

Introduction

Exoneree Emmanuel Mervilus was held in captivity for 1,454 days as a prisoner for a crime he did not commit because the Defendants violated his state and federal constitutional rights. Defendants used unlawful polygraph and identification tactics designed to secure his conviction. These tactics were the Defendants' custom, policy and practice and Defendants knew they were improper and employed them anyway. As a result, Mervilus was convicted and sentenced to eleven years in prison. The majority of Mervilus' time was served at Albert C. Wagner Correctional Facility, dubbed "Gladiator School" because of its violent reputation. Mervilus spent 1,334 days behind bars before New Jersey's Appellate Division reversed his conviction. Mervilus, though, was not released from custody. Though the Union County Prosecutor continuously offered Mervilus time served in exchange for a guilty plea and Mervilus was facing a potential 11 year prison sentence, Mervilus rejected each offer. The Union County Prosecutor then decided to re-try the case, a decision which resulted in Mervilus serving an additional 120 days of jail time. After a full trial, a jury acquitted Mervilus after less than an hour of deliberation. Mervilus was arrested at the age of 22 and exonerated at the age of 29. Throughout the investigation, arrest, trial, appeal and retrial, Mervilus continuously professed his innocence. Now, Mervilus seeks recovery for the wrongs done to him.

Allegations

1. Plaintiff Exoneree Emmanuel Mervilus, residing at 345 South Broad Street, Elizabeth, New Jersey 07202, through his attorneys Gage Spencer & Fleming LLP and Hartmann Doherty Rosa Berman & Bulbulia LLC brings this action alleging generally that Defendants violated Mervilus' constitutional and other rights and as a result Mervilus

was wrongfully held behind bars for 1,454 days. Mervilus brings this action under 42 U.S.C. § 1983, the New Jersey Civil Rights Act, N.J.S.A. § 10:6-1, et seq. (“NJCRA”) and state common law claims against the below listed defendants:

Union County Union County Administration Building 10 Elizabethtown Plaza Elizabeth, New Jersey 07207	Chief of Police Ronald Simon Elizabeth Police Department 1 Police Plaza Elizabeth, New Jersey 07201	Edward Benenati Elizabeth Police Department 1 Police Plaza Elizabeth, New Jersey 07201
The City of Elizabeth Clerk, Elizabeth City Hall, East Scott Place Elizabeth, New Jersey 07201	John Kaminkas c/o Union County Prosecutor’s Office 32 Rahway Avenue Elizabeth, New Jersey 07201	Robert Perez Elizabeth Police Department 1 Police Plaza Elizabeth, New Jersey 07201
New Jersey Attorney General RJ Hughes Justice Complex 25 Market Street, Box 080 Trenton, New Jersey 08625-0080	c/o Union County Police Department 300 North Avenue East Westfield, New Jersey 07090	Michael Barros Elizabeth Police Department 1 Police Plaza Elizabeth, New Jersey 07201
Union County Prosecutor Theodore J. Romankow Union County Prosecutor’s Office 32 Rahway Avenue Elizabeth, New Jersey 07201	Nathan Hewette-Guyton Union County Prosecutor’s Office 32 Rahway Avenue Elizabeth, New Jersey 07201	Lydia Martinez Elizabeth Police Department 1 Police Plaza Elizabeth, New Jersey 07201
Chief of Police Daniel Vaniska Union County Police Department 300 North Avenue East Westfield, New Jersey 07090		

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EMMANUEL MERVILUS,
Plaintiff

V.

SUMMONS IN A CIVIL CASE

UNION COUNTY, ET AL.,
Defendant

CASE NUMBER: **2:14-CV-07470-ES-MAH**

TO: *(Name and address of Defendant):*

Union County
Union County Administration
Building 10 Elizabethtown Plaza
Elizabeth, New Jersey 07207

UNION COUNTY COUNSEL
RECEIVED
JAN 14 2015
ADMINISTRATION BUILDING
ELIZABETH, NJ

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States Agency, or an office or employee of the United States described in Fed. R. civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Tal Z. Cushmaro (NJ Attorney ID: 090312013)
Hartmann Doherty Rosa Berman & Bulbulia LLC
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jevans@gagespencer.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

WILLIAM T. WALSH

CLERK

STEPHEN BOND

(By) DEPUTY CLERK



ISSUED ON 2014-12-02 14:05:22, Clerk
USDC NJD

RETURN OF SERVICE		
Service of the Summons and complaint was made by me(1)	DATE	
NAME OF SERVER (<i>PRINT</i>)	TITLE	
<i>Check one box below to indicate appropriate method of service</i>		
<input type="checkbox"/> Served personally upon the defendant. Place where served: _____ _____		
<input type="checkbox"/> Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.		
<input type="checkbox"/> Name of person with whom the summons and complaint were left: _____		
<input type="checkbox"/> Returned unexecuted: _____ _____		
<input type="checkbox"/> Other (specify) : _____ _____ _____		
STATEMENT OF SERVICE FEES		
TRAVEL	SERVICES	TOTAL
DECLARATION OF SERVER		
<p>I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.</p>		
Executed on	_____	_____
	Date	<i>Signature of Server</i>

		<i>Address of Server</i>

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Attorneys for Plaintiff Exoneree Emmanuel Mervilus

**United States District Court
District of New Jersey**

Emmanuel Mervilus,

Plaintiff,

-against-

Union County, The City of Elizabeth, The Attorney
General of the State of New Jersey, Theodore J.
Romankow, Daniel Vaniska, Ronald Simon, John
Kaminskas, Nathan Hewette-Guyton, Edward Benenati,
Robert Perez, Michael Barros, Lydia Martinez and John
Doe Identification Officers,

Defendants.

Civil Action No.:

Civil Action

**Verified Civil Rights
Complaint With Jury
Demand and Designation
of Trial Counsel**

Introduction

Exoneree Emmanuel Mervilus was held in captivity for 1,454 days as a prisoner for a crime he did not commit because the Defendants violated his state and federal constitutional rights. Defendants used unlawful polygraph and identification tactics designed to secure his conviction. These tactics were the Defendants' custom, policy and practice and Defendants knew they were improper and employed them anyway. As a result, Mervilus was convicted and sentenced to eleven years in prison. The majority of Mervilus' time was served at Albert C. Wagner Correctional Facility, dubbed "Gladiator School" because of its violent reputation. Mervilus spent 1,334 days behind bars before New Jersey's Appellate Division reversed his conviction. Mervilus, though, was not released from custody. Though the Union County Prosecutor continuously offered Mervilus time served in exchange for a guilty plea and Mervilus was facing a potential 11 year prison sentence, Mervilus rejected each offer. The Union County Prosecutor then decided to re-try the case, a decision which resulted in Mervilus serving an additional 120 days of jail time. After a full trial, a jury acquitted Mervilus after less than an hour of deliberation. Mervilus was arrested at the age of 22 and exonerated at the age of 29. Throughout the investigation, arrest, trial, appeal and retrial, Mervilus continuously professed his innocence. Now, Mervilus seeks recovery for the wrongs done to him.

