convicted at trial.

386. Given that the only eye-witness Abreu identified a different Black male sitting in the gallery at trial and admitted that he could not positively identify Mervilus, there can be little doubt that the unlawfully gotten out-of-court identification obtained by Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton influenced the jury in favor of a guilty verdict. Indeed, after

Abreu's identification fell apart, the Union County Prosecutor and Hewette-Guyton used the results of the manufactured Photo Identification Procedure to save their case and to convict Mervilus.

387. Any later identification of Mervilus by Abreu—albeit unreliable—was tainted by the unlawfully suggestive out-of-court Photo Identification Procedure.

388. Thus, there was no probable cause to prosecute Mervilus because Benenati, Perez, Barros, Martinez, John Doe Identification Officers, and the Union County Prosecutor and Hewette-Guyton poisoned any identification of Mervilus by utilizing or causing to be utilized unlawful Photo Identification Procedure tactics.

389. There was a meaningful connection between Abreu's unreliable and tainted "identification" and Mervilus' conviction and this connection is so significant that it affected the outcome of the criminal case. "The State's case hinged to a great degree on the victim's testimony." *Mervilus*, 418 N.J. Super. at 147.

390. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, by virtue of them forwarding the Union County Prosecutor and Hewette-Guyton the results of this known unlawfully-gotten evidence is an unacceptable corruption of the truth-seeking function of the trial process.

391. The complete disregard of clearly established law, including the failure to keep a record, is persuasive evidence that Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton were aware that the Photo Identification Procedure was incorrect and nevertheless, offered the evidence in bad faith.

392. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, the Union County Prosecutor and Hewette-Guyton did not act in good faith and no immunity should be given to them.

393. Without the use of this unlawful photo identification procedure, there is a reasonable likelihood that Mervilus would not have been convicted and would have never spent nearly four years behind bars fighting for—and ultimately regaining—his freedom.

Claim 15: NJCRA Malicious Prosecution Claims Related to the Unlawful Photo Identification Procedure
Against: Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton
N.J.S.A. § 10:6-1, et seq.

394. Mervilus repeats and realleges all of the above allegations as if fully restated.

395. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton, while acting under color of law, deprived Mervilus of his clearly established rights and privileges secured by the Fourth and Fourteenth Amendments of the Constitution and of the fundamental New Jersey Constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1.

396. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton initiated and/or caused the initiation of a criminal proceeding against Mervilus.

397. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton deprived Mervilus of his constitutional rights by administering and/or causing to be administered an unlawfully suggestive Photo Identification Procedure to identify Mervilus by only showing photographs

of two Black suspects (which were clearly arrest photos) to the only eyewitness and then forwarding the results to the Union County Prosecutor and Hewette-Guyton to bring charges against Mervilus that would otherwise have not been initiated.

398. The constitutional right to a fair Photo Identification Procedure was clearly established at the time of the wrongful identification because of the A.G.'s Guidelines and a number of New Jersey and Supreme Court cases. Indeed, a reasonable official at the time would understand that conducting and forwarding the results of the photo array conducted here violated Mervilus' constitutional rights.

399. Benenati, Perez, Barros, Martinez and John Doe Identification Officers were acting under color of state law when they performed the unlawful Photo Identification Procedure.

400. The Union County Prosecutor and Hewette-Guyton were acting under color of state law when they caused the unlawful Photo Identification Procedure and despite its shortcomings, and lack of documentation, used the ill-gotten results to prosecute Mervilus.

401. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton caused the initiation of a criminal proceeding against Mervilus without probable cause. Significantly, since they tainted the already weak identification by Abreu, they had no reasonably trustworthy information to believe that Mervilus committed the crime.

402. After Benenati, Perez, Barros, Martinez and John Doe Identification Officers forwarded the Union County Prosecutor and Hewette-Guyton the results of the

unlawful Photo Identification Procedure a criminal proceeding was initiated against Mervilus.

403. The results of the unlawful Photo Identification Procedure gleaned by Benenati, Perez, Barros, Martinez and John Doe Identification Officers and forwarded to the Union County Prosecutor and Hewette-Guyton was a significant cause of the decision to prosecute Mervilus.

404. Mervilus was not indicted by a grand jury until March of 2007, four months after his arrest and the unlawful Photo Identification Procedure. Thus the decision of whether and what crimes to charge Mervilus were still being contemplated when the results of this unlawful procedure were forwarded from Benenati, Perez, Barros, Martinez, John Doe Identification Officers to the Union County Prosecutor and Hewette-Guyton

405. The indictment by the grand jury was tainted because of the unlawful Photo Identification Procedure.

406. The proceeding ended favorably to Mervilus because he was eventually acquitted.

407. Mervilus suffered a deprivation of liberty consistent with the concept of seizure as a consequence of the legal proceeding, to wit, he spent nearly four years behind bars.

408. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton's decision was actuated by malice, indeed, they maliciously and inexplicably, violated multiple provisions of the A.G.'s Guidelines and clear New Jersey law in order to have charges brought against Mervilus.

409. Mervilus was innocent of the crime for which he was incarcerated.

410. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton did not act in good faith and no immunity should be given to them.

411. Mervilus was directly harmed by these constitutional violations because he spent 1,454 days behind bars as a result.

**Count 16: NJCRA Conspiracy to Violate Mervilus' Constitutional Rights In Relation to the Unlawful Photo Identification Procedure
Against: Benenati, Barros, Perez and John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton
N.J.S.A. § 10:6-1, et seq.**

412. Mervilus restates and realleges the above allegations as if fully restated.

413. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton, under color of law, entered into a conspiracy, combination, agreement or understanding for the purpose of depriving, either directly or indirectly, Mervilus of his clearly established rights and privileges secured by the Fourth and Fourteenth Amendments of the Constitution and of the fundamental New Jersey Constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1.

414. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton performed acts in furtherance of the conspiracy including: (1) conducting or causing to conduct an unlawful and prejudicial Photo Identification Procedure; (2) failing to document the Photo Identification Procedure in violation of clear New Jersey and Supreme Court law; (3) presenting or causing to present this ill-gotten identification to the Union County Prosecutor and Hewette-Guyton while they were still contemplating whether and what charges to attempt to indict Mervilus with; (4) presenting or causing to present the results of the unlawful Photo Identification Procedure to the grand-jury, thus procuring an indictment by fraud; and (5) presenting or

causing to present the results of this knowingly unlawful Photo Identification Procedure to the jury once the eye-witness testimony fell apart because he identified the wrong Black male at trial.

415. Upon information and belief, Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton entered into this conspiracy, at the latest, on or around when Mervilus agreed to the lie detector test and the conspiracy lasted at least as long as the end of Mervilus' second trial.

416. Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton did not act in good faith and no immunity should be given to them.

417. Because of the conspiracy between Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton Mervilus was injured, and he was deprived of the rights and privileges of a citizen of the United States and as a result, he spent 1,454 days behind bars as an innocent man.

**Count 17: NJCRA *Monell* Claim for the Unconstitutional Custom, Policy and Practice
and the Failure to Supervise and Train Related to Unlawful Photo Identification
Procedures
Against: The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief
and Elizabeth
N.J.S.A. § 10:6-1, et seq.**

418. Mervilus repeats and realleges the above allegations as if fully restated.

419. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments and fundamental New Jersey constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1.

420. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth have a long-standing custom and practice of denying the accused their constitutional rights by virtue of the unconstitutional administration and subsequent use of Photo Identification Procedures.

421. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth are supervisory personnel or bodies with law enforcement oversight responsibilities for screening, hiring, training, instructing and disciplining those responsible for conducting criminal investigations at the UCPO, UCPD and EPD, including Photo Identification Procedures, and of those who deprived Mervilus of his constitutional rights.

422. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth endorsed these unlawful Photo Identification Procedures that denies the accused their constitutional rights.

423. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth have developed Photo Identification Procedure customs, policies and practices that represent official policies that are inflicting injuries to the accused, including Mervilus.

424. Although the A.G. has issued the A.G.'s Guidance, the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth have established a course of conduct to disregard the A.G.'s Guidance and other state, federal, and constitutional laws when administering and using Photo Identification Procedures in a way that is so well-settled and permanent as to virtually constitute law.

425. The A.G., Union County Prosecutor, UCPD Chief and EPD Chief are municipal employees that acted under a formal government custom, policy and practice.

426. The A.G., Union County Prosecutor, UCPD Chief and EPD Chief are municipal employees with policy-making authority who ratified the unconstitutional behaviors of their subordinates, Benenati, Perez, Barros, Martinez, John Doe Identification Officers and the Union County Prosecutor and Hewette-Guyton.

427. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth did not act in good faith and no immunity should be given to them.

428. Upon information and belief, there are number of other accused persons who have fell victim to the same constitutional violations described herein.

Count 18: NJCRA Failure to Supervise and Train Claim for the Unconstitutional Custom, Policy and Practice Related to Unlawful Photo Identification Procedure Tactics Against: The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth
N.J.S.A. § 10:6-1, et seq.

429. Mervilus repeats and realleges all of the above allegations as if fully restated.

430. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Fourth and Fourteenth Amendments and fundamental New Jersey constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1.

431. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth are supervisory personnel or bodies with law enforcement

oversight responsibilities for screening, hiring, training, instructing and disciplining those responsible for conducting criminal investigations at the UCPO, UCPD and EPD, including Photo Identification Procedures, and of those who deprived Mervilus of his constitutional rights.

432. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were aware and should have been aware of the Photo Identification Procedure misconduct alleged in this Complaint, and willfully, deliberately, intentionally, recklessly and with negligence and gross negligence failed to supervise and take appropriate preventative, remedial or corrective steps.

433. Upon information and belief, the harm to the accused occurred on numerous occasions.

434. As discussed above, with the Photo Identification Procedure tactics that Benenati, Perez, Barros, Martinez and John Doe Identification Officers were employing, the risk of constitutionally cognizable harm to the accused is so great and so obvious that the risk and the failure of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth to respond alone supports the findings of the existence of unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it.

435. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth did not act in good faith and no immunity should be given to them.

436. As a result of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth's failure to supervise, Mervilus constitutional rights were violated.

OTHER CLAIMS

Count 19: Abuse of Process
Against: Union County Prosecutor and Hewette-Guyton
Actionable Under: 42 U.S.C. § 1983

437. Mervilus repeats and realleges all of the above allegations as if fully restated.

438. The Union County Prosecutor and Hewette-Guyton, while acting under color of law, deprived Mervilus of his clearly established constitutional rights and privileges secured by the Eighth and Fourteenth Amendments, by abusing the legal process against him.

439. The Union County Prosecutor and Hewette-Guyton (a) had an ulterior motive; and (b) performed further acts after the issuance of process representing the perversion of the legitimate use of process.

440. After Mervilus successfully reversed his conviction, the Union County Prosecutor and Hewette-Guyton initiated another criminal proceeding against him for the same crime.

441. After initiating the proceeding, although it became clear that they could not win their case against Mervilus, instead of dropping their case, they perverted the legitimate use of process by continuing to prosecute Mervilus.

442. The Union County Prosecutor and Hewette-Guyton had an ulterior motive for continuing to prosecute Mervilus.

443. The Union County Prosecutor and Hewette-Guyton wanted to save embarrassment from the reversal and protect themselves and the UCPO from a civil lawsuit.

444. Under New Jersey law a person cannot sue under the N.J. Mistaken Imprisonment Act if they have pleaded guilty. *See* N.J.S.A. § 52:4C-3(d).

445. Upon information and belief, the Union County Prosecutor and Hewette-Guyton were afraid of civil suit and embarrassment, so instead of dropping the case against Mervilus, they proceeded against him. They threatened Mervilus with a potential eleven year prison term while offering him time-served for a guilty plea.

446. The Union County Prosecutor and Hewette-Guyton caused Mervilus to risk eleven years in prison and to defend himself even though they had no case against him which violates his constitutional rights.

447. Because of this unlawful tactic, Mervilus spent an additional 120 days in jail, which was a perversion of due process under the Fourteenth Amendment and amounts to cruel and unusual punishment under the Eighth Amendment.

448. The Union County Prosecutor and Hewette-Guyton did not act in good faith and no immunity should be given to them.

449. The Union County Prosecutor and Hewette-Guyton hoped Mervilus would fold and plead guilty, thus securing them a conviction and protecting them from a civil lawsuit.

Count 20: Abuse of Process
Against: Union County Prosecutor and Hewette-Guyton
Actionable Under: New Jersey Common Law

450. Mervilus repeats and realleges all of the above allegations as if fully restated.

451. The Union County Prosecutor and Hewette-Guyton violated Mervilus civil rights by abusing the legal process against him.

452. The Union County Prosecutor and Hewette-Guyton (a) performed improper, unwarranted and a perverted use of process after it has been issued; and (b) after process has been issued, an ulterior purpose in securing it by committing further acts which reveal a motive to coerce or oppress Mervilus.

453. After Mervilus got his conviction reversed, the Union County Prosecutor and Hewette-Guyton initiated another criminal proceeding against him for the same crime.

454. After initiating the proceeding, although it became clear that they could not win their case against Mervilus, instead of dropping their case, they perverted the legitimate use of process by continuing to prosecute Mervilus.

455. The Union County Prosecutor and Hewette-Guyton had an ulterior motive for continuing to prosecute Mervilus.

456. The Union County Prosecutor and Hewette-Guyton wanted to save themselves and the UCPO from embarrassment from the reversal and protect themselves and their offices from a civil lawsuit.

457. Under New Jersey law a person cannot sue under the N.J. Mistaken Imprisonment Act if they have pleaded guilty. *See* N.J.S.A. § 52:4C-3(d).

458. Upon information and belief, the Union County Prosecutor and Hewette-Guyton were afraid of civil suit and embarrassment, so instead of dropping the case against Mervilus, they proceeded against him. They threatened Mervilus with a potential eleven year prison term while offering him time-served for a guilty plea.

459. The Union County Prosecutor and Hewette-Guyton caused Mervilus to risk eleven years in prison and to defend himself even though they had no case against him which violates his constitutional rights.

