

18-9110 ORIGINAL

No.

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IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

APR 05 2019

OFFICE OF THE CLERK

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DARIUS MURPHY

Petitioner,

VS.

STATE OF NEW JERSEY

Respondents.

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE STATE OF NEW JERSEY

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Darius Murphy  
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### **QUESTIONS PRESENTED**

1. WHAT SPECTRUM OF EVIDENCE IS REQUIRED TO PROVE ACTUAL INNOCENCE CLAIM?
2. WHAT CONSIDERATION IS GIVEN TO A MISIDENTIFICATION IN AN ACTUAL INNOCENCE CLAIM?
3. WHAT CONSIDERATION IS GIVE TO THE TOTALITY OF CIRCUMSTANCES THAT SUPPORT THE CLAIM OF ACTUAL INNOCENCE?

## LIST OF PARTIES

[X] All Parties appear in the caption of the case on the cover page.

Petitioner is Darius Murphy;

And the Respondent is the Attorney General for the State of New Jersey.

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### OPINIONS BELOW

**[X]** For cases from **state courts**:

January 22, 2019, Denial of the review  
from the Supreme Court of New Jersey (Appendix A)

November 21, 2018, Opinion from the  
Appellate Division of the Superior  
Court of New Jersey. (Appendix B)

November 1, 2016, Order Denying a Motion  
for a New Trial, By Judge Alfonse Ciffelli of Essex  
County, Superior Court of New Jersey. (Appendix C)

**[X]** is unpublished.

### JURISDICTION

**[X]** For cases from **state courts**:

The date on which the highest state court decided my case  
was **November 21, 2018**. A copy of that decision appears at  
**Appendix B**.

**[X]** A timely petition for rehearing was thereafter denied on the  
following date: **January 22, 2019**, and a copy of the order  
denying rehearing appears at **Appendix C**.

The Jurisdiction of this Court is invoked under 28 U.S.C.  
1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution guaranties each citizen a right to due process and a fair trial. Amendment XIV, cl. 1:

All persons born or naturalized in the United States, and Subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

This Clause imposes procedural limitations on a State's power to take away protected entitlements.

Here we have to "focus[] on the merits of a petitioner's actual-innocence claim and...the rationale underlying the miscarriage of justice exception, i.e., ensuring that federal constitutional errors do not result in the incarceration of innocent persons." (Ginsburg, J., joined by Kennedy, Breyer, Sotomayor, and Kagan, JJ.) The Justices also held, "The standard the United States Supreme Court adopted in Schlup v. Delo 513 U.S.298, 130 L.Ed.2d 808, 115 S.Ct 851, is demanding. The gateway should open only when a petition presents evidence of innocence so strong that a court cannot have confidence in



the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error."

With respects to the questions asked to this court in the interest of the public importance; the fundamental fairness standard, the miscarriage of justice standard, the actual innocence standard and the due process standard.

## STATEMENT OF THE CASE

### I. Course of proceedings

Defendant-Petitioner was indicted, along with Keith Henderson, Victor Parker, Michael Ricks, and Keith Koonce, by an Essex County Grand Jury for one count of murder, contrary to N.J.S. 2C:11-3(a)(1) and (2); one count of felony murder, contrary to N.J.S. 2C:11-3 (a)(3); two counts of armed robbery, contrary to N.J.S. 2C:15-1; one count of conspiracy to commit armed robbery, contrary to N.J.S. 2C:15-1 and N.J.S. 2C:15-2; one count of fourth degree aggravated assault by pointing a firearm, contrary to N.J.S. 2C:12-1(b)(4); one count of third degree endangering the welfare of a child, contrary to N.J.S. 2C:24-4(a), as defined by N.J.S. 9:6-1, 9:6-3, and 9:6-8.21; one count of third degree terroristic threats, contrary to N.J.S. 2C:12-3; one count of second degree possession of a weapon with the purpose to use it unlawfully against the person of another, contrary to N.J.S. 2C:39-4(a); and one count of third degree possession of a weapon without a carrying permit, contrary to N.J.S. 2C:39-5(b).