Allegations

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was wrongfully held behind bars for 1,454 days. Mervilus brings this action under 42 U.S.C. § 1983, the New Jersey Civil Rights Act, N.J.S.A. § 10:6-1, et seq. (“NJCRA”) and state common law claims against the below listed defendants:

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Chief of Police Daniel Vaniska Union County Police Department 300 North Avenue East Westfield, New Jersey 07090		

A. Parties¹

2. Plaintiff Exoneree Emmanuel Mervilus is a citizen of the State of New Jersey.

3. Defendant New Jersey Attorney General² (“A.G.”), at all relevant times was responsible for supervising and training in the Union County Prosecutor’s Office (“UCPO”), Union County Police Department (“UCPD”) and Elizabeth Police Department (“EPD”) and the employees and contractors therein, in relation to law enforcement activities, including the investigation and prosecution of Mervilus. The A.G. is responsible for initiating and monitoring the law enforcement customs, policies and practices at the UCPO, UCPD and EPD. The A.G.’s decisions are final and unreviewable. At all relevant time periods, the A.G. had supervisory responsibilities overseeing all aspects of the investigation and prosecution of Mervilus. The A.G. is sued in his/her personal and official capacities.

4. Defendant Theodore J. Romankow (“Union County Prosecutor”) was the Union County Prosecutor during the relevant time period. At all relevant times the Union County Prosecutor supervised the UCPO and its prosecutors, detectives, investigators, support staff and other employees. The Union County Prosecutor is responsible for initiating and monitoring customs, policies and practices at the UCPO. The Union County Prosecutor’s decisions are final and unreviewable. As per the Union County

¹ “Defendants” shall refer to all of the Defendants collectively.

² New Jersey had different Attorney Generals during the relevant time period. The Attorney Generals during the relevant time period were Stuart Rabner (2006-2007), Anne Milgram (2007-2010), Paula T. Dow (2010-2011) and Jeffery S. Chiesa (2012-2013). Throughout this complaint a reference to “A.G.” means the New Jersey Attorney General during the time referenced.

website, the Union County Prosecutor is “the county’s chief law enforcement officer.”³ The Union County Prosecutor had supervisory responsibilities overseeing all aspects of the investigation and litigation against Mervilus. The Union County Prosecutor is sued in his personal and official capacities.

5. Defendant Daniel Vaniska (“UCPD Chief”) was the Chief of Police at the UCPD during the relevant time period. At all relevant times, the UCPD Chief was responsible for the supervision and training of the UCPD and its police, detectives, investigators and other employees. The UCPD Chief is responsible for initiating and monitoring customs, policies and practices at the UCPD. The UCPD Chief’s decisions are final and unreviewable. The UCPD Chief had supervisory responsibility overseeing all aspects of the investigation of Mervilus. The EPD Chief is sued in his personal and official capacities.

6. Defendant Union County (“Union County”) is the municipal entity that, at all relevant times, exercised authority over the UCPD and UCPO. The UCPD and UCPO are administrative, executive and enforcement functions of Union County. Union County is responsible for establishing customs, policies, procedures, training, supervision and other supervisory roles over the UCPD and UCPO and its employees and contractors. Union County is responsible for the injuries to Mervilus because municipal employees (the members of the UCPD and UCPO described herein) acted under a formal government custom, policy and practice to deprive the accused of their constitutional rights. Also, the members of the UCPD and UCPO described herein consistently unconstitutionally

³ County of Union, New Jersey, *Prosecutor’s Office*, <http://web.archive.org/web/20110419210454/http://ucnj.org/government/prosecutor/> (this was the website on April 19, 2011, when Theodore J. Romankow was the Union County Prosecutor).

performed their jobs, and the Union County Prosecutor and the UCPD Chief were aware and ratified the unconstitutional behavior. Union County acted with deliberate indifference to the rights of the accused.

7. Defendant Ronald Simon (“EPD Chief”) was the Chief of Police at the EPD during the relevant time period. At all relevant times, the EPD Chief was responsible for the supervision and training of the EPD and its police, detectives, investigators and other employees. The EPD Chief is responsible for initiating and monitoring customs, policies and practices at the EPD. The EPD Chief’s decisions are final and unreviewable. The EPD Chief had supervisory responsibility overseeing all aspects of the investigation of Mervilus. The EPD Chief is sued in his personal and official capacities.

8. Defendant City of Elizabeth (“Elizabeth”) is the municipal entity that, at all relevant times, exercised authority over the EPD. The EPD is an administrative, executive and enforcement function of Elizabeth. Elizabeth is responsible for establishing customs, policies, procedures, training, supervision and other supervisory roles over the EPD and its employees and contractors. Elizabeth is responsible for the injuries to Mervilus because municipal employees (the members of the EPD described herein) acted under a formal government custom, policy and practice to deprive the accused of their constitutional rights. Also, the members of the EPD described herein consistently unconstitutionally performed their jobs, and the EPD Chief was aware and ratified the unconstitutional behavior. Elizabeth acted with deliberate indifference to the rights of the accused.

9. Lieutenant John Kaminskas administered the polygraph exam and gave the polygraph-related testimony in Mervilus’ trial. Lt. Kaminskas was acting under color of law under the policies and customs of the A.G., Union County Prosecutor, UCPD

Chief, Union County, EPD Chief and Elizabeth. Lt. Kaminskas is sued in his personal and official capacities.

10. Defendant Nathan Hewette-Guyton was the assistant district attorney that prosecuted Mervilus and continued prosecuting him after his case was overturned. Hewette-Guyton was employed by the UCPO and acted toward Mervilus under color of statutes, ordinances, customs, and usage of the Union County Prosecutor, the A.G. and Union County. Hewette-Guyton is sued in his personal and official capacities.

11. Defendant Officer Edward Benenati is a police officer employed by the EPD. He acted towards Mervilus under color of the statutes, ordinances, customs and usage of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth. Benenati signed the Investigation Report related to the October 19, 2006 incident (“Investigation Report”). Benenati was also the arresting officer. Benenati participated in the Photo Identification Procedure. Benenati is sued in his personal and official capacities.

12. Defendant Detective Robert Perez is a police officer employed by the EPD. Perez acted towards Mervilus under color of the statutes, ordinances, customs and usage of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth. Perez questioned Miguel Abreu, Perez is listed on the top right hand corner of the Investigation Report and he signed the Voluntary Statement on October 26, 2007 (“Voluntary Statement”). Perez participated in the Photo Identification Procedure. Perez is sued in his personal and official capacities.

13. Defendant Officer Michael Barros is a police officer employed by the EPD. Barros acted towards Mervilus under color of the statutes, ordinances, customs and usage of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and

Elizabeth. Barros acted within the scope of his employment. Barros was at the scene of Mervilus' arrest. Barros is listed as a signatory of the Investigation Report. Barros participated in the Photo Identification Procedure. Barros is sued in his personal and official capacities.

14. Defendant Lydia Martinez is a police officer employed by the EPD. Martinez acted towards Mervilus under color of the statutes, ordinances, customs and usage of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth. Martinez was the typist of the "Voluntary Statement." Martinez knowingly participated in the Photo Identification Procedure. Officer Martinez is sued in her personal and official capacities.

15. Defendants John Doe Identification Officers are other law enforcement personnel involved in the Photo Identification Procedure. The names of such officers are currently unknown. Each John Doe Identification Officer acted towards Mervilus under color of the statutes, ordinances, customs and usage of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth. Each John Doe Identification Officer is sued in his/her personal and official capacities.

B. Jurisdiction and Venue

16. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 and 28 U.S.C. § 1343 because the claims arise under 42 U.S.C. § 1983.

17. This Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) over the related New Jersey Civil Rights ("NJCR") N.J.S.A. § 10-6, et seq. claims and other state common law actions because they arise out of the same common nucleus of operative fact as the federal civil rights claims.

18. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) because all defendants reside in New Jersey; and (2) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

19. This Court has personal jurisdiction over the Defendants because the Defendants have maintained systematic and continuous contacts with New Jersey. Additionally, the claim arises from and relates to conduct performed within New Jersey.

C. Procedural History: Investigation, Trial, Conviction, Reversal, Retrial, Acquittal

20. On October 19, 2006, Mervilus, then 22 years old, was arrested and charged with first degree robbery, N.J.S.A. § 2C:15-1, aggravated assault, N.J.S.A. § 2C:12-1(b) and possession of a weapon, N.J.S.A. § 2C:39-4(d). Mervilus pleaded not guilty to all of the charges against him. Unable to post the \$100,000 bail, Mervilus was held in the Union County Jail.

21. The Union County Prosecutor and Hewette-Guyton's theory of the case was that Mervilus held a man while he was robbed and stabbed. The allegations are not true.

22. During the investigation, Benenati, Barros, Perez, Martinez and John Doe Identification Officers used a suggestive Photo Identification Procedure where pictures of only two Black suspects were shown (just Mervilus and his co-defendant Daniel Desire) to Miguel Abreu, the Union County Prosecutor and Hewette-Guyton's only eye-witness.

23. In March of 2007, Mervilus was indicted.

24. On May 25, 2007, Mervilus, professing his innocence, stipulated to a polygraph examination.

25. On May 27, 2007, Lt. Kaminskas administered a polygraph exam to Mervilus using a polygraph machine called the Axciton Computerized Polygraph (“Axciton”).

26. On or around June 12, 2007, Mervilus, still awaiting trial, posted bail.

27. Mervilus was incarcerated continuously by the Union County Department of Corrections, in the Union County Jail, from October 19, 2006 through on or about June 12, 2007.⁴

28. Mervilus refused any plea deals offered by the Union County Prosecutor and Hewette-Guyton. Mervilus maintained his innocence throughout the investigation and litigation.

29. At trial, the Union County Prosecutor and Hewette-Guyton’s only eye-witness, complaining witness Miguel Abreu, could not identify Mervilus. Instead, Abreu identified a Black male sitting in the gallery observing the Court proceedings.⁵

30. The Union County Prosecutor and Hewette-Guyton elicited unlawful polygraph testimony from its regular polygraph examiner and witness Lt. Kaminskas. Lt. Kaminskas, in turn, gave false testimony at trial that was inappropriately and purposefully designed to convince the jurors that polygraph tests were infallible and to secure a conviction.

31. On February 14, 2008, Mervilus was convicted of first degree robbery, N.J.S.A. § 2C:15-1, and aggravated assault, N.J.S.A. § 2C:12-1(b)(1), (2). Mervilus was

⁴ This is a total of approximately 237 days.

⁵ “Both sides stipulated before the jury that this individual was not the co-defendant, Daniel Desire.” *State v. Mervilus*, 418 N.J. Super 138, 141 n. 4 (App. Div. 2011).

immediately remanded to the custody of the Union County Department of Corrections in the Union County Jail.

32. On March 28, 2008, at Mervilus' sentencing hearing, the Union County Prosecutor and Hewette-Guyton argued for an extended period of incarceration as punishment. The Honorable Douglas M. Fasciale, J.S.C. imposed an eleven-year sentence, a period of parole ineligibility under the "No Early Release Act," N.J.S.A. § 2C:43-7.2, for eight-five percent (85%) of the term,⁶ and \$530 in fees and fines.

33. This severe sentence was imposed, in part, because of Mervilus' lack of remorse. At sentencing, Mervilus stated in substance: "I feel sorry for what happened to him, but how can I be remorseful for a crime I didn't commit?"⁷

34. Mervilus was in the custody of the Union County Department of Corrections in the Union County Jail from February 2008 until May of 2008. In May of 2008, Mervilus was transferred to the Albert C. Wagner Correctional Facility (more commonly known as "Gladiator School") under the custody of the New Jersey Department of Corrections.

35. During Mervilus' time at "Gladiator School" he was regularly assaulted by other inmates, including gang members and gang affiliates. Mervilus did not associate and was not part of any gangs or organizations and he believes that as a result of his non-affiliation, he was often forced to physically defend himself.

36. In January of 2011, Mervilus was transferred to South Woods State Prison in Bridgeton, New Jersey under the custody of the New Jersey Department of Corrections.

⁶ This is a mandatory minimum prison term of 9 years, 4 months and 5 days.

⁷ This is not an exact quote.

37. While Mervilus was incarcerated, he saved his receipts for his commissary purchases. He was always intent on proving his innocence, clearing his name and bringing a civil suit to recover for the wrongs done to him, including the money he spent on commissary.

38. After over three years in prison, on February 15, 2011, Mervilus' conviction was reversed because "improper polygraph evidence was prejudicial error warranting reversal." *State v. Mervilus*, 418 N.J. Super 138, 147 (App. Div. 2011).⁸

39. Mervilus was not aware that his case had been reversed until April of 2011 when he was transferred from the South Woods State Prison to the Union County Jail.

40. Before the reversal, in Mervilus' co-defendant's trial, which Hewette-Guyton also tried, eyewitness testimony proved that Mervilus was not present at the scene of the crime. Nevertheless, the Union County Prosecutor and Hewette-Guyton immediately decided to continue prosecuting Mervilus. Though his conviction had been reversed, Mervilus was not released from custody.

41. Mervilus remained in the custody of the Union County Department of Corrections, in the Union County Jail, awaiting trial, until June. This caused Mervilus to serve an additional 120 days of jail time.

42. On or around June 14, 2011, Mervilus was able to post bail and was released from custody.

43. Mervilus was incarcerated continuously by the State of New Jersey Department of Corrections and the Union County Department of Corrections from February 14, 2008 through on or around June 14, 2011.⁹

⁸ The opinion has been attached as **Exhibit A**.

44. The Union County Prosecutor and Hewette-Guyton continuously offered Mervilus time served and three years of parole in exchange for a guilty plea. Mervilus rejected each offer. Mervilus, though facing eleven years in prison, refused to plead guilty to a crime he did not commit.

45. On January 18, 2013, after a full trial, and roughly thirty minutes of jury deliberation, Mervilus was acquitted of all charges. After 1,454 days behind bars Mervilus had been exonerated.

D. Exoneree Emmanuel Mervilus is Innocent

46. Though Mervilus has been fully exonerated it is important to note that he is innocent, too.

47. The Union County Prosecutor and Hewette-Guyton represented that on October 19, 2006, Mervilus held the complaining witness Abreu from behind while Daniel Desire cut him. During the alleged altercation, Abreu's backpack was stolen. Abreu waved down an EPD vehicle and complained that he had been robbed and cut. He pointed to two Black males on the street, one of them was Mervilus.

48. During the time of the alleged altercation Mervilus was not at the scene of the crime and was not involved in any altercation. Mervilus was a few blocks away speaking with two people. When Benenati, Perez and Barros came to arrest Mervilus, he explained that he was not involved in any altercation.

49. Desire was arrested with Mervilus on October 19, 2006.

50. At Desire's trial, witness Gary Augustine testified that Mervilus was not involved in the altercation and was not at the scene of the crime.

⁹ This was a total period of approximately 1,217 days.

51. According to Augustine's testimony, Augustine himself was involved in the altercation.

52. Augustine explained that four people were involved in the altercation: Gary Augustine, Daniel Desire, Miguel Abreu and a Spanish male who was with Miguel Abreu. Not Mervilus.