460. The Union County Prosecutor and Hewette-Guyton did not act in good faith and no immunity should be given to them.

461. The Union County Prosecutor and Hewette-Guyton hoped Mervilus would fold and plead guilty, thus securing them a conviction and protecting them from a civil lawsuit.

**Count 21: Negligence
Against: All Defendants**

462. Mervilus repeats and realleges all of the above allegations as if fully restated.

463. All Defendants engaged in the misconduct alleged in this Complaint negligently performed their jobs and Mervilus was harmed as a result.

464. All Defendants owed a duty of care to Mervilus.

465. All Defendants breached their duty.

466. The Defendants' negligence was the proximate cause of Mervilus' injury.

467. Defendants did not act in good faith and no immunity should be given to them.

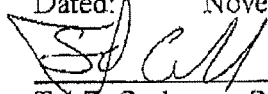
468. Mervilus suffered actual damages. As a result of the Defendants negligence, Mervilus spent 1,454 days behind bars for a crime he did not commit.

Prayer For Relief

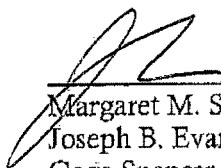
WHEREFORE, Plaintiff Exoneree Emmanuel Mervilus prays for judgment in his favor as follows:

- (a) Judgment in favor of Mervilus and against Defendants for the respective claims of this Complaint that name them;
- (b) Award compensatory damages to Mervilus and against the Defendants, jointly and severally, in an amount to be determined at trial;
- (c) Award punitive damages to Mervilus and against Defendants, jointly and severally, in an amount to be determined at trial, in order that such award will deter similar proscribed conduct by Defendants in the future;
- (d) Award to Mervilus and against Defendants pre-judgment and post-judgment interest on all sums awarded;
- (e) Award to Mervilus and against Defendants the cost of pursuing this action, including reasonable attorneys' fees under 42 U.S.C. § 1988, N.J.S.A. § 10:6-2(f) and any other applicable fee shifting law;
- (f) Award to Mervilus and against Defendants civil penalties under N.J.S.A. § 10:6-2(e);
- (g) Award to Mervilus and against Defendants non-monetary relief including, but not limited to, vocational training, tuition assistance, counseling, housing assistance, and health insurance coverage as appropriate;
- (h) A jury trial;
- (i) Reasonable attorneys' fees; and
- (j) Any other relief that the Court deems just and proper.

Dated: November 26, 2014



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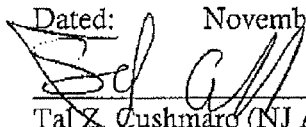
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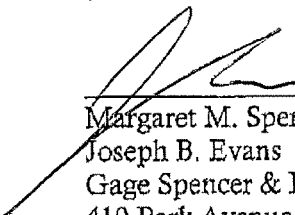
Jury Demand

Mervilus demands a trial by a jury on all issues so triable under Rule 38 of the Federal Rules of Civil Procedure.

Dated: November 26, 2014



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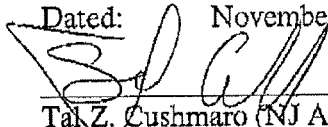
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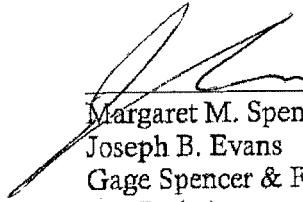
Designation of Trial Counsel

Mervilus designates Margaret M. Spencer and Joseph B. Evans as trial
counsel.

Dated: November 26, 2014



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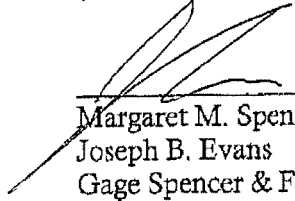
Certification Under L. Civ. R. 11.2

I certify that the matter in controversy is not the subject of any other pending or contemplated court action or arbitration proceeding, except that there is currently a pending action that Mervilus commenced in the Superior Court of New Jersey, Union County on October 21, 2014, against the State of New Jersey Department of the Treasury under New Jersey's Mistaken Imprisonment Statute, N.J.S.A. § 52:4C-1, et seq. *Mervilus v. New Jersey Department of the Treasury*, No. UNN-L-3833-14.

I certify under penalty of perjury that the foregoing is true and correct.

Dated:  November 26, 2014

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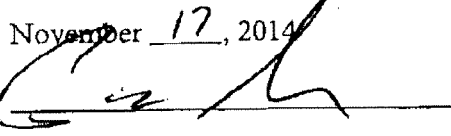
Verification

I, Emmanuel Mervilus, am the Plaintiff in the within Verified Complaint and being of due age and sound mind, hereby verify under penalty of perjury that:

1. I have read the Verified Complaint;
2. The statements contained herein are true based on my personal knowledge and/or information and belief; and
3. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.


Emmanuel Mervilus

Sworn to and subscribed before me

November 17, 2014


PRANAV SHARMA
Commission # 2392520
Notary Public, State of New Jersey
Commission Expires
January 05, 2015

Exhibit A

State v. Mervilus

Superior Court of New Jersey, Appellate Division
January 18, 2011, Submitted; February 15, 2011, Decided
DOCKET NO. A-5812-07T3

Reporter: 418 N.J. Super. 138; 12 A.3d 258; 2011 N.J. Super. LEXIS 29

STATE OF NEW JERSEY,
PLAINTIFF-RESPONDENT, v. EMMANUEL
MERVILUS A/K/A EMMANUEL
MERVILOUS A/K/A EMANUEL MERVILUS
A/K/A EMMONVEL MERVILUS A/K/A
EMMANUEL MERVELOUS,
DEFENDANT-APPELLANT.

Subsequent History: [***1] Approved for
Publication February 15, 2011.

Prior History: On appeal from the Superior
Court of New Jersey, Law Division, Union
County, Indictment No. 07-03-00231.

Case Summary

Procedural Posture

After a jury trial in the Superior Court of New
Jersey, Law Division, Union County, defendant
was convicted of first degree robbery and
aggravated assault. He appealed.

Overview

The victim was attacked and robbed by three
men, one of whom stabbed him. The victim told
police defendant was one of the robbers, but
could not positively identify him at trial.
Defendant, who was represented by counsel,
signed an agreement to take a polygraph test and
stipulated to its admissibility. Without objection,
the State presented the test results through the
testimony of a polygraph expert. The appellate
court held that admission of the expert's
testimony, which was couched in terms of
"innocent" and "guilty" test takers, was plain
error and warranted reversal of defendant's
conviction. While an expert could testify as to
opinions highly relevant to whether a defendant
committed the crime charged, even though it
embraced ultimate issues that the jury had to

decide, the expert could not invade the jury's
province by expressing an opinion as to a
defendant's guilt. As the admission of the
polygraph evidence could have affected the
outcome, retrial was required. If the State
intended to rely on polygraph test results at the
retrial, it had to first establish the reliability of
polygraph evidence at a Frye hearing under
N.J.R.E. 104, as required by State v. A.O.

Outcome

The judgment was reversed and the case was
remanded for a new trial.

Counsel: *Caruso & Diaz, L.L.C.*, attorneys for
appellant (*John D. Caruso*, on the brief).