Petitioner was tried before the Honorable Donald J. Volkert Jr., J.S.C., and a jury in 1996, from November 12 to the 21st, and was found guilty of all but one count in the indictment. (Defendant was acquitted of murder but convicted of a lesser offense of aggravated manslaughter. Ibid.) On January 23,

1997, Judge Volkert denied Petitioner's alternative motions for a judgment of acquittal or a new trial (alleging, among other things, that Petitioner's trial attorney was ineffective for not calling alibi witnesses and the verdict was against the weight of the evidence.) Judge Volkert then sentenced Petitioner to an aggregate term of thirty years all to be served without parole. He also imposed a \$400.00 VCCB penalty and a \$400.00 SNSF assessment.

Prior to getting sentenced Co-defendant Henderson made a statement to the judge about Petitioner's innocence and how he was forced to trial because he wanted to plea to the truth of the matter and that was that Petitioner was not a participant in the crime. (Appendix I)

Petitioner's convictions and sentence were upheld by the Appellate Division on June 15, 1999. A subsequent petition for certification to the Appellate Division was denied by the Supreme Court on November 3, 1999.

Thereafter, Petitioner filed a Petition for Post-Conviction Relief on July 17, 2000, and a Motion for a New Trial based on Newly Discovered Evidence on October 3, 2000. The Motion for a New Trial filed in 2000 was based on co-defendant Henderson's statements at the sentencing hearing and the fact that several family members of Henderson's made certified statements admitting that Henderson confided in them that Petitioner was

not a participant in the crime. Judge Volkert, after consolidating the motion for a new trial and the petition for P.C.R., denied relief on August 30, 2004. Appellate Division reversed, in part, and remanded for an evidentiary hearing on May 22, 2007. (Appendix F)

On August 11, 2010, after the hearing on one aspect of the remand, Honorable Judge Michael A. Petrolle, J.S.C denied Defendant's claim regarding juror bias. This portion of the hearing was held without the petitioner's attendance, and without petitioner's consent of waiver. On September 28, 2010, Judge Petrolle, denied Petitioner's claim regarding ineffectiveness of trial Counsel.

An appeal was filed to the Appellate Division. Subsequently, on April 27, 2011, Petitioner filed a Motion for a New Trial based on Newly Discovered Evidence of Co-defendant Victor Parker's misidentification/recantation.

The Appellate Division denied Petitioner's appeal on March 25, 2013 in a written opinion. A Motion for Reconsideration to the Appellate Division was filed. In May of 2013 the motion was denied.

On July 31, 2013, the Honorable Thomas M. Moore, J.S.C. dismissed Petitioner's Motion for a New Trial without prejudice pursuant to R. 2:9-1(a). The dismissal was due to the motion mistakenly identified as a petition for Post-Conviction Relief.

On August 23, 2013, Petitioner re-filed the Motion for a New Trial based on Newly Discovered Evidence of Co-defendant Victor Parker's misidentification/recantation. Then on November 15, 2013, the Honorable Alfonse J. Cifelli, J.S.C. dismissed Petitioner's Motion for a New Trial without prejudice, mistakenly stating that the misidentification/recantation of Victor Parker was previously litigated.

On November 25, 2013, Petitioner sent Judge Cifelli a letter advising that the misidentification/recantation of Victor Parker's trial testimony was not a part of his P.C.R. Then, on December 13, 2013, Judge Cifelli sent a letter to Petitioner informing him to resubmit the motion with all relevant affidavits and documents attached.

Petition for Certification was filed and denied by May of 2014.

On October 20, 2015, Brooke M. Barnett, Esq. filed a Motion for a New Trial Based on Newly Discovered Evidence on the behalf of Petitioner. Subsequently, Judge Cifelli granted an evidentiary hearing to allow Victor Parker's misidentification/recantation to be cross examined.

The Hearing was held in the course of 3 dates; August 16, 17 and 30 of 2016. On August 30, 2016, Judge Cifelli concluded the hearing, ordered the Attorneys to submit their closings by September 9, and scheduled his decision for September 30, 2016.

On October 28, 2016, after several postponements, Petitioner gave his attorney permission to allow the Judge to proceed with his decision in Petitioner's absence. Judge Cifelli eventually denied Petitioner's Motion for a New Trial.

The Appellate Division of New Jersey denied the appeal pursuant to Judge Cifelli's October 28, 2016 order denying Petitioner's Motion for a New Trial on November 21, 2018. Subsequently, the Supreme Court of New Jersey declined to hear the case on January 22, 2019.

This petition follows of those denials of Petitioner's Claims and the violations of Petitioner's State and Federal Constitutional Rights.