53. The EPD never arrested Augustine.

54. The Union County Prosecutor never charged Augustine.

55. The Appellate Court that reversed Mervilus' conviction outlined the lack of evidence in the Union County Prosecutor and Hewette-Guyton's case: "[t]he police came on the scene after the assault, and the State's case hinged to a great degree on the victim's testimony." *Mervilus*, 418 N.J. Super. at 147. "The victim claimed to have gotten a good look at the assailants but misidentified a courtroom spectator as being one of the robbers, and he could not identify the defendant in the courtroom." *Id.* "A knife was found moments after the stabbing, but it bore no traces of blood and no fingerprints." *Id.* "The State stipulated that tests performed on the knife revealed no blood or fingerprints." *Id.* at 143 n. 6.

56. There was no legitimate identification of Mervilus, testimony shows that Mervilus was not involved in the altercation and the knife found on the ground was never tied to Mervilus or any of the other people involved in the altercation.

57. Nevertheless, Mervilus was arrested by Benenati, Barros and Perez on October 19, 2006 when he was 22 years old. On January 18, 2013, at the age of 29, he was finally exonerated.

E. Unlawful Polygraph Tactics Deprived Mervilus of His Rights and Enabled the Defendants to Obtain a Wrongful Conviction

58. Notwithstanding the guilty verdict in his first trial, Mervilus is innocent. Below are the wrongful, unlawful and unconstitutional polygraph tactics the Defendants employed to obtain a conviction.

1. Polygraph Exams: An Investigative Tool That Is Fraught With the Risk of Constitutionally Cognizable Harm to the Accused

59. Polygraph exams are fraught with the risk of constitutionally cognizable harm to the accused. The allegations that follow explain the risks. Also, this section provides the backdrop for the reasons why the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were aware and should have been aware that there were improper polygraph-related customs, policies and practices being employed by law enforcement.

60. There are two primary constitutional risks when law enforcement uses polygraph exams: (1) polygraph exams are unreliable; and (2) it is likely that jury members will place undue weight on its results. Because of this potentially disastrous combination of risks, the misuse of polygraph exams is even more troubling.

61. The constitutional cognizable risk of using polygraph exams is so high that supervisors have a heightened supervisory and training responsibility if they choose to implement this risky investigative tool.

62. Lt. Kaminskas used the Axciton Computerized Polygraph when he questioned Mervilus.

63. The Axciton, like most polygraph machines, observes three characteristics: cardio, sweat glands and breathing reactions.

64. According to the Axciton website, “when a person lies, they are afraid of being caught in a lie, and they respond with generally increased heart rate, sweating, and complexly suppressed breathing.”¹⁰ This is the unproven assumption that underlies the problems related to the reliability of polygraph exams. Basically, if a subject sweats, changes breathing patterns and has heightened blood pressure the Axciton will determine that a subject is being “deceptive.”

65. When administering Axciton exams, polygraphers will ask a series of “control” and “pertinent” questions. An example of a “control” question is “what is your name?” An example of a “pertinent” question is “did you commit a robbery?” The polygrapher would then attempt to measure the difference in the subject’s heart rate, sweating and breathing when answering the questions.

66. “As certain empirical evidence has shown, however, there is substantial variation in how individuals respond physiologically when they are lying or telling the truth, and the responses that humans produce in such situations are not specific to either deception or truth-telling.” *State v. A.O.*, 198 N.J. 69, 91 (2009).

67. Thus, the polygraph exam has unfortunately and wrongly been dubbed a “lie-detector” test, when in fact, it only measures three characteristics. It has yet to be proven that those three factors alone can determine truthfulness. Polygraph exams cannot conclusively identify “lying” or “truth-telling.”

68. A number of courts, including the New Jersey Supreme Court and the United States Supreme Court have opined on the unreliability of polygraph examinations and their heightened risk of constitutional harm to the accused.

¹⁰ AXCITON SYSTEMS, *What is a Polygraph?*, <http://www.axciton.com/whatispolygraph.htm> (copyright 2006) (last visited November 24, 2014).

69. In another case where Lt. Kaminskas testified—which was overruled because of the admission of his polygraph testimony—the Supreme Court of New Jersey outlined the weaknesses and unreliability of polygraph exams. *State v. A.O.*, 198 N.J. 69, 83 (2009).

70. “Serious questions about the reliability of polygraph evidence remain.” *A.O.*, 198 N.J. at 83 citing *State v. Domicz*, 188 N.J. 285, 313 (2006) (before Mervilus’ trial and investigation).

71. “Polygraph exams rely on two assumptions: (1) that deception triggers certain emotional states; and (2) that those emotional states produce specific, measurable physiological changes in the body.” *Id.* at 91.

72. There are substantial variations in how individuals respond physiologically when they are lying or telling the truth, and the responses that humans produce in such situations are not specific to either deception or truth-telling. *Id.* at 92.

73. “Some studies suggest that the accuracy rate is ‘little better than could be obtained by the toss of a coin.’” *Id.*

74. “Nonetheless, to many citizens who serve on juries, polygraph evidence—presented by experts and arrayed in scientific language—has an aura of infallibility.” *Id.* “Compounding these questions about reliability is the fact that many lay people tend to view polygraph evidence as bordering on infallible.” *Id.* at 91. “Thus, potentially unreliable polygraph evidence may receive undue weight and distract jurors from judging the credibility of witnesses directly.” *Id.*

75. The Supreme Court of the United States noted “there is simply no way to know in a particular case whether a polygraph examiner’s conclusion is accurate, because

certain doubts and uncertainties plague even the best polygraph exams.” *Id.* at 86 citing *United States v. Scheffer*, 523 U.S. 303 (1998).

76. “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.’” *A.O.*, 198 N.J. at 91.

77. It is not just New Jersey that has polygraph-related problems. “Polygraphs and 250 Wrongful Conviction Exonerations” outlines 250 cases—of which Mervilus’ case is included—where exonerees’ constitutional rights were violated by the use (and misuse) of polygraph exams.¹¹

78. “The vast majority of states either ban polygraph evidence altogether or do not admit such evidence absent a stipulation between the State and defendant.” *Id.* at 84. “Twenty-eight states bar admission of polygraph evidence outright, eighteen states limit the admission of polygraph evidence to cases where both parties stipulate to its use.” *Id.* “Only New Mexico allows the admission of polygraph exams results without stipulation.” *Id.*

79. “Underscoring the widespread skepticism about the polygraph’s reliability, four states—Massachusetts, Wisconsin, North Carolina and Oklahoma—have experimented with allowing the admission of polygraph evidence for a number of years, only to reject the practice and reinstate the traditional rules of inadmissibility.” *Id.* at 85.

80. “As a general rule, polygraph results are not admissible in evidence in New Jersey.” *Id.* at 83.

¹¹ Morrison Bonpasse, *Polygraphs and 250 Wrongful Conviction Exonerations* (2013), available at http://www.academia.edu/5837477/Polygraphs_and_250_Wrongful_Conviction_Exonerations.

81. Thus, polygraph exams pose a great risk to the accused, and those tasked with supervisory law enforcement roles have a heightened responsibility to supervise and train their subordinates should they choose to employ this constitutionally risky investigative tactic.

82. The risk of constitutionally cognizable harm is so great and so obvious that the failure of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth to respond to its misuse alone supports the findings of the existence of unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it.

2. Defendants Employed Polygraph Tactics Designed to Wrongfully Convict Mervilus

83. The accused in New Jersey are being subjected regularly to the misuse and abuse of polygraph examinations. Mervilus is a victim.