Theodore J. Romankow, Union County
Prosecutor, attorney for respondent (*Meredith L.
Balo*, Assistant Prosecutor, of counsel and on the
brief).

Judges: Before Judges LISA, REISNER and
ALVAREZ. The opinion of the court was
delivered by REISNER, J.A.D.

Opinion by: REISNER

Opinion

[**258] [*139] The opinion of the court was
delivered by

REISNER, J.A.D.

Defendant Emmanuel Mervilus appeals from his
conviction for first degree robbery, *N.J.S.A.
2C:15-1*, and aggravated assault, *N.J.S.A.
2C:12-1(b)(1)*, *-1(b)(2)*. Based on improper
expert testimony concerning polygraph
evidence, we reverse the conviction and remand
for a new trial. If the State intends to rely on

polygraph evidence at the re-trial, the State must first establish the reliability of polygraph evidence at a *Frye*¹ hearing. At the *N.J.R.E. 104* hearing, the defendant may also challenge the reliability of his individual polygraph test, e.g., whether the machine was working properly or the expert administered the test correctly. However, [*140] as we construe *State v. A.O., 198 N.J. 69, 965 A.2d 152 (2009)*, [***2] a *Frye* hearing is mandatory.

I

We begin by summarizing the most pertinent history and the trial evidence. At a pretrial hearing, all counsel agreed to the following facts as alleged by the State: Near the intersection of Morris and Union Avenues in Elizabeth, the victim, Miguel Abreu,² flagged down two police officers. He reported that he had been robbed by three men, one of whom stabbed him and another of whom fled on a bicycle with his backpack. Abreu said he had followed the two remaining assailants down Morris Avenue. He pointed out two men standing some distance away and told the officers that they had attacked him. Based on this identification, the police arrested defendant and co-defendant, Daniel Desire.

Relying on *State v. Ruffin, 371 N.J. Super. 371, 853 A.2d 311 (App.Div.2004)*, the judge denied a *Wade*³ hearing because defendant presented "no evidence . . . which alleges that the officers were, in any way, suggestive" and "[i]n fact, there is no evidence that they said anything to the victim prior to his identifying" [***3] the two suspects.

At the trial, Abreu testified that after leaving work he rode his bicycle to the Rahway train station and took the train home to Elizabeth. As

Abreu and a co-worker were walking away from the Elizabeth train station along Morris Avenue, they encountered a group of three men. Abreu described them as two tall black men wearing their hair "rolled," and one man who was "very little." One of the tall men grabbed Abreu's arms from behind, while the other tall man approached him from the front. The man in front swung a knife at Abreu and cut him. According to Abreu, [*141] as he was trying to escape, his backpack started to slip off one of his arms. The man behind him pulled the backpack off Abreu's other arm and handed it to the small man, who fled on "a small bike that they had." Although the two larger men then walked away, Abreu testified that he "never lost sight" of them from the time they attacked him until the police arrived and he was able to point them out to the officers.

At the trial, Abreu claimed that he got a good look at the two larger men. But when asked if he saw either of them in the courtroom, [***4] Abreu identified a spectator whom he said resembled the assailant who stabbed him.⁴ On cross-examination, he admitted that he could not positively identify either attacker in the courtroom. However, he testified that he was sure that the two men whom the police arrested on the night of the attack were the ones who robbed him. He asserted that he knew that the police were arresting the right suspects because a knife was found on the ground near the two arrestees.

According to Officer Benenati, he was passing by in his patrol car when Abreu rolled his bicycle into the street in front of [***260] the police vehicle, showed the officer his stab wound and asked for help.⁵ When Benenati asked who

¹ *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923).

² Mr. Abreu's full name is Miguel Abreu Barrientos, but he ordinarily uses Abreu as his last name.

³ *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926 18 L. Ed. 2d 1149 (1967).

⁴ Both sides stipulated before the jury that this individual was not the co-defendant, Daniel Desire.

⁵ Abreu testified that he encountered a passerby who called the police for him. Benenati testified that no one summoned him to the scene; he just happened to be on patrol in that area.

stabbed him, Abreu pointed to two men who were walking about 100 yards away. After Benenati's partner recovered a knife about ten feet from the two suspects, Abreu was able to identify it as the knife used to stab him. ⁶ The suspects, later identified as defendant and Desire, were photographed at the police station. Benenati then showed copies of those photographs to Abreu, who identified the subjects as [***5] his [*142] attackers. In his testimony, Benenati also identified the men in the photographs as being the persons he arrested on the night of the assault.

Before the trial, defendant, who was represented by counsel, signed an agreement to take a polygraph test and stipulated to its admissibility at his trial. The State presented the test results through the testimony of a polygraph expert, Lieutenant John Kaminskas. He first explained in general how a polygraph worked, repeatedly referring to the different reactions of persons who were "innocent" as opposed to those who were "guilty." He also referred to the ability of the test to differentiate persons who were "telling the truth" as opposed to those who were "lying."

After next describing the results of defendant's polygraph test, during which defendant denied involvement in the robbery, Kaminskas was asked if he was "able to develop an opinion whether or not Mr. Mervilus [***6] was telling the truth." Summarizing his views, Kaminskas testified that "in my opinion . . . he wasn't telling the truth." Under questioning from the prosecutor, Kaminskas also testified that in his extensive experience as a polygrapher, in "between 60 and 70 percent of the . . . tests I conduct[,] I find the . . . people are truthful." In those cases, he would report the results to the "investigating officers" and "a lot of times the case is terminated or charges against the person are dropped."

On cross-examination, Kaminskas referred to the test as "not just a lie detector [but] also a

truth indicator." He testified that he had never encountered a situation in which he had opined that "someone was . . . showing signs of deception, and [it later] came out that they were truthful." He also described a "guilty" suspect as being "a little more anxious . . . because they know that the truth is going to be found out."

Defendant testified that he was not involved in the attack on Abreu. According to defendant, he insisted on taking a polygraph test because he believed it would establish his "innocence." He testified that at the time he took the test, he was distraught because his mother [***7] had just died. When told that he failed, [*143] defendant offered to re-take the polygraph test, but he was not permitted to do so. Defendant was cross-examined extensively about the polygraph results.

II

On this appeal defendant presents the following points for our consideration:

POINT I: THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION AND THE VERDICT WAS [**261] AGAINST THE WEIGHT OF THE EVIDENCE.

POINT II: AGGREGATE ERRORS DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

A. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE RESULTS OF A POLYGRAPH TEST WITHOUT FIRST DETERMINING THAT THE EVIDENCE WAS RELIABLE AT A PRE-TRIAL HEARING (NOT RAISED BELOW).

B. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO OFFER IMPROPER EXPERT TESTIMONY THEREBY

⁶ The State stipulated that tests performed on the knife revealed no blood or fingerprints.

PREJUDICING THE DEFENDANT'S RIGHT TO A FAIR TRIAL (NOT RAISED BELOW).

C. THE TRIAL COURT ERRED IN DENYING TRIAL COUNSEL'S MOTION FOR A WADE HEARING CONCERNING MR. ABREU'S OUT-OF-COURT "SHOW-UP" IDENTIFICATION OF MR. MERVILUS NEAR THE SCENE OF THE INCIDENT.