## II. Relevant facts

1. On September 6, 1995, hours after the incident Janice Gordon gave a description of the individual believed to have been the petitioner. Based on Gordon's description, a photo array was compiled she identified a picture of Michael Hooper as the unmasked assailant.

2. In December of 1995, four months later Victor Parker was apprehended for shooting at the police during a robbery. He implicated the petitioner in this crime to get leniency from prosecution.

3. Before Co-defendant Henderson was sentenced, He made a statement exonerating the petitioner. (Appendix I)

4. In 2000, Petitioner filed a new trial motion for a new trial using Henderson's statements accompanied by several certified statements from Henderson's family admitting that Henderson told them personally that petitioner had nothing to do with the crime. (Appendix G)

5. Petitioner who was locked up 5 months after the crime did not know what date the crime happened because the discovery (including the indictment and police reports) given to him consist of four different dates.

6. Petitioner's trial attorney never investigated the alibi witness once the petitioner found out what date the crime happen; one other aspect of the 2007 remand. (Appendix F)

7. Victor Parker wrote the petitioner to admit to him that he finally found out that he made a mistake when he identified him, which amounted to the misidentification/recantation testimony that this petition is based on.

## REASONS FOR GRANTING THE PETITION

The State and Federal courts have steadfastly recognized that there are situations that require a defendant who is actually innocent to prove such innocence, a process that is not an end in itself. The liberty interest of a defendant must, therefore, be examined first, because the process is adversely recognized once any person is convicted of a crime.

"As of 2002,[] [The United States Supreme] Court used the word 'disturbing' to describe the number of instances in which individuals had been sentenced to death but later exonerated. At that time, there was evidence of approximately 60 exonerations [of this type]." Glossip v. Gross, 135 S.Ct. 2726, 2756-2757 (2015). In Glossip, the Court's focus dealt with wrongful convictions and exonerations rallied around DNA evidence, but found there were many other ways that lower courts secured convictions of innocent people that lacked scientific proof, and based more on false confessions, mistaken eyewitness testimony, untruthful jailhouse informants, and ineffective defense counsel.

Any innocent person is at risk of a wrongful or invalid conviction anytime he/she is adamant about proving his/her innocence and is willing to take a complaint or indictment to trial. As of March 5, 2019, the National Registry of Exonerations totals the number of exonerations in the entire



United States at 2401. (Appendix H-pge. 1-2) In the graphs reported by the registry, perjury or false accusations lead in the percentage of exonerations followed by Official Misconduct, then Mistaken witness identifications. That shows that we have a flaw in our justice system that has to be rectified, especially after a defendant presents the prima facie showing of actual innocence.

Miraculously, out of the 2401 exonerations New Jersey's, the exoneration count is only at 37 according the National Registry of Exonerations. (Appendix H-pge 4-8) Out of the 37 there are 25 that did not have DNA evidence. In the county of Essex where the petitioner was tried and convicted the exoneration count is 9 and 8 were either Mistaken ID, Perjury or false accusation, or inadequate legal defense or all combined, all of which the petitioner has exposed in this present case. New Jersey is one of the state's that does not have a conviction integrity unit. States that have implemented some version of a conviction integrity unit have a higher percentage of exonerations. (Appendix H)

Assuming the Supreme Court has recognized a freestanding claim of actual innocence, the petitioner must demonstrate that "in light of new evidence, 'it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt.'" House v. Bell, 547 U.S. 518, 537 (quoting

Schlup, 513 U.S. at 327); see McQuiggin v. Perkins, 569 U.S. 383, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019 (2013). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." Schlup at 324. The new evidence must be reliable, and the reviewing court "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." Id. at 332.

"Third Circuit case law makes clear that five requirements must be met before a trial court may grant a new trial on the basis of newly discovered evidence: (a) the evidence must be in fact newly discovered, i.e. discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." Government of the Virgin Islands v. Lima, 774 F.2d at 1250 (quoting United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976))

In this case, the evidence used in the new trial motion was newly discovered misidentification/recantation evidence,

which falls under the mistaken eyewitness testimony category along with the False Accusation category. The Petitioner in this case was not a suspect until Victor Parker was arrested for shooting at the police in the midst of an armed robbery. Parker's attempt to flee prosecution required him implicate the petitioner in this crime. Yet, 20 years later Parker recanted his identification of the petitioner. What makes this case extraordinary is the fact that Parker never said that he lied or that the crime did not happen. Only that he gave up the wrong person due to misinformation on his part.