84. Despite the scientific proof that polygraph exams only measure three characteristics in a subject's response and the Supreme Court opining that "[s]ome studies suggest that the accuracy rate is 'little better than could be obtained by the toss of a coin'" (*Domicz*, 188 N.J. 285, 31) in Mervilus' trial "[u]nder questioning by the prosecutor, Kaminskas gave testimony designed to inappropriately show that polygraph tests are infallible." *Mervilus*, 418 N.J. Super. at 147.

85. "Kaminskas' improper testimony" raises concerns because "jurors would perceive polygraph evidence as infallible and would give it disproportionate weight in deciding to convict or acquit a defendant." *Id.* at 145. "Adding to the mix the serious questions about the reliability of polygraph evidence, its misuse is all the more troubling." *Id.*

86. Lt. Kaminskas' testimony was also designed to convince jurors that Mervilus was guilty and that the polygraph had already determined that Mervilus was guilty. *See id.* at 146. The Axciton—or any other polygraph machine—cannot determine guilt or establish innocence.

87. Lt. Kaminskas' improper tactics included stating that polygraph tests are designed to separate the innocent from the guilty, presenting his opinion that Mervilus was guilty, and wrongly communicating that law enforcement agencies believe innocent people will pass and guilty people will fail a lie detector test. *See id.* at 145-7. Each of these theories are untrue, unproven and an unconstitutional presentation of the results of a polygraph examination.

88. It is clear New Jersey law that polygraph exam results are only admissible if a subject stipulates to a polygraph examination and its admissibility *and* the prosecution can establish that the results should be admitted in a pre-trial hearing. This pre-trial hearing is called a N.J.R.E. 104 hearing. In a N.J.R.E. 104 hearing the prosecution bears the burden of proving the omnibus issue of whether the polygraph evidence should be admitted which includes that the polygraph machine was working properly, that it was administered properly, and that the results are “generally accepted, within the relevant scientific community, to be reliable.” *Mervilus*, 418 N.J. Super. at 148.

89. Mervilus was not afforded a N.J.R.E. 104 hearing at all, thus the polygraph results and testimony was admitted without the Union County Prosecutor and Hewette-Guyton ever having to carry this burden.

90. The exam results that Lt. Kaminskas generated were improper.

91. The examination reportedly occurred on May 25, 2007 for nearly two hours from 10:23 AM through 12:17 PM.

92. Despite the exam being over two hours long, Lt. Kaminskas only reported four “pertinent” questions in a report that spanned little more than one page.

93. Here, the “control” questions were not listed so Mervilus, his attorney and the Court were unable to review and determine whether the mix and the method of the “control” questions to the “pertinent” questions was a proper administration of the Axciton exam.

94. Lt. Kaminskas, in his three sentence “results” section condemning Mervilus, writes “therefore, it is the opinion of this polygraphist that he answered these test questions in an untruthful manner.” The Axciton can reach no such result. Any properly trained polygrapher would know that.

95. Ultimately, “admission of the improper polygraph evidence was prejudicial error warranting reversal of defendant’s conviction.” *Id.*

3. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth Knew and Should Have Known of the Improper Polygraph-Related Custom, Policy and Practice Used to Convict the Accused and Approved its Misuse

96. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth knew of the improper polygraph-related customs, policies and practices that were used to convict Mervilus and yet, they did nothing to stop it.

97. There was a custom, policy and practice in place designed to (a) get the accused to stipulate to a polygraph examination; (b) conduct trial without a N.J.R.E. 104 hearing; (c) present false testimony designed to convince the jury that polygraphs are infallible; (d) present improper polygraph testimony that champions to the jury that the

polygrapher believes the accused is guilty in order to inappropriately sway the jury to convict the accused. Mervilus fell victim to this unlawful custom, policy and practice.

98. This is not the first time in Union County that improper polygraph examinations and testimony caused wrongful convictions. And it is not the first time that Lt. Kaminskas was the polygrapher in a case where an accused was wrongfully convicted because of his testimony.

99. The same officer who testified against Mervilus, Lt. Kaminskas, caused other reversals in Union County.

100. These Kaminskas reversals happened *before* Mervilus' trial. Therefore the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth knew and should have known about Kaminskas' improper tactics and the need to train and supervise him further.

101. In *State v. A.O.*, another reversal where Lt. Kaminskas testified, the conviction was reversed because the defendant was not afforded a N.J.R.E. 104 hearing. 297 N.J. Super. 8 (App. Div. Nov. 27, 2007) *aff'd* 198 N.J. 69 (2009). The Union County Prosecutor highlighted Lt. Kaminskas' inappropriate and prejudicial testimony including: "the results were '100 percent accurate' and 'the machine said [defendant] lied.'" *Id.* at 19. This Appellate Division case was decided before Mervilus' trial and wrongful conviction, and subsequently was affirmed by the New Jersey Supreme Court. The Appellate Division in Mervilus' case referenced *A.O.*: "Kaminskas' improper testimony also implicated the very concerns that the Court expressed in *A.O.*" *Mervilus*, 418 N.J. Super. at 145.

102. In *State v. Brown*, a conviction was reversed where Lt. Kaminskas and the Union County Prosecutor "in effect used the polygraph evidence to 'prejudicially

bolster' the truth of defendant's confession when the defense was attempting to show that defendant falsely confessed." No. A-5662-01T4, 2005 N.J. Super. Unpub. LEXIS 739, at *27 (App. Div. Sep. 21, 2005). "This is impermissible." *Id.* The Court was "convinced that defendant's substantive rights were affected." *Id.* This case was decided before Mervilus' trial and wrongful conviction.

103. The accuracy of Lt. Kaminskas' polygraph exams has also been called into question. *State v. Charles*, No. A-1039-10T3, 2011 N.J. Super. Unpub. LEXIS 2136 (App. Div. Aug. 8, 2011) ("[w]e agree that the report of defendant's expert, Meyer, calls into question the accuracy of some of the results reported by Detective Kaminskas." Ultimately, the 2004 conviction in this case was confirmed on appeal and the decision was published after Mervilus' trial).

104. It is important to note that because of the significant hurdles inmates face when trying to reverse convictions, there may be many others who fell victim to the same wrongdoings but were unable to reverse their convictions.

105. Thus, the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were aware that the polygraph tactics being employed were improper yet they continued to proceed with the same administrator and procedure.

106. Lt. Kaminskas' false testimony at trial demonstrates a complete misunderstanding of the reliability and ability of a polygraph exam.

107. Lt. Kaminskas' false testimony evidences the lack of training and supervision by the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth.

108. Lt. Kaminskas' testimony was so wrong, deceitful and unsupported that no reasonably trained polygraph examiner could have given such testimony in good faith.

109. Thus, the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth were aware and should have been aware of the risk of constitutional harm, and yet, did nothing about it.

110. A polygraph exam is a far cry from being 100 percent accurate and testimony of that nature supports the lack of proper training of Lt. Kaminskas and his personal culpability for violating Mervilus' constitutional rights.

111. The Union County Prosecutor and Hewette-Guyton championed Lt. Kaminskas improper testimony in *A.O.*: “[a]nd [Kaminskas is] 100 percent accurate . . . [Defendant] denies these allegations and he thinks [he can] fool the machine.” *Id.* at 77. “Guess what?” *Id.* “He can’t.” *Id.* “The machine said he lied.” *Id.* After a miscarriage of justice like the testimony and arguments made in *A.O.*, the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief, Elizabeth, and certainly Lt. Kaminskas were on notice that the polygraph-related customs, policies and practices being employed were constitutionally improper. But no one did anything to change it.