D. TRIAL COUNSEL'S FAILURE TO CHALLENGE THE ADMISSIBILITY OF THE PATENTLY ILLEGAL OUT-OF-COURT PHOTO IDENTIFICATION PROCEDURE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

E. THE PROSECUTOR'S CROSS-EXAMINATION OF [***8] MR. MERVILUS AND COMMENTS IN SUMMATION CONCERNING HIS POST-ARREST SILENCE VIOLATED HIS RIGHT AGAINST SELF-INCRIMINATION AND DEPRIVED HIM OF A FAIR TRIAL (NOT RAISED BELOW).

F. THE PROSECUTOR'S COMMENTS IN SUMMATION SUGGESTING THAT MR. MERVILUS'S TESTIMONY WAS TAILORED DEPRIVED MR. MERVILUS OF HIS RIGHT TO A FAIR TRIAL.

G. IMPROPER COMMENTS MADE BY THE PROSECUTOR DURING SUMMATIONS SHIFTED THE BURDEN OF PROOF AND DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL (NOT RAISED BELOW).

H. THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY

THAT IT COULD FIND DEFENDANT GUILTY OF SECOND DEGREE ROBBERY UNDER A THEORY OF ACCOMPLICE LIABILITY.

[*144] Having reviewed the record, we decline to consider Point II D, *State v. Sparano*, 249 N.J. Super. 411, 419, 592 A.2d 608 (App.Div.1991), and we conclude that Point I and Points II C and E through H are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(2)*. Thus, we turn to Points II A and B, concerning the polygraph evidence.

Defendant makes two arguments. First, relying on *State v. A.O.*, *supra*, a case decided a year after his trial was conducted, he contends that the trial court should not have admitted the polygraph evidence without first holding [***9] an *N.J.R.E. 104* hearing to determine its reliability. Second, he contends that by explaining the polygraph results in terms of "innocent" and "guilty" test takers, the polygraph expert implicitly and improperly testified as to defendant's guilt.

In *State v. A.O.*, the Court reaffirmed that polygraph evidence is generally inadmissible, and specifically held that it is inadmissible where an uncounseled defendant enters into a stipulation. However, the Court declined to overrule the "narrow" holding of *State v. McDavitt*, 62 N.J. 36, 44-46, 297 A.2d 849 (1972), allowing polygraph stipulations where a defendant enters into the agreement with advice of [***262] counsel. *A.O.*, *supra*, 198 N.J. at 90, 965 A.2d 152.

In considering whether to go further and bar polygraph evidence altogether, the Court

acknowledged that such evidence might be unreliable.⁷ a sufficient factual record in the case before it, the *A.O.* [***11] opinion required that such a record be made in any future case where a party sought to introduce polygraph evidence:

[Recent] studies explain that polygraphy relies on two assumptions: (1) that deception triggers certain emotional states; and (2) that those emotional states produce specific, measurable physiological changes in the body. As certain empirical evidence has shown, however, there is substantial variation in how individuals respond physiologically when they are lying or telling the truth, [***10] and the responses that humans produce in such situations are not specific to either deception or truth-telling. The inherent ambiguities in such responses, which arise from individual variations in the subject's cardiovascular, electrodermal and respiratory activity, [*145] often make it difficult for a test administrator to determine if the examinee is lying, nervous, tired, or simply trying to game the system.

... Even more troubling, "to the extent that the polygraph errs, studies have repeatedly shown that the polygraph is more likely to find innocent people guilty than vice versa."

[*Id.* at 91-92, 965 A.2d 152 (citations omitted).]

See also *State v. Domicz*, 188 N.J. 285, 311-14, 907 A.2d 395 (2006). The Court also noted that juries are likely to give polygraph evidence "undue weight" because "many lay people tend to view polygraph evidence as bordering on infallible." *A.O.*, *supra*, 198 N.J. at 92.

While the Court declined to prohibit the use of polygraph evidence altogether due to the lack of

Because we lack a factual record, we cannot fully address those issues today. *However, a proper record will have to be developed in the trial court the next time a party seeks to introduce stipulated polygraph evidence, agreed to by both sides.* That evidence should be introduced only if the parties can first establish its reliability at an *N.J.R.E. 104* hearing.

[*Ibid.* (emphasis added).]

Against that legal backdrop, we first address the testimony of the polygraph expert. Because the defense did not object to that evidence at trial, we consider defendant's arguments under the plain error rule. *R. 2:10-2; State v. Macon*, 57 N.J. 325, 336, 273 A.2d 1 (1971).

The State presented testimony from Lieutenant Kaminskas, the same polygraph expert who testified in *A.O.* As in *A.O.*, under questioning by the prosecutor, Kaminskas gave testimony designed to convince the jury that polygraph tests are infallible. See *A.O.*, *supra*, 198 N.J. at 77, 965 A.2d 152. His testimony also communicated that the tests are designed to separate the "innocent" from the "guilty." Not only did he use those words to describe the test [***12] takers, but he told the jury that a "guilty" subject would be more nervous than an "innocent" one.

[*146] In explaining how a polygraph exam is administered, the expert also used the terms "guilty" and "innocent." For example, in explaining the difference between "control questions" and "relevant questions" pertaining to the crime, he stated [**263] that "a person [who] actually did the crime, or was —

⁷ See *State v. A.O.*, 397 N.J. Super. 8, 30, 935 A.2d 1202 (App.Div.2007) (Weissbard, J.A.D., concurring)(urging the Court to bar the use of polygraph evidence due to its unreliability).

participated in the incident, will react to [relevant] questions . . . [whereas] a person who is innocent, or had no involvement in the incident, will react to [other types of] question[s]." He testified that a person who "reacts more" to the relevant test questions was "lying." Kaminskis also opined that defendant reacted to relevant questions and his answers, indicating that he had no involvement with the robbery, showed deception, meaning the defendant "wasn't telling the truth." Although the expert did not explicitly state that he believed defendant was guilty, his testimony implicitly constituted an opinion on defendant's guilt.

In eliciting his testimony that polygraph results, where obtained, often determined whether a defendant would be prosecuted, the State further emphasized to the jury the [***13] importance of polygraph evidence. According to Kaminskis, in 60-70 percent of the exams he administers, the test taker is truthful, and "a lot of the times the case is terminated or charges against the person are dropped." His testimony thus communicated to the jury that law enforcement agencies believe guilty people will fail a polygraph test and innocent people will pass.

An expert may testify as to opinions highly relevant to whether a defendant committed the crime charged, "even though it embraces ultimate issues that the jury must decide." *State v. Odom*, 116 N.J. 65, 79, 560 A.2d 1198 (1989). But an expert may not invade the jury's province by expressing an opinion as to a defendant's guilt.

We have repeatedly and consistently recognized that a jury's determination of criminal guilt or innocence is its exclusive responsibility. A jury's verdict of ultimate criminal liability can never be equated simply with its determination of underlying facts; the determination of guilt or innocence transcends the facts on which it is based, no matter how compelling or inexorable those facts may be. The

determination of facts that serve to establish guilt or innocence is a function [*147] reserved exclusively to the [***14] jury. Hence, an expert's testimony that expresses a direct opinion that defendant is guilty of the crime charged is wholly improper.