The difference of the misidentification/recantation in this case, and that of others, is that Parker still attest to everything that he said in his original statement and testimony except one thing; the identification of the petitioner.

In Neil v. Biggers, 409 U.S. 188, 197-198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), "the [five f]actors to be considered [in proving misidentification of a witness] are: (1) the circumstances under which the witness viewed the actual crime; (2) the witness['s] degree of attention; (3) the accuracy of the description prior to the suggestive photo array; (4) the level of certainty in identifying the perpetrators; and (5) the lapse of time between the crime and the legal confrontation." Even though these were not the factors considered in the motion for a new trial during the 2016 evidentiary, hearing these

factors were met thought testimony. Parker was introduced to the petitioner on a prior occasion as co-defendant Henderson's nephew. Sometime later Henderson told him, "My nephew and his boy have something set up." In Parker's mind, the nephew Henderson spoke of was the nephew that he met before. This is where the misinformation created the misidentification.

The night of the incident Parker testified at the trial and the evidentiary hearing that, the rolls were set and he came on the scene without formal introduction just to fall into place. Neil at 197 factor (2) witness degree of attention. Parker's attention was on the crime he only thought he was certain who the other participants were. Using Neil factor (1), his view of the crime was that of one to focus on the victims or potential witnesses not the actors.

Under the Fourteenth Amendment's due process clause, eyewitness identification evidence is unreliable and must be suppressed if suggestive identification procedures have led to "a very substantial likelihood of irreparable misidentification." Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). Parker admitting he knew of the petitioner as Henderson's nephew, but he did not know of the other person who looks like the petitioner who was also referred to as Henderson's nephew. The victim/witness (Gordon) made an identification the night of the incident; she picked out

a picture of Michael Hooper as the person she saw at the crime. Five months later, after Parker misidentified the petitioner, Gordon made a half-hearted, and admittedly uncertain, identification of the petitioner in a photo array. Her statement and her trial testimony was, "looks like him but I'm not sure." (Appendix E)

Using the factors in Neil the first identification made, by Gordon, the night of the incident was the only surety of any identification made by her. A judge considering a motion for a new trial has to take into account his interpretation of a witness is not necessarily the same interpretation that a juror would have. If a petitioner has met the *prima facie* criteria for a motion for a new trial and the witness cross-examined to the point where he/she provides information that would change the verdict, the judge broadens the burden by adding more to the criteria. A judge using terms like "being evasive" to describe a witness, or negatively mentioning a witness said, "I don't recall", when that particular judge did not hear the trial testimony or even review the trial testimony to see how similar both testimonies were, can create a rash judgment. This court has to make clear that once the criterion has been met, a new trial should be ordered and the evidence brought in front of a new jury, especially in an actual innocence case.

This Case involves a matter of mistaken identification by a witness who was a participant of the crime. The witness (Parker) admitted his misinformation was thinking because Henderson referred to one person as his nephew on one occasion that this was the same nephew he referred to on a different occasion. This misinformation led to his misidentification. Parker being the only witness to positively identify the petitioner in the robbery/murder of Corey Davis was actually the only evidence used to convict the petitioner and if this evidence is directly contradicted through a showing of misidentification this evidence should be given to a jury to consider.

According to New Jersey law, In order for a defendant to be granted a New Trial based on Newly Discovered Evidence pursuant to R. 3:20 a person must meet prima facie criteria. The new evidence must be; 1) material to the issue and not merely cumulative or impeaching or contradictory, 2) discovered since the trial and not discoverable by reasonable diligence beforehand, and 3) of the sort that would probably change the jury's verdict if a new trial were granted. State v. Johnson, 34 N.J. 212, 222 (1961); State v. Carter, 85 N.J. 300, 314 (1981); see also State v. Ways, 180 N.J. 171, 197, (2004).

In the Federal Court's the criteria is similar yet it goes further to include the "fundamental miscarriage of justice

exception" explained in both Sawyer v. Whitley 505 U.S. 333, 120 L.Ed 229, 112 S.Ct. 2514 (1992) and Murray v. Carrier, 477 U.S. 478, 91 L.Ed 2d 397, 106 S.Ct. 2639 (1986). The Sawyer and Carrier standards add that, "actual innocence does not merely require a showing that a reasonable doubt exists in the light of the new evidence but rather that no reasonable juror would have found the defendant guilty." Also see, House, at 538 where it states, "The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors."