112. Even though Defendants' ill-gotten conviction against *A.O.* was reversed, they used the same antics against Mervilus.

113. No properly trained polygraph examiner would (in good faith) give testimony like: “[the polygraph test is] not just a lie detector [but] also a truth indicator.” *Mervilus*, 418 N.J. Super. at 142. Any reasonably competent polygraph examiner would know that statement is not true and is unsupported. If the A.G., Union County Prosecutor,

UCPD Chief, Union County, EPD Chief and Elizabeth properly trained Lt. Kaminskas then he would know that is incorrect.

114. Despite the number of studies and court opinions to the contrary, Lt. Kaminskas purposely misled the jurors about the infallibility of the exam by testifying 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.’” *Id.*

115. Lt. Kaminskas also described a “guilty” suspect as being ‘a little more anxious . . . because they know that the truth is going to be found out.’” *Id.*

116. On August 17, 2000, in an article in the Cranford Chronicle, Lt. Kaminskas made a misleading statement that mirrors his testimony, six years later, in Mervilus’ trial. “I trust the instrument completely,” said Lt. Kaminskas “they are very accurate—95 percent in most studies.”¹² The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth should have been aware of the undue weight and misleading statements being made regarding polygraph exams and the need for training and supervision.

117. As further evidence of Lt. Kaminskas’ constitutional violations, and the failure to supervise and train him by the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth the polygraph exam results demonstrate unwarranted findings.

118. Lt. Kaminskas, in his three sentence “results” section condemning Mervilus, writes “therefore, it is the opinion of this polygraphist that he answered these test

¹²Dara Meoli, *Inspectors’ gadgets*, CRANFORD CHRONICLE, August 17, 2000, at B-1 *available at* http://archive.cranfordlibrary.org:8080/CranfordChronicle/1993/1993-08-17/pg_0007.pdf. A copy has been attached as Exhibit B.

questions in an untruthful manner.” The Axciton can reach no such result. Any properly trained polygrapher would know that.

119. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth failed to supervise and failed to train Lt. Kaminskas.

120. Lt. Kaminskas knew his conduct was unlawful, yet he chose to violate Mervilus’ constitutional rights anyway. Mervilus suffered a grave injury because of this violation: he served 1,465 days behind bars as an innocent man.

121. Lt. Kaminskas has a track record of false testimony, he has testified in hundreds of trials in Union County, and despite his failings, including the other reversed cases, he continues to be employed and used by the Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth.

122. Thus, upon information and belief, there are a large number of inmates who, unlike Mervilus, could not reverse their convictions and are currently incarcerated because of the unlawful polygraph-related custom, policy and practice being implemented by Lt. Kaminskas, Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth. These unlawful polygraph-related customs, practices and policies are being approved by the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth.

F. Benenati, Barros, Perez, Martinez and John Doe Identification Officers Knowingly Manufactured an Identification by Employing the Custom, Policy and Practice of Using an Unlawful Photo Identification Procedure to Enable the Union County Prosecutor and Hewette-Guyton to Convict Mervilus

123. Abreu was asked to identify his alleged assailant three times: (1) a suggestive “show-up” identification; (2) an unconstitutional Photo Identification Procedure; and (3) an in-court identification where Abreu identified a spectator instead of Mervilus.

124. Mervilus' constitutional rights were violated because the identification procedures employed and/or endorsed by Benenati, Perez, Barros, Martinez, John Doe Identification Officers, the Union County Prosecutor, Hewette-Guyton, A.G., UCPD Chief, Union County, EPD Chief and Elizabeth were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. And Mervilus was misidentified.

125. Unlawful identification tactics caused Mervilus to be wrongly identified as the assailant and wrongly convicted at trial. Described below is the custom, policy and practice related to the unlawful Photo Identification Procedure tactics used to obtain Mervilus' conviction.

1. The Unlawful Photo Identification Procedure Used to Convict Mervilus

126. Benenati, Perez, Barros, Martinez, John Doe Identification Officers, the Union County Prosecutor and Hewette-Guyton, while acting under color of state law, deprived Mervilus of his constitutional rights by administering and causing to be administered an unlawfully suggestive Photo Identification Procedure used to convict Mervilus.

127. If Mervilus had not been identified he could not have been convicted.

128. The alleged altercation was a stranger-on-stranger encounter. The identification is critical. Mervilus' defense at trial was mistaken identity. The strength of Abreu's ability to identify Mervilus as the person who grabbed him from behind was the central issue to be determined by the jury. The unlawful Photo Identification Procedure was thus particularly harmful to Mervilus.

129. The “show-up” identification was unreliable. Mervilus was first pointed out by Abreu in the street in the middle of the night. Mervilus and Abreu were strangers. The identification took place after police had detained Mervilus and Desire. Abreu was tired, suffering from an injury and extremely emotional and excited. Abreu also stated that the knife on the ground—which has never been tied to Mervilus or any other defendant—influenced his identification. Abreu stated that he believed his show-up identification was accurate “because when the police grabbed them, in one second the knife was on the ground right next to them.” Abreu’s “show-up” identification was suggestive and was not sufficiently reliable.

130. Because the “show-up” identification was unreliable, Benenati, Barros, Perez, Martinez and John Doe Identification Officers should have performed additional identification procedures to ensure that they arrested the correct person. Apparently, they thought so too and they did use other procedures. What they used to cure Abreu’s weak street identification was an unlawful Photo Identification Procedure.

131. According to Abreu’s testimony, when he was brought in to the EPD Benenati, Barros, Perez, Martinez and John Doe Identification Officers performed a Photo Identification Procedure where they only showed him photographs of two Black males, Mervilus and his co-defendant.

132. Benenati, Barros, Perez, Martinez and John Doe Identification Officers simultaneously presented Abreu with two pictures of each man, Mervilus and Desire, one from the side and one from the front. They were clearly arrest photos.

133. Benenati, Barros, Perez, Martinez and John Doe Identification Officers did not create a write up of the lineup procedure even though they were required to do so.

134. The Photo Identification Procedure conducted by Benenati, Barros, Perez, Martinez and John Doe Identification Officers clearly violated at least five provisions of the “Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures”¹³ which have been effective since 2001 (“A.G.’s Guidelines”). *See* ¶ I(E)(1) (“Include one suspect in each identification procedure.”) . . . , (4) (“Include a **minimum** of five fillers (nonsuspects) per identification procedure.”) (emphasis in original) . . . , (8) (“View the array, once completed, to ensure that the suspect does not unduly stand out.”); ¶ II(A)(6) (“Document in writing the lineup procedure, including: (a) Identification information and sources of all photos used. (b) Names of all persons present at the photo lineup. (c) Date and time of the identification procedure.”); ¶ I(C) (“When possible, photo or live lineup identification procedures should be conducted sequentially, i.e., showing one photo or one person at a time to the witness, rather than simultaneously.”).

135. Benenati, Barros, Perez, Martinez and John Doe Identification Officers’ failure to retain a complete record of the Photo Identification Procedure violated clear New Jersey (and United States Supreme Court) law at the time the unlawful photo array was conducted. *See State v. Delgado*, 188 N.J. 48 (2006); *see also Kirby v. Illinois*, 406 U.S. 682 (1972).

¹³ ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001) available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

136. The Union County Prosecutor and Hewette-Guyton did not disclose any documentation of the procedure and results of the Photo Identification Procedure except for the photographs of Mervilus.