[*Id.* at 77, 560 A.2d 1198 (citations omitted).]

Nor may an expert accomplish the same improper goal indirectly. "It may be that an expert's opinion is expressed in such a way as to emphasize that the expert believes the defendant is guilty of the crime charged under the statute. This would be impermissible." *Id.* at 80, 560 A.2d 1198. The prosecution may "not properly seek a favorable resolution of the fact issues committed to the jury for resolution by bolstering the testimony of its only fact witness with the opinion of an expert on the ultimate issue." *State v. Boston*, 380 N.J. Super. 487, 494, 882 A.2d 987 (App.Div.2005), certif. denied, 186 N.J. 243, 892 A.2d 1290 (2006).

Kaminskis' improper testimony also implicated the very concerns that the Court expressed in *A.O.* — that jurors would perceive polygraph evidence as infallible and would give it disproportionate weight in deciding to convict or acquit a defendant. Adding to the mix the serious questions about the reliability of polygraph evidence, its misuse is all the more troubling.

We conclude that admission of the improper polygraph evidence was prejudicial [***15] error warranting reversal of defendant's conviction. While this is a closer case than *A.O.*, in which there were significant weaknesses in the State's case, we cannot describe the State's evidence against defendant [**264] as overwhelming. This is not a case in which, for example, a defendant was caught red-handed selling drugs to an undercover police officer. See, e.g., *State v. Nesbitt*, 185 N.J. 504, 508, 888 A.2d 472 (2006). Here, the police came on the scene after the assault, and the State's case hinged to a great degree on the victim's

testimony. The victim claimed to have gotten a good look at the assailants but mis-identified a courtroom spectator as being one of the robbers, and he could not identify defendant in the courtroom. A knife was found moments after the stabbing, but it bore no traces of blood and no fingerprints. Defendant testified, and thus his credibility was in issue. The improper polygraph testimony could have made a difference to the outcome. *State v. Macon, supra*, 57 N.J. at 336, 273 A.2d 1. [*148] Therefore, we reverse defendant's conviction and remand this case for re-trial.

We next address defendant's argument that *A.O.* should be applied retroactively and that the trial court should have sua sponte [***16] held an *N.J.R.E. 104* hearing concerning the reliability of polygraph evidence. The Court's language in *A.O.*, concerning the need for such a hearing in the "next" case, implies prospective application. However, in light of our determination that the improper polygraph testimony warrants reversal of defendant's conviction, we need not address the retroactivity issue.

We add the following comments for the trial court's guidance on remand. In considering whether polygraph evidence should be banned altogether, the Court stated that any future attempts to introduce polygraph evidence in a

criminal trial would require a preliminary determination as to its reliability. *A.O., supra*, 198 N.J. at 92, 965 A.2d 152. Therefore, if the State intends to rely on polygraph evidence, it must first prove the reliability of such evidence at an *N.J.R.E. 104* hearing. *Ibid.*

On this appeal, defendant asserted his right, at the *N.J.R.E. 104* hearing, to challenge the proper functioning of the testing equipment and the manner in which the test was administered. But we construe *A.O.* as requiring much more. The Court clearly intended that a record be created on the omnibus issue of whether polygraph evidence should be permitted [***17] or barred. Therefore, the State must carry the burden to prove that polygraph test results are "generally accepted, within the relevant scientific community, to be reliable." *State v. Chun*, 194 N.J. 54, 91, 943 A.2d 114, cert. denied, 555 U.S. 825, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008) (Alcotest found scientifically reliable); *State v. Harvey*, 151 N.J. 117, 169-71, 699 A.2d 596 (1997), cert. denied, 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683 (2000) (finding DNA evidence admissible); *Frye, supra*, 293 F. at 1014 ("systolic blood pressure deception test" held inadmissible as lacking scientific reliability).

Reversed and remanded.

Exhibit B

Community Life

Prime Time Inside

Inspectors' gadgets

For the high-tech Union County PD, serving and protecting is about heart *and* hardware

By DARRA MEOU

THE CHRONICLE

WESTFIELD — Behind the tall, rusted chain-link fence at 260 North Ave., inside the brick building that are remnants of old factories, lies Union County's secret weapon against crime.

At Union County Police Headquarters, officers use state-of-the-art law enforcement technology to battle crime in the county's myriad communities.

The Union County Police Department, under the direction of Chief Richard Munias, focuses not on the spotlight, but spends its money on equipment that makes the most of the money's worth, the arm of a state trooper, a county police officer and a private investigator all would like. But inside the County Police compound, it is obvious this agency is different.

Suspects placed under arrest carry their mug shots taken by a digital camera. Copies of the mug shot could be printed immediately or e-mailed to other agencies. But the new digital camera barely scratches the surface of this high-tech approach to serving and protecting.

From the county department's automatic gas cleaners to a process that has been collected evidence on a chain of custody can be clearly established, it is clear this is not your father's PD.

"The technology is amazing," said county Lt. Chris Hansen, acting chief of the National Crime Information System 2000 mobile data base.

Presently, county police have jurisdiction over the 6,000 acres of county parks and all county buildings. County police also maintain whatever resources they have available for logistical support for other agencies. When Al Gore visited Westfield, the county police provided foot patrols and mounted police the county benefit equal even several lunch staffing amounts in the city to meet for employees.

All told, county headquarters processes an average of 50 arrests per month.

The Union County Police Department became an official agency in 1922. It started out in an old Tuley building in Southfield and headquarters moved to Westfield in 1978, where it has remained ever since.

Union County Police operate a shared service program. One example of their cooperative efforts in fighting crime is the recent acquisition of an Integrated Ballistic Information System. If any county agency has a shooting offense, being the shell casing found on the scene is county headquarters, where a fire arm forensic forensic captures all the markings on the casing and sends that

image through a modem to Essex County Police. Essex County has a database of other images of casing found on other crime scenes. The images are compared and if a match is found, investigators have a better chance of determining if the crime are linked.

The Essex database is also tied into databases in New York and



Union County Police Lt. Chris Hansen works the controls to his cousin's Mobile Video camera. The camera is just an example of the gadgets employed by the high-tech department, which utilizes equal doses of compassion, computers and creativity to protect and serve the residents of Union County.

and sound proofing interiors. The trailer is also much more secure than outdoor ranges; officers use lead free bullets when practicing at the range, and all bullet casings are easily collected and recycled. There is a lighting control to simulate different hours of the day inside the trailer, and stress and opening red lights have been installed to simulate different stress levels.

Officers in training use not the only ones who experience increased stress at headquarters. The only polygraph examiner in the county is an officer in the Union County Police Department, and he provides services to 21 municipalities and the County Prosecutor's Office. In 1999, Det. John Kamonikas provided polygraph results for over 60 cases, providing evidence that solved lawsuits and murders. "I trust the instrument completely," Kamonikas said. "They are very accurate — 95 percent in most states."

The process of discharging fireworks and ammunition by digging out a mine in a quarry and setting them off is not how these days, at least for the Union County Police. The county has another trailer, designed in Oregon, that is used to blow up low grade ammunition. The trail or resembles a large wood burning stove, after the chamber is locked, an officer turns on the gas and ignites the ammunition through a small hole with a blow torch. The trailer can burn 30 pounds of ammunition in 10 minutes. "This is safe and efficient," Vaniska noted.