Here, Petitioner clearly met the prima facie criteria because the Honorable Alfonse J. Cifelli, J.S.C. granted an evidentiary hearing to assess the new evidence under cross-examination. Petitioner met each other criteria required to receive a new trial. As the questions presented ask what spectrum of evidence is required, what consideration is given to misidentification and what consideration is given to the totality of the circumstances? These questions in this extraordinary situation of a case are very relevant.

If the new testimony evidence of the misidentification, which is the direct opposite to the trial identification testimony which was the only evidence to directly link the petitioner to the crime, is used in a new trial there is no way that any reasonable juror would convict the petitioner. This

evidence meets both the Sawyer and the Carrier standard. Even with the Herrera Standard, (Herrera v. Collins 506 U.S. 390, 122, L.Ed.2d 203, 113 S.Ct 853 (1993)), "[where the] petitioner's claim cannot be evaluated on the assumption that the trial that resulted in his conviction had been error free," petitioner clearly met each prong. The petitioner's trial was not error free, which was evident by the remand ordered by the Appellate Division of New Jersey in 2007.

Law and society, as they ought to do, when an offense has been committed it demands accountability. However, the societal injustice is compounded when an innocent man has been subjected to a conviction and prison time as the justification to the committed offense.

In Harris v. Gov't of the Virgin Islands, 55 V.I. 1102 at 1135, "Third Circuit held that, in some circumstances, impeachment evidence alone is enough to justify granting a Rule 33 [new trial] motion on interest-of-justice grounds. United States v. Quiles, 618 F.3d at 391-92. In doing so, it relied heavily on the Seventh Circuit's explanation in United States v. Taglia, 922 F.2d 413, one of the very cases that the trial court rejected as distinguishable:

[Statements by other courts] that new trials should not be granted on the basis of newly discovered impeachment evidence cannot be taken at face value. Nothing in the text or history of Rule 33 . . . supports a categorical distinction between types of



evidence; and we cannot see the sense of such a distinction. If the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted. The 'interest of justice,' the operative term in Rule 33, would require no less . . ."

"The judicial language that seems to exclude impeaching testimony from the scope of Rule 33 thus illustrates the tendency to over generalize. It is easy to confuse a practice with a rule. The practice has been to deny new trials where the only newly discovered evidence was impeaching. But the practice should not be taken to imply a rule that even if the defendant proves that his conviction almost certainly rests on a lie, the [d]istrict judge is helpless to grant a new trial." Harris at 1135

In a case of actual innocence, such as the present case, the evidence was vital to the entire conviction so it could not be looked at as just impeaching. There was not one other piece of evidence to corroborate the misidentification. So in the interest of justice a new trial should be granted when the only evidence was proven to be a misidentification, a mistake or a lie. Justice Scalia stated, "It would be marvelously inspiring to be able to boast that we have a criminal-justice system in which a claim of 'actual innocence' will always be heard, no

matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault." See Bousley v. United States, 523 U.S., at 635, 118 S.Ct. 1604, 140 L.Ed.2d 828 (Scalia, J., dissenting). In the case, the Petitioner has maintained his innocence the entire time, even forcing his co-defendants to trial because he would not plead guilty to a crime that he did not commit.

The disparity used by this justice system is shown in the numbers used in the National Registry of Exonerations. With regard to race and crime the reports are is disturbing. (Appendix H-2) New Jersey, being one of the worst in the nation, is explained in the way the courts have dealt with this case. Due process is guaranties the right to a fair judicial review. Here, Petitioner has been denied that type of review.

Justice Scalia continues, "I suspect it is this vision of perfect justice through abundant procedure that impels the Court today. Of course, we do not have such a system, and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could." Bousley, ibid. The Court notes, "that tenable actual-innocence gateway pleas are rare." McQuiggins 569 U.S. at 1042-1043.

In the present case, the Hearing Judge's opinion on Parker's demeanor is perplexed and the petitioner having met all

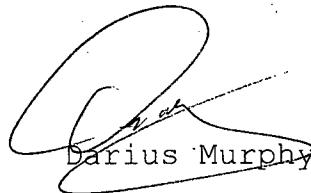
the prongs for both the newly discovered standards and the misidentification standards. This being so, the petitioner ask that this court grant certiorari so that this innocent man can enjoy the fruits of justice as afforded by the constitution of this great nation.

#### CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Date: April 4, 2019

Respectfully submitted,



Darius Murphy