No._____

IN THE SUPREME COURT OF THE UNITED STATES

SHAWN JOHNSON,

Petitioner

Vs.

ADMINISTRATOR NEW JERSEY STATE PRISON, et al
Respondent

REGARDING APPLICATION OF CERTIFICATE OF APPEALABILITY; WHICH ASSERTED TO REVIEW THE ORIGINAL RECORD: AND MOTION FOR APPOINTMENT OF PRO BONO COUNSEL

PETITION FOR WRIT OF CERTIORARI

Shawn Johnson, pro se
SBI #732464C
New Jersey State Prison
3rd & Cass Street
P.O. Box 861
Trenton, N.J. 08625.

PETITIONER IS IN STATE CUSTODY

Questions presented

Shawn Johnson was arrested in Monmouth County, NJ, in self-defense for shooting Tyliq Pugh & Jahmere Crooms. He has credible evidence that he is actually innocent of this crime and State's witnesses have recanted their trial testimony. The State's prosecutor did conceed at the district court level to the self-defense claim.

List of parties

All parties appear in the caption of the cover page

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Petition for Writ of Certiorari

Shawn Johnson respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals, For the Third circuit.

Opinions Below

The dated June 5, 2018 order of the United States Court of Appeals, Shawn Johnson v. Administrator New Jersey State Prison; Attorney General of State of New Jersey, Docket No. 17-2697, For the Third circuit is attached as *Appendix A,* which issued no opinion. Defendant received such Order on June 8, 2018, see *Appendix B.* The Court's General Docket, is attached as *Appendix C.* The dated January 25, 2018 order of the United States Court of Appeals, For the Third Circuit, is attached as *Appendix D.* The United States District Court For the district of New Jersey, Case No. 15-8322(MAS) Opinion, is attached *as Appendix E.*

Jurisdiction

On Petition for Panel Rehearing asserted the jurisdiction of the Third Circuit Court pursuant to 28 U.S.C. § 2253; 28 U.S.C. § 1331; 28 U.S.C. § 2254(a); 28 U.S.C. § 1367(a); The AEDPA. U.S. Const. Art. III, § 2 and § 3. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a); 14 Stat. 385-86 (1867); 5 Stat. 539-40 (1840); 1 Stat. 81-82 (1789).

Relevant Constitutional Provisions

Petitioner asserts that "*In all Cases...which a State shall be a Party, the supreme Court shall have original Jurisdiction...*" U.S. Const. Art. III, § 2, cl.2; "the privilege

of the writ of habeas corpus shall not be suspended unless when in cases or rebellion or invasion the public safety may require it." U.S. Const. Art. I, § 8, cl.2.; "The judicial Power of the United States, shall be vested in one supreme Court...arising under this constitution, laws of the United Sates..." U.S. Const. Art. III, § 1

Statement of the Case

Petitioner sough de novo review before the United States Court of Appeals, to remand back to the issues raised on appeal to supplement with the District of New Jersey, on a § 2254 Petition, has which had nine (9) grounds for habeas relief [See D.N.J., ECF No. 1]; Petitioner filed a Traverse i.e. a Reply Brief And Appendix [See D.N.J. ECF No. 10] which raised four (4) points with sub-points; Petitioner also raised by way of a Motion For Reconsideration [See D.N.J. ECF No. 15] four (4) grounds.

REASONS FOR GRANTING THE WRIT

Petitioner asserts Supreme Court Rule 10(a). The Supreme court of the United States, should now remand back to the District court, directing evidentiary hearings in accordance with Townsend v. Sain, 372 U.S. 312-13 (1963) and further making a "judicial inquiry...into the very truth and substance of the causes of [petitioner's imprisonment as it is now]...necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court [who arbitrarily] proceeded to judgment against him," Frank v. Mangum, 237 U.S. 331 (1915). Habeas corpus relief is available

only if there have been violations of federal constitutional law. Milton v. Wainwright, 407 U.S. 371, 377 (1971), petitioner hereby makes a prima facie case, for a showing of cause and prejudice, Murray v. Carrier, 477 U.S. 478, 485 (1986), and fundamental miscarriage of justice, i.e., an innocent person has been convicted of the crime. Id. at 495; McCandless v. Vaughn, 172 F. 3d 255, 260 (3rd Cir. 1999).