Any resident who lives near 911 can thank the Union County Police for their service. The agency installed the current 911 system in 1974 and has maintained it ever since. "It is Union County is a multiple step-up story," and Vaniska noted.

Any resident who lives near 911 can thank the Union County Police for their service. The agency installed the current 911 system in 1974 and has maintained it ever since. "It is Union County is a multiple step-up story," and Vaniska noted.

The bike patrol is good for the communities," Audinis added. "It is a lot of good exercise and a lot of good people."

While the bicycle patrols suggest a kinder, gentler police force, the overriding theme of the Union County Police Department is high tech. To that end, the department installed Mobile Video cameras in 10 patrol cars six months ago, and the department has already received funding for 10 more cameras.

The camera begins recording automatically when an officer turns on the red lights. The camera can also be turned on manually from inside the car, as well as from a remote on the officer's belt. The tapes are kept for 30 days and can be used for training or for evidence. The camera also records audio and indicates what lights are on in the car, and when an officer applies pressure to his brakes. The camera can be taken off its dashboard mount to a distance of 75 feet from the car, and is fitted with a powerful zoom lens. "I had a choice. I was doubtful," Audinis said of the camera. "I thought, great, just another thing against the police." Now, he thinks it's great. "I had a choice. I'd have a camera."

Union County Police officers are part of the county's emergency management team and also serve as IRTA operators. The Union County Bomb Squad, which is based out of this department, received between 60 and 100 calls last year, many involving bomb threats when the unit and a very expensive package. "You're not afraid of the package — you respect it," noted bomb technician Sgt. Richard Puerfel.

From the 3,000 county technicians can determine the components of a suspicious device and whether it is a bomb. When the technician attempts to remove the situation, he or she must gear up on an 80 pound suit. In especially volatile situations, the bomb squad employs the use of a robot, which is wired with two cameras and a string which can be retracted from the bomb squad's inside unit.

Union County Police also provide child seat safety checks every week.

Parsons can bring their cars to headquarters and have trained officers inspect their safety seats. It makes sure they are properly installed in the vehicle. The county administration is very supportive," Vaniska noted. "They allow us the funding to do these kinds of things."

"I am being approached by a lot more citizens. Kids and other people come up and say hi. The white polo (shirt) the bike officers wear is more friendly than the all-dark blue uniforms. It is a completely different attitude. The bike patrol is good for the communities. A lot of good exercise and a lot of good people."

— Kris Audinis
Bicycle officer, Union County PD

Primo/visum. That is not Union County's only link to agencies in other states according to Union County Capt. David Szustka, the Integrated Ballistic Information System will soon be a nationwide effort.

Another feature of the Union County headquarters is the "infinite envelope." In what looks like the back end of an 18-wheeled tractor trailer is a police firing range, where officers from municipal agencies all over the county receive semi-annual firearms qualifications. Union County Police purchased the range to cut down on overtime and to bring officers close to headquarters. "This has paid for itself in a year," Vaniska said. "It cost \$141,900, delivered directly to funding."

The range is the only one of its kind in the state. The trailer is surrounded by a half-inch-thick armored plate, four layers of rubber mat



Union County Police Capt. Daniel Vaniska (right), who calls the county department's technology "amazing," and bicycle patrol officer Kris Audinis (shown) are just two of the officers working to keep the county safe. The county police offer tactical — and technological — support to the myriad municipal departments in Union, providing everything from firearms training to bomb-defusing robots to computers that can zero in on the tiniest details etched into recovered bullet casings.



Union County Police officer Kris Audinis (shown) is just one of the officers working to keep the county safe. The county police offer tactical — and technological — support to the myriad municipal departments in Union, providing everything from firearms training to bomb-defusing robots to computers that can zero in on the tiniest details etched into recovered bullet casings.

Exhibit C

Wrongly convicted, Elizabeth man spent 3 years in prison

Richard Khavkine/The Star-Ledger By Richard Khavkine/The Star-Ledger

on February 10, 2013 at 8:32 AM, updated February 14, 2013 at 7:06 PM

ELIZABETH — He said he was fifth in line at the Dunkin' Donuts on Broad Street, near the downtown Elizabeth train station, waiting to buy an apple juice.

Union County prosecutors, though, argued that he was even closer to the train station on that night in October 2006, and that he and two others had jumped a 26-year-old city man, slashed him with a knife and robbed him of his backpack.

Emmanuel Mervilus, then 23, insisted on his innocence, and asked to take a polygraph test. He failed it and, following a five-day trial in February 2008, a jury used that evidence to convict him of armed robbery and aggravated assault. He was sentenced to 11 years.

His alleged accomplice, now a former friend, was tried and convicted on a theft charge and sentenced to four years. The third man was never found.

Inside the A. C. Wagner Youth Correctional Facility, and, later, South Woods State Prison, Mervilus said he traded punches for respect. And for more than three years behind those bars, Mervilus fought to clear his name.

Two years ago, an appeals court ruled that the person administering the polygraph had given improper testimony at Mervilus' trial. It took him months to make bail, but at his retrial in January, a jury took 40 minutes to acquit him of all charges.

"It's seven years since I've been in this nightmare," Mervilus, dressed in a button-down shirt and tie, argyle sweater and pressed slacks, said in the living room of the South Broad Street apartment he shares with his family, about a mile from the alleged knifing. "Something wrong happened to me. And me going away affected a lot of people's lives."

Although his mother was battling cancer before his arrest, he said his prosecution and subsequent incarceration added to her stress and sped her death. His sister, Shakia, who calls Mervilus her mentor, said she became powerless to keep their younger brother from getting himself into trouble with the law.

"When he got locked up, my whole world was turned upside down," Shakia, 25, said of Emmanuel. "I felt that because the system failed, it also failed my younger brother."



Emmanuel Mervilus no longer takes it for granted that he can take a walk outside his Elizabeth apartment. Mervilus, 29, spent more than three years in prison on a wrongful assault and robbery conviction. Following his retrial in January, a jury acquitted him of all charges. Aristide Economopoulos/The Star-Ledger

Mervilus, who turned 29 on Thursday and celebrated with a cake and Bible study, said he is more frustrated than angry.

"I'm just happy to have my life back," said Mervilus, who wears his hair in neat, long dreads, and, thin and fit again, looks little like the short-haired man in his prison mugshot. "I believe in the justice system now."

His lawyer, John Caruso, said discrepancies and inconsistencies in the alleged victim's testimony allowed him to establish "ironclad reasonable doubt" and pave the way for an acquittal.

The man initially told police he was a bystander as a friend had his backpack robbed by three men, one of whom then slashed him. But in a statement given to authorities a week later, he said it was he who was both robbed and slashed.

"How could the jury believe anything he was saying when he was so inconsistent on such an important fact?" said Caruso, who won the appeal while in private practice and the acquittal with the county's public defender's office.

And, as happened in the initial trial, the victim, asked if his assailant was in the courtroom, replied that he was and then pointed to someone other than Mervilus. Critically, Caruso said, he was able to show that the man never got a look at the face of the man who supposedly was holding him from behind — allegedly Mervilus.