137. Also, the record is unclear as to which officer conducted the lineup. However, the person conducting the Photo Identification Procedure should be someone other than the primary investigator assigned to Mervilus' case.

138. Benenati, Barros, Perez, Martinez and John Doe Identification Officers forwarded the results of this unlawful Photo Identification Procedure to the Union County Prosecutor and Hewette-Guyton before Mervilus was indicted.

139. The Union County Prosecutor and Hewette-Guyton were still contemplating whether and what charges to try to indict Mervilus with when Benenati, Barros, Perez and John Doe Identification Officers forwarded the Photo Identification Results.

140. Thus, because of the Photo Identification Procedure results that Benenati, Barros, Perez, Martinez and John Doe Identification Officers forwarded to the Union County Prosecutor and Hewette-Guyton before the indictment, the indictment was procured by fraud and other corrupt means.

141. At trial, when asked to identify the assailant, Abreu identified a Black male sitting in the gallery observing the Court proceedings.

142. Abreu admitted that he could not accurately identify Mervilus.

143. Abreu admitted that he never got a look at the face of the man who was holding him from behind—allegedly Mervilus.

144. Abreu stated that once he was subjected to the Photo Identification Procedure, he was then able to describe Mervilus. This unlawful investigatory tactic employed by Benenati, Barros, Perez, Martinez and John Doe Identification Officers tainted Abreu's already very weak identification beyond repair.

145. After Abreu identified a Black male spectator in the audience as the assailant instead of Mervilus, then the Union County Prosecutor and Hewette-Guyton relied on the results of the unlawful Photo Identification Procedure administered by Benenati, Barros, Perez, Martinez and John Doe Identification Officers to save their case and to convict Mervilus.

146. Once it became clear that Abreu's identification of Mervilus was falling apart the Union County Prosecutor and Hewette-Guyton presented the results of the unlawful Photo Identification Procedure to the jury to resuscitate their case against Mervilus. Without these ill-gotten results, the jury, having just seen Abreu wrongly identify a spectator, may never have convicted Mervilus.¹⁴

147. The Appellate Court noted the weakness of Abreu's identification: "[t]he police came on the scene after the assault, and the State's case hinged to a great degree on the victim's testimony." *Mervilus*, 418 N.J. Super. at 147. "The victim claimed to have gotten a good look at the assailants but misidentified a courtroom spectator as being one of the robbers, and he could not identify defendant in the courtroom." *Id.*

148. Benenati signed the Investigation Report.

149. Perez is listed on the top right hand corner of the Investigation Report.

150. Barros is listed as a signatory of the Investigation Report.

¹⁴ There was no *Wade* hearing at trial. *United States v. Wade*, 388 U.S. 218 (1967).

151. Perez signed the Voluntary Statement and according to the Voluntary Statement, Abreu made his statement to Perez.

152. Martinez is listed as the typist of the Voluntary Statement.

153. According to Abreu, he did not know what he was signing when—seven days after the alleged incident—he signed the Voluntary Statement condemning Mervilus.

154. Abreu stated that the Voluntary Statement was never read or explained to him and he never read it himself.

155. Abreu cannot read, write or speak English.

156. When Benenati, Barros, Perez, Martinez and John Doe Identification Officers had Abreu at the EPD, there was a Spanish-speaking detective available and questioning Abreu. However, Benenati, Barros, Perez, Martinez and John Doe Identification Officers chose not to translate the report for him or explain what was on it.

157. Benenati, Barros, Perez, Martinez and/or John Doe Identification Officers told Abreu to “just sign” the Voluntary Statement that condemned Mervilus.

158. Mervilus’ constitutional rights were violated because the identification procedures were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification and Mervilus was misidentified.

2. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth Knew and Should Have Known of the Custom, Policy and Practice of Performing Unlawful Photo Identification Procedures and Approved the Misuse

159. The constitutionally cognizable risk of performing improper Photo Identification Procedures is so high that the A.G., Union County Prosecutor, UCPD Chief,

Union County, EPD Chief and Elizabeth have a heightened supervisory and training responsibility.

160. At the time of the Photo Identification Procedure at issue in this case, there were already a number of published opinions about law enforcement in New Jersey not complying with the A.G.'s Guidelines and unconstitutionally performing Photo Identification Procedures.

161. The United States Supreme Court states: "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals . . . regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." *Simmons v. United States*, 390 U.S. 377 (1968).

162. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth knew of the improper polygraph-related customs, policies and practices that were used to convict Mervilus and yet, did nothing to stop it.

163. Two years before Mervilus' trial the New Jersey Supreme Court opined on this issue. *See State v. Delgado*, 188 N.J. 48 (2006).

164. The Court in *Delgado* highlighted the importance of constitutional Photo Identification Procedures: "[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country." *Id.* at 60.

165. The A.G.'s Guidelines were created "to ensure that identification procedures in this State minimize the chance of misidentification of a suspect." *Id.* at 61.

166. Thus, the A.G. and New Jersey courts have recognized that improperly performed Photo Identification Procedures carry a significant risk of misidentifying suspects and wrongful convictions.

167. Especially with stranger-on-stranger investigations proper eye-witness identification is crucial. Having a custom, policy and practice of performing improper Photo Identification Procedures creates an unreasonable risk of constitutionally cognizable harm to the accused.

168. Upon information and belief, there are many others currently incarcerated because of improper Photo Identification Procedures and the failure to supervise and train by the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth.

169. The A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth failed to supervise and train their subordinates regarding Photo Identification Procedures.

170. Therefore, the risk of constitutionally cognizable harm is so great and so obvious that the failure of the A.G., Union County Prosecutor, UCPD Chief, Union County, EPD Chief and Elizabeth to respond to unlawful Photo Identification Procedures alone supports the findings of the existence of unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it.

G. After the Reversal, Testimony Showed that Mervilus was Not Involved in the Altercation But the Union County Prosecutor and Hewette-Guyton Continued to Prosecute Him Anyway, Only to Then Offer Him Time-Served for a Guilty Plea

171. On February 18, 2011, Mervilus' conviction was reversed. However, he was not released from custody.

172. Despite the significant lack of evidence against Mervilus, the Union County Prosecutor decided to proceed against Mervilus immediately.

173. The Union County Prosecutor and Hewette-Guyton decided to continue prosecuting Mervilus, putting him at risk for an eleven-year sentence, only to then offer him time-served and three years parole in exchange for a guilty plea.

174. This tactic caused Mervilus' freedom to be denied for an additional 120 days.

175. From the outset, the Union County Prosecutor and Hewette-Guyton continuously offered Mervilus time-served for a guilty plea. Mervilus denied each and every offer.

176. Despite the risk of an eleven year prison sentence Mervilus refused to plead guilty to a crime he did not commit.

177. Mervilus continued to profess his innocence. After a complete jury trial, and less than an hour of deliberation, on January 18, 2013, Mervilus was acquitted by a jury of his peers.

178. Mervilus was arrested at the age of 22; he was exonerated at the age of 29.

H. Post-Exoneration

179. On January 18, 2013, immediately after Mervilus was acquitted, he began to seek legal counsel to pursue a lawsuit against various governmental entities and individuals because of his wrongful imprisonment and related civil rights violations and other claims.

180. On or around the last week of March 2013, Mervilus hired Muhammad Bashir, an attorney duly authorized to practice in the State of New Jersey, to pursue various lawsuits on his behalf in relation to his wrongful conviction, period of incarceration and civil rights claims.