I PETITIONER MOVES TO CORRECT MANIFEST ERRORS OF LAW UPON WHICH THE JUDGMENT WAS BASED

Petitioner asserts Supreme Court Rule 10(a), Petitioner asserted below Fed. R. App. P. 40(a)(2), moves to correct manifest errors of law or fact upon which the judgment was based. See 11 Charles A. Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995); see also Harsco v. Zlotnicki, 779 F.2d 906 (3rd Cir. 1985), cert. denied, 476 U.S. 1171 (1986). The Judges have **overlooked** at the appendix, to examine "carefully" the adduced documents; facts and several controlling decisions within the filed Reply brief [D.N.J. ECF No. 10]. Also, the judge overlooked to carefully read the arguments in the Reply brief, [D.N.J. ECF No. 10]. See Id. at Exhibit D [D.N.J. ECF No. 15] which **expressly cite ["identify"] each of the Constitutional violations. Id. at pages 9, 13, 14, 15, 19, 23, 27, 28.** "grounds" under 28 U.S.C. § 2254(a), that petitioner is in custody in violation of the Constitution of the United States. Requires evidentiary hearing. See 372 U.S. 312-13 (1963).

Wherefore this court "**overlooked** matters, if considered by the Court, might reasonably have resulted in a different conclusion." Assisted Living, Infra, 996 F.Supp. at 422.

II PETITIONER MOVES TO PRESENT NEWLY DISCOVERED EVIDENCE PREVIOUSLY UNAVAILABLE

Petitioner asserts Supreme Court Rule 10(a). Petitioner asserted below Fed. R. App. P. 40(a)(2), to present newly-discovered evidence or previously unavailable evidence. See 11 Charles A. Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995); see also Harsco v. Zlotnicki, 779 F.2d 906 (3rd Cir. 1985), cert. denied, 476 U.S. 1171 (1986). The Federal Court's opinion alleges that "new evidence that was not presented to the state court unless it is "a factual predicate that could not have been discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). See Id. at page 4, par.2 through page 5, [D.N.J. ECF No. 13].

Thus, at 28 U.S.C. § 2254(e)(2)(B), assert actual innocence. See Sawyer v. Whitley, 112 S.Ct 2514 (1992)(actual innocence exception to procedural default). Although this affidavit, was previously discovered, during the State PCR proceeding those issues remained **unresolved**. The Petitioner contends to rely on the Antiterrorism and Effective Death Act ("AEDPA"), 1996 Act of April 24 subsections:

> (e)(1) that the merits of the factual dispute **were not resolved** in the State court hearing;
>
> (e)(2) that the material facts where not adequately developed at the State court hearing;

(e)(3) that the material facts where not adequately developed at the State court hearing;

(e)(6) that the applicant did not receive a full, fair and adequate hearing;

(e)(7) that the applicant was denied due process of law in the State court proceeding;

(e)(8) "...the evidence to support such factual issue was made...is produced [and] provided...[before this] Federal Court...[for examination, to grant] an evidentiary hearing...[by clear] proof ...to establish by convincing evidence that the factual determination was erroneous."

By invitation of the District Court's opinion, as secured below in petitioner's Brief in support of Motion For Reconsideration [See D.N.J. ECF No. 15] present a **prosecutorial misconduct claim**. See Id. at page 12, par 2 [D.N.J. ECF No. 13], to established a **Brady** claim. See Strickler v. Green, 527 U.S. 263, 1999).

The Recantation Affidavit of Tyshan Smalls dated July 29, 2008. See Id. at Exhibit A [D.N.J. ECF No. 15], appears to have been presented to a state court since March 20, 2012, by way of the prima facie Respondent's Answering Brief. See Id. at page 2 through page 4, par. 1, [D.N.J. ECF No. 6] "establishes" the State's continued Brady violations, as held in Dennis v. Secretary, PA Department of Corrections, 834 F3d 263 (3d Cir. 2016) because: (1) the evidence suppressed is favorable to the accused; (2) the evidence is exculpatory and impeaching; (3) the evidence is material to the defense. The State may not add: (a) a due diligence requirement; (b) timeliness requirement; (c) may not defend on the ground that the 1st trial, et al. defense

attorneys could have discovered the suppressed evidence; (d) may not defend on the ground that the suppressed evidence would not have been admissible evidence; (e) may not defend on the materiality on the ground that the rest of the evidence was sufficient to support a conviction.