Caruso, who prior to becoming a defense attorney worked in the Essex County Prosecutor's Office and for the Philadelphia district attorney, called Mervilus' conviction, successful appeal, retrial and subsequent acquittal "a Halley's Comet occurrence."

"It's a miraculous journey through the criminal justice system for a man who always professed his innocence," he said.

Through a spokesman, Assistant Prosecutor Nathan Hewette-Guyton recounted the case facts and the initial jury's findings, and essentially closed the matter.

"The prosecutor's office stands by its investigation and prosecution but respects the jury's decision," she said.

Mervilus, though, went further.

"The person they need to prosecute is the victim," he said. "The victim is a liar."

Before his arrest, Mervilus was working at an oil distribution company at Port Newark. He was next in line for a promotion, to an oil technician, that would earn him \$25 an hour. He learned to weld, fill tank cars and take and measure chemical readings.

"This is when I say my opportunity was missed," he said.

With his name, photo and list of convictions still on the state's Department of Corrections rolls, Mervilus said it's been difficult to convince would-be employers that he's been found innocent of any crime. It could be months before even his conviction is expunged from the official record.

"Labeled as a thief, no one wants to hire you," he said.

He said he makes about \$8 an hour moving boxes at a Linden distribution company.

Before his retrial, prosecutors offered him a deal: time served, and probation, in exchange for a guilty plea. He refused.

"The truth will always stay the same," he says now. "I don't know the real story. I don't think I'll ever know the real story. I only know I didn't do this crime."

Note: The original version of this article contained two inaccuracies. The offer of a plea deal came before Emmanuel Mervilus's second trial and the misidentification of Mervilus by a witness occurred only in the first trial.

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Exhibit D

Text Only Version NJHome Services A to Z Departments/Agencies State Wide Search

State of New Jersey
Department of Corrections
 "Protecting Public Safety by Changing Offender Behavior"

Commissioner
 Gary M. Lanigan

Divisions of the DOC AgrIndustries Search the DOC

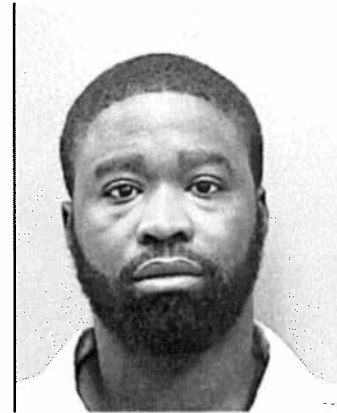
DOC Home Page | Search Form | Escapes | Restrictions

Offender Details:

Printer Friendly Version

Emmanuel Mervilus

SBI Number: 000748602C
 Sentenced as: Mervilus, Emmanuel
 Race: Black
 Ethnicity: Black
 Sex: Male
 Hair Color: Black
 Eye Color: Brown
 Height: 6'0"
 Weight: 211 lbs.
 Birth Date: February 7, 1984
 Admission Date: March 28, 2008
 Current Facility: Released by Court - SWSP
 Current Max Release Date: N/A
 Current Parole Eligibility Date: N/A



CURRENT PRISON SENTENCE

Offense	Offense Date	Sentence Date	County of Commitment	Commitment Order	Mandatory Minimum Term	Maximum Term
1 count of : 2C:12-1B1*2 Assault/Agg-Att/Cause Ser. Bodily Inj /2	October 19, 2006	March 28, 2008	Union	UNN070300231I	None	1 Day
1 count of : 2C:12-1B2*3 Assault/Agg-Att/Cause Injury With Wpn /3	October 19, 2006	March 28, 2008	Union	UNN070300231I	None	1 Day
1 count of : 2C:15-1*1 Robbery /1	October 19, 2006	March 28, 2008	Union	UNN070300231I	None	1 Day
1 count of : 2C:15-1*1 Robbery /1	October 19, 2006	March 28, 2008	Union	UNN070300231I	9 Years 4 Months 5 Days	11 Years

INCARCERATION HISTORY

Date In Custody	Date Out of Custody
March 28, 2008	September 27, 2012

ALIASES

Mervilus, Emmanuel
 Mervelus, Emmanuel
 Mervilus, Emmanuel
 Mervilus, Emanuel
 Mervilus, Emmonvel

previous back to list next
 modify search new search

Criteria Chosen:

First Name = EMMANUEL; Last Name = MERVILUS;

Disclaimer:

The purpose of the Offender Search Web Page is to promote public safety and welfare while providing community access to selected offender information, consistent with the spirit and intent of the New Jersey Open Public Records Act (OPRA).

The New Jersey Department of Corrections updates this information on a biweekly basis to ensure that it is complete and accurate as possible. This information, however, may change quickly. In addition, it is noted that offenders on Work Release, Furlough, or in a Residential Community Program are visible to the public and these types of releases are not necessarily reflected in their profile. Therefore, the information on this site may not reflect the true current location, status, release date or other information regarding an offender.

It should also be noted that the records of offenders who have been paroled or released are not updated after they leave the custody of the correctional facility, therefore, no presumption should be made that any offender listed as paroled from a correctional facility remains under active parole supervision.

Furthermore certain offenders, at the discretion of the New Jersey Department of Corrections and other law enforcement agencies, may be excluded from the web site.

The New Jersey Department of Corrections Database was last updated on November 22, 2014. Visit restrictions change daily.

For questions concerning any offender information available on this WebPage, please contact:

Central Reception & Assignment Facility
 PO BOX 7450
 Trenton, NJ 08625
 email: Central Reception & Assignment Facility

If additional information is required, please direct written inquires to the mailing address listed above.



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Exhibit E

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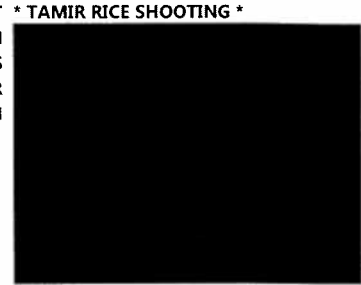
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Who is Emmanuel Mervilus? Was Emmanuel Mervilus arrested? When was Emmanuel Mervilus arrested? What was Emmanuel Mervilus arrested for?



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Race
Ethnicity
Gender
Hair Color
Eye Color
Height "
Weight
Birth date
SBI Number
Admission Date
Current Facility
Current Max Release Date *N/A*
Current Parole Eligibility Date *N/A*

Sentence Information:

Offense	Offense Date	Sentence Date	County of Commitment	Commitment Order	M: Mi Te
2C:12-1B1*2 Assault/Agg- Att/Cause	October 19, 2006	March	Union	UNN070300231I Nc	
2C:12-1B2*3 Assault/Agg- Att/Cause	October 19, 2006	March	Union	UNN070300231I Nc	
2C:15-1*1	October 19, 2006	March	Union	UNN070300231I Nc	
2C:15-1*1	October 19, 2006	March	Union	UNN070300231I Mc Da	

Incarceration History:

Date In Custody Date Out of Custody

Aliases:

-
-
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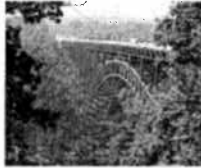
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