181. The Defendants are not immune from this action, and this action is not barred by the New Jersey Tort Claims Act because the New Jersey Tort Claims Act does not apply to federal or state civil rights actions.

182. On April 18, 2013, Bashir completed and filed a Notice of Claim which was served on the City of Elizabeth, the Elizabeth Police Department (particularly the Police Captain, Officers Benenati and Barros, and Detective Robert Perez) and the Union County Prosecutor's Office via Theodore J. Romankow.

183. On the Notice of Claim Bashir complains of violations of Mervilus' constitutional rights and says that the investigation and prosecution of Mervilus was "in violation of [h]is Title 1983 Civil Rights."

184. Bashir also writes "my office represents the interest of Emmanuel Mervilus . . . forward any and all responses or correspondence to my attention at the above office address."

185. Mervilus believed that his federal and state civil rights and related claims were pending.

186. On or around August 18, 2014, Bashir returned Mervilus' case file to him and withdrew from any legal representation of him.

187. On September 9, 2014, Mervilus retained Gage Spencer & Fleming LLP to represent him.

188. Mervilus has complied with all notice and statutory requirements in bringing this lawsuit.

I. Mervilus' Background and Reasons for Granting Mervilus Other Non-Monetary Relief

189. Before Mervilus' arrest, at the age of 22, he was the sole earner in his household. After receiving his high school degree, he supported his mother, who was diagnosed with cancer and his younger brother and sister. He worked full-time at Port Newark, a cooking oil company where he was making \$13.00 per hour. He was in line for a significant promotion as an oil technician before he was arrested. Those junior to Mervilus at the time that he was arrested have since been promoted to oil technician, a position that earns \$29.50 per hour or more.

190. On April 7, 2007, while Mervilus was wrongfully held behind bars, his mother died of cancer. Mervilus and his family believe that the added stress of Mervilus being in jail hastened her death.¹⁵ Mervilus was in jail and was unable to attend his mother's funeral.

191. Once Mervilus' case was reversed, and he was out on bail, he sought various manual labor positions. Upon information and belief, because of his criminal history, he was unable to find employment. Mervilus' inmate profile and mugshot remain

¹⁵ An article written by Richard Khavkine of the Star-Ledger sheds light on Mervilus and his family. Richard Khavkine, *Wrongly Convicted, Elizabeth Man Spent 3 Years in Prison*, NEW JERSEY.COM (Feb. 10, 2013, 8:32 AM, updated Feb. 14, 2013, 7:06 PM), http://www.nj.com/union/index.ssf/2013/02/wrongly_convicted_elizabeth_ma.html. A copy of this article has been attached as **Exhibit C**.

readily available on the New Jersey Department of Corrections website¹⁶ as well as other publicly available databases, including www.mugshots.com.¹⁷ Also, the New Jersey Department of Corrections webpage (and the others that reference it) wrongly list the “Date Out of Custody” as September 27, 2012. Thus, for over a year, Mervilus was seeking employment while the New Jersey databases were inaccurately reporting that he was presently incarcerated.

192. Throughout 2011 and 2012, Mervilus performed manual labor work periodically when he could find it. He was paid roughly \$8.50 per hour.

193. Mervilus currently is employed at Talbot Hall, a Community Education Center designed to assist current (and previously) incarcerated adults obtain appropriate housing situations with a stated mission of “breaking the cycle of recidivism.” Talbot Hall is a behavioral assessment center. Mervilus is a unit counselor there. He helps evaluate certain inmates who are being considered for halfway houses. He is getting paid \$11.00 per hour.

194. Mervilus is expecting a child in the near future.

195. Mervilus does not have health insurance.

196. Mervilus has been living with friends and relatives since his release from prison. He currently lives with his sister in Elizabeth.

¹⁶ STATE OF NEW JERSEY, DEPARTMENT OF CORRECTIONS, (last visited November 25, 2014) (last updated November 22, 2014) available at <https://www6.state.nj.us/DOC/Inmate/details?x=1399346&n=0>. A copy of this webpage has been attached as **Exhibit D**.

¹⁷ This website claims that “This Official Record was collected from a Law Enforcement agency on 1/07/2013.” MUGSHOTS.COM, <http://mugshots.com/US-Counties/New-Jersey/Union-County-NJ/Emmanuel-Mervilus.37908036.html> (last visited November 24, 2014). A copy of this webpage has been attached as **Exhibit E**.

197. Mervilus is currently a full-time student at Essex County College where he seeks a degree in social services.

198. Mervilus would like to attend a four-year college and have a career in social services. He hopes to become a probation officer. However, due to his low income, it would be difficult for him to pay for continued education. With additional training and education Mervilus would be more likely to find sustainable employment for himself and to support his family.

199. Though Mervilus is making all efforts to become a contributing member of society, the time he wrongfully spent behind bars continues to harm him. He currently suffers from financial and emotional distress that thwarts his ability to meaningfully support himself and his family and to contribute to society.

200. Recovery in this case would not only begin to rebuild Mervilus' life but it would also chill New Jersey law enforcement from injuring other accused persons.

201. Mervilus is innocent. Mervilus was wrongfully convicted. Mervilus reversed his conviction. Mervilus has been exonerated. The Defendants are to blame.

Damages

202. Mervilus seeks damages from October 19, 2006 through the present.

203. Because of the Defendants' misconduct outlined above, Mervilus spent 1,454 days as a prisoner for a crime he did not commit.

204. As a direct and proximate result of the acts of the Defendants, the injuries and damages sustained by Mervilus, arising from the deprivation of his civil rights include: the violations of his clearly established constitutional rights, including his rights under the Fourth, Eighth and Fourteenth Amendments and fundamental New Jersey

constitutional rights under N.J. Const. art. I ¶ 7 and N.J. Const. art. I ¶ 1, personal injuries, pain and suffering, severe mental anguish, emotional distress, economic damages including loss of income and future earning potential and the inability to obtain or maintain certain professional licenses, humiliation, indignities, embarrassment, degradation, injury to reputation, permanent loss of natural psychological development, restrictions of all forms of personal freedom and physical liberty including diet, sleep, personal care, personal contact, educational opportunity, vocational opportunity, personal fulfillment, sexual activity, family relations, reading, television, movies, travel, enjoyment and expression. When he was arrested, Mervilus was the sole earner in his household and was a father figure to his younger brother and sister. When Mervilus was incarcerated, he lost his chance to be a father figure for his family. Mervilus lost his mother to cancer while he was being wrongfully held behind bars and he was unable to attend her funeral. As a direct result of the unjust conviction and imprisonment many of these effects of these disabilities continue to plague Mervilus to this day.

205. Because the acts described in this complaint were done intentionally, willfully, purposefully, knowingly, unlawfully, maliciously, wantonly, recklessly and/or with bad faith, the conduct of the Defendants meet all of the standards for the imposition of punitive damages.

Claims

POLYGRAPH CLAIMS:

**Count 1: Due Process Claim Related to Unlawful Polygraph Tactics
Against: Lt. Kaminskis, the Union County Prosecutor and Hewette-Guyton
42 U.S.C. § 1983**

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

207. Lt. Kaminskis, 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.

208. Lt. Kaminskis, 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.

209. Lt. Kaminskis 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.

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

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

212. Mervilus was not afforded a N.J.R.E. 104 hearing, which was his right, to determine whether the polygraph evidence should be admitted.

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

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

215. 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 Mervilus was guilty.

216. 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.

217. 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.

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

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