1. Conviction on testimony known to prosecution to be perjured as denial of due process. 2 L ed 2d 1575, 3 L ed 2d 1991.
2. Obtaining conviction on perjured testimony known to prosecuting authorities to be perjured, as denial of due process. 98 ALR 411.

The Recantation Affidavit of Tyshan Smalls dated July 29, 2008. See Id. at Exhibit A [D.N.J. ECF No. 15], the favorability prong is satisfied by *exculpatory* or impeachment *evidence*. See Dennis, 834 F.3d at 286. Similar to the evidence in this case, the third circuit Court has held that withholding a witness's criminal record satisfies the favorability prong. Wilson v. Beard, 589 F.3d 651, 662 (3rd Cir. 2009). The judge indicated that petitioner did not attach said affidavit to the *"petition"*. [See D.N.J. ECF No. 1] he is absolutely right.

However, The judge *overlooked* to look for it at the appendix. See Id. at Petitioners appendix 30(Pa30) from the Reply Brief, [See D.N.J. ECF No. 10] for the Recantation Affidavit of Tyshan Smalls dated July 29, 2008. See Id at Exhibit C (D.N.J. ECF No. 15], as part of the record, see Habeas Rule 8(a), Habeas Rule 7(b). Which provides exculpatory evidence, which states in relevant part (quoting):

> "I Tyshan Smalls...on the day of October 18, 2006...[I] did take a phone and black handgun from Mr. Tylik Pugh. The reason

> for me coming out with this information now is because I believe it was a big part in this case. And I didn't want to say I took the handgun, then get charged with something. Plus that was my friend and I didn't want him to be found with it in his possession."(end of quote)

The Recantation Affidavit of Tyshan Smalls dated July 29, 2008. See Id. at Exhibit A [D.N.J. ECF No. 15], has shown a "reasonable probability" that combined with all of the above mentioned evidence "could have" been used in any way that ultimately would have altered the result. See Dennis at 834 F.3d 263; see also Johnson v. Folino, 705 F.3d 117, 130 (3rd Cir. 2013)(information is material if it "could have led to the discovery of admissible evidence that *could have* made a difference in the outcome of the trial sufficient to establish a 'reasonable probability' of a different result")(emphasis added). This *"could have"* standard is important, because defendant's arguments provide material evidence that could have led to other admissible evidence and certainly would have altered the investigation of Mr. Shawn Johnson's attorneys. See Dennis, 834 F.3d at 308-12 (explaining that evidence may be material if it alters defense investigations or trial preparation)

Thus, the State's Answering brief [See D.N.J. ECF No. 6], had already **conceded** in relevant part:

> (8) newly discovered evidence that Tyshon Small "tampered with the crime scene which **would affirm self defense for Johnson.**" Exhibit F at Da56-59. Id. at page 3, par 1, lines 10-13, [ECF No. 6]. cf. see Exhibit A (emphasis added)

The above evidence was not presented at trial. See Jones v. Calloway, 842 F.3d 454, 461 (7th Cir. 2016); as set forth in Schulp v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed. 2d 808 (1995) to wit, that newly discovered evidence combined with the old evidence must make it more likely than not that no reasonable juror would have found defendant guilty beyond a reasonable doubt. Also see Dennis, Supra at 834 F3d 263 (emphasis added) to assert the "actual innocent" exception. See Schulp, Supra at 320, 115 S.Ct. at 864, 130, L.Ed 2d at 831.

The District Court's opinion, [See D.N.J. ECF No. 13], at the Factual Background, is axiomatic to the record inter alia: **"Croom and Pugh shot him first."** See Id. at page 1 [D.N.J. ECF No. 3] Thus, asserting Fed R. Evid. 302 for N.J.S.A 2C:3-4a., states in relevant part:

> The use of force upon another person is **justifiable** when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself [i.e." self defense"] against the use of unlawful force by such other person on the present occasion.

The argument the court adduces under the AEDPA, (Slip Op. at page 2), [See D.N.J. ECF No. 13], appears to be vitiated, and immaterial. Having The State's respondent "affirm[ed] self defense for Johnson." See Id. at Da56-59; and Id. at page 3, par 1, lines 10-13, [D.N.J. ECF No. 6], establishes to be ***justifiable*** for his right to "bear arms." U.S. Const. Amend. II, to exercise his right to "defend [his] life." N.J. Const. Art. I, par. 1.. Having *satisfied the "1 day" conviction* for all "merged" weapons

charges, requires that petitioner be set at "liberty" as guaranteed by U.S. Const. Amends V, XIV, § 1; 28 U.S.C. § 2254(a); 28 U.S.C. § 1331. Since as established by the Presentence report at the Court History, establishes that the extended term imposition is illegal because such NERA conviction "shall not apply" pursuant to N.J.S.A. 2C:43-7c. (emphasis added)

Thus, both of the Appellate Court's Orders (See Appendix A, and Appendix E) and The District Court both abused its discretion when its decision [D. N.J. ECF No. 13], is upon clearly erroneous findings of facts, and erroneous conclusions of law. See Morris v. Horn, 187 F. 3d 333, 341 (3rd Cir. 1999). Habeas corpus should be granted. "Self defense" being justifiable under State law presents the nexus to actual innocence. Stocker v. Warden, 2004 U.S. Dist. LEXIS 5395 [EDPA, Giles, C.J.]

Wherefore the above "show[s]...that...factual matters... [were] overlooked by the court in reaching its prior decision." Assisted Living Assocs. v. Moorestown Tp., 996 F.Supp. 409, 422 (D.N.J. 1988)

III PETITIONER MOVES TO PREVENT A MANIFEST INJUSTICE

Petitioner asserts Supreme Court Rule 10(a). Petitioner asserted below Fed. R. App. P. 40(a)(2), moves to prevent manifest injustice. See 11 Charles A. Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995); see also Harsco v. Zlotnicki, 779 F.2d 906 (3rd Cir. 1985), cert. denied, 476 U.S. 1171 (1986). Consequently, "[t]he Court will only entertain...**overlooked** matters, if considered by the Court,

might reasonably have resulted in a different conclusion." Assisted Living, Infra, 996 F.Supp. at 422; evidentiary hearing should be granted. See 372 U.S. 312-13 (1963).

The presumption of correctness of both the appellate court's orders (See Appendix A and Appendix E), and of the District Court's record which relied upon the state record does not apply, [See D.N.J. ECF. No. 13] (Slip Op. at page 9, par. 2, lines 5-14). Hereby "the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1), because it left all the issues presented unresolved. [D.N.J. ECF No.'s 1, 9, 10, 15), Thus, that is why petitioner moved before this Appellate court where the standard of review is supposed to be plenary. [D.N.J. ECF No.'s 1, 9, 10, 15].

The 3rd Circuit Court's Order (See Appendix E) also overlooked to review that Petitioner expressly identified at page 10 of the Reply brief, [D.N.J. ECF No. 10], that he sough *de novo* ***review,*** but it appears both judges have *overlooked* to read the Standard of Review. See Id at pages 10-14, to rely upon the state record.

Therefore, after an examination of the both 3rd Cir. Court's orders (See Appendix A and Appendix E) and the District's Court opinion, [D.N.J. ECF No. 13] both have evaded to "fully" address the merits presented for review. It appears petitioner did overtake the court, who returned an arbitrary and capricious decision, [D.N.J. ECF No's. 14], having petitioner filed a traverse, and respondent was barred from filing a responsive

pleading thereto [D.N.J. ECF No. 10] as it was not permitted. In lieu of Appellate Rule, petitioner hereby adopts by reference pursuant to Fed. R. Civ. P. 10(c), the arguments at page 1 through page 30. See Id. at Exhibit D and Exhibit C, [D.N.J. ECF No. 15], from the Reply Brief already filed [D.N.J. ECF No's. 10],

Wherefore, all of the above "show that dispositive factual matters [on several] controlling decision of law [were] overlooked by the court in reaching its prior decision." Assisted Living Assocs. v. Moorestown Tp., 996 F.Supp. 409, 422 (D.N.J. 1988)

IV PETITIONER MOVES TO ACCORD THE DECISION TO AN INTERVENING CHANGE IN PREVAILING LAW

Petitioner asserts Supreme Court Rule 10(a). Petitioner asserted below Fed. R. App. P. 40(a)(2), to accord the decision to an intervening change in prevailing law. See 11 Charles A. Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995); see also Harsco v. Zlotnicki, 779 F.2d 906 (3rd Cir. 1985), cert. denied, 476 U.S. 1171 (1986); evidentiary hearing is sought. See 372 U.S. 312-13 (1963).

A. Actual Innocence

Petitioner contends that "as raised below" [See D.N.J. ECF No. 15], has already asserted a claim of actual innocence at Point II, Supra (emphasis added), which establishes the nexus to present an intervening change in law, by the Supreme Court who decided McQuiggin v. Perkins, 133 S.Ct. 1924, 185 L.Ed. 2d 1019 (2013), which held that a credible claim of actual innocence or

miscarriage of justice falls within the exception of the AEDPA's one year statutes of limitations. That Descision is consistent with Rivas v. Fisher, 687 F.3d 514, 549 (2d. Cir. 2012, which granted habeas based on the Supreme court's observation that "concern about the injustice that result from the conviction of an innocent person has long been at the core of our criminal justice system, "reflecting" a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Schulp, Supra at 325

B. Ineffective Assistance of Counsel

The next intervening change in law is asserted under Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309, 182 L. 132 S.Ct. 1309, 182 L.Ed 2d 272. Regarding all claims of ineffective assistance of counsel ("IAC"), [D.N.J. ECF No. 1]; and Ground Four (Slip Op. at page 10-12), the two component to satisfy Strickland for ineffective assistance of counsel (Slip Op. at page 10, par. 2) where already satisfied by the argument in the Reply Brief, [D.N.J. ECF No. 10] which "begins" with the holding in Saranchack. Id at page 19,. [D.N.J. ECF No. 10].

Petitioner's Claims are "substantial" meaning arguable merit as held in Bey v. Superintendent, SCI Greene, 2017 U.S. App. LEXIS 8280 (3rd Cir. 2017). Petitioner "further" asserts Fed. R. App. P. 40(a)(2) by showing at Point I through Point III Supra to asserts the holding in Saranchack v. Secretary, Department, 802 F.3d 579 (3rd Cir. 2015) reads in pertinent part, as follows:

> In addition to objectively unreasonable conduct, a petitioner must also show that counsel's deficiency

> "prejudiced the defense." Wiggins, 539 U.S. at 521 (citing Strickland, 466 U.S. at 687) to meet this standard, "[t]he defendant must show that there is a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A defendant need not prove that the evidence would have been insufficient if not for counsel's error. See Breakiron v. Horn, 642 F. 326, 140 (3rd Cir. 2011). Nor need a defendant prove "that counsel's deficient conduct more likely than not altered the outcome." But a defendant must demonstrate more than "that errors had some conceivable effect on the outcome of the proceeding." Id. Further the prejudice inquiry focuses on "the effect the same evidence would have had on an unspecified, objective fact finder" rather than a particular decision maker in the case. Saranchack I at 616 F. 3d 309.

Based on this formulation of the prejudice standard, it is axiomatic to being correct, reveals that the Third circuit Court's interlocutory Orders (See Appendix A, and Appendix E); the District Court's decisions [D.N.J. ECF 13] (Slip Op. at page 10-12); and the December 5, 2013 State court post-conviction-relief decisions that applied in my case has contradicted Strickland; Boyd v. Nish et al., 2007 U.S. Dist. LEXIS 7176 (EDPA 2007, Tucker, J.)[Section 2254 Habeas Corpus be Granted based to State Prisoner based on ineffective assistance of counsel].

Wherefore, Petitioner has "show[n] that dispositive factual matters [on all above] controlling decision of law [where] overlooked by the court in reaching its prior decision." Assisted Living Assocs. v. Moorestown Tp., 996 F.Supp. 409, 422 (D.N.J. 1988) (cf. See D.N.J. ECF No. 15]

CONCLUSION

WHEREFORE because the above four (4) reasons, petitioner seeks this court to remand back to the district court to appoint pro bono counsel and proceed on evidentiary hearings.

Respectfully presented,

Dated: June 28, 2018

Shawn Johnson