

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DIWONE WALLACE, Petitioner

VS.

MICHAEL MELVIN, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
United States District Court-Southern District of ILLINOIS

PETITION FOR WRIT OF CERTIORARI

Diwone Wallace # B83019

P.O. Box 99

Pontiac, IL 61764

QUESTION PRESENTED

1. Whether or not petitioner established under the fundamental miscarriage of justice standard - that he is actually innocent.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Cases:

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Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENTS 11-27

Amendment XI

Passed by Congress March 4, 1794. Ratified February 7, 1795.

(Note: A portion of Article III, Section 2 of the Constitution was modified by the 11th Amendment.)

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

Passed by Congress December 9, 1803. Ratified June 15, 1804.

(Note: A portion of Article II, Section 1 of the Constitution was changed by the 12th Amendment.)

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves: they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate: the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted: The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.]* The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President: a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

*Superseded by Section 3 of the 20th Amendment.

Amendment XIII

Passed by Congress January 31, 1865. Ratified December 6, 1865.

(Note: A portion of Article IV, Section 2 of the Constitution was changed by the 13th Amendment.)

SECTION 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Passed by Congress June 13, 1866. Ratified July 9, 1868.

(Note: Article I, Section 2 of the Constitution was modified by Section 2 of the 14th Amendment.)

SECTION 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.

SECTION 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, (being twenty-one years of age,*) and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

*Changed by Section 1 of the 26th Amendment.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The opinion of the United States court of appeals appears at Appendix A— and is unpublished.

The opinion of the United States district court appears at Appendix B— and is unpublished.

The opinion of the Illinois Supreme Court appears at Appendix C.

The opinion of the Illinois Appellate Court appears at Appendix D.

JURISDICTION

On August 30, 2017, the United States Court of Appeals decided my case. No petition for rehearing was filed. The date on which the highest state court decided my case was January 29, 2014, a copy of that decision appears at Appendix C. No petition for rehearing was filed.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On December 5, 1999, five men entered the home of Tina Jackson and Dwayne Wilson during the early morning hours. Jackson and Wilson were shot at close range with a shotgun. Defendant and four other men were charged with first-degree murder and tried separately. A sixth man, Terrance Luster, plead guilty to home invasion under a agreement whereby he would testify against the other five men and the state would request a sentence of seven years on the home invasion charge.

Terrance Luster testified that, at about 2:30 a.m. on December 5, 1999, men, including petitioner, came to his home and asked to use his walkie-talkies. Luster accompanied the men to the victim's home and acted as lookout. One of the men kicked in the door, and the five, excluding

Luster called one of the other men on the walkie-talkie, and was told to bring a bag from the porch to the door. As he approached the house, he heard a female scream and a shotgun blast. When he got to the door, he saw petitioner pointing a sawed-off shotgun at Montez Wilson. Wilson turned as if to run, and petitioner shot him.

Tina Jackson died instantly from a shotgun blast to the head. Wilson died later that day from a shotgun blast to his back.

Tina Jackson's brother, aged 12, was in the house at the time of the shooting. He ran to the nearby home of his mother, Trina Jackson. Trina Jackson and her sister Tiffany Jackson immediately went to Tina Jackson's house. Tiffany Jackson entered first. Her eyes met the eyes of Montez Wilson, and Wilson said,

"Diwone Smith." Trina Jackson then entered the house. She asked Wilson what happened, and Wilson replied, "Diwone Smith" shot me". When a police officer arrived, Tina Jackson heard Wilson tell the officer that Diwone Smith shot him. As Wilson was being carried from the home on a stretcher, his sister Shirley Collins, heard him say "Diwone shot me." The state presented evidence that petitioner Diwone Wallace was also known as Diwone Smith.

Petitioner testified at his trial. He testified that he was at his grandmother's house at the time of the murders. He said that he was there all evening the evening before the murders, except that he left at around 7:00 or 8:00 in the evening to buy cigarettes and a snack for his son. His son was at the home of petitioner's mother that night. Petitioner took the snack to his

mother's house. After about 40 minutes, he returned to his grandmother's house, where he stayed all night. His grandmother, Victoria Wallace, and his aunt, Brenda Brown, testified that petitioner was at Victoria Wallace's house all night, sleeping on the sofa.

Trial counsel failed to call Barbara Hunter and Feron Stanley, who would have proved that Mario Stanley a state witness lied about seeing petitioner running from the crime scene. And trial counsel also failed to call Mario Fulgham, who would have testified that Akhenaton Wallace another state witness, lied about seeing petitioner running from the crime scene that night. In fact, Akhenaton Wallace told Mr. Fulgham, who is the cousin of one of the deceased victim's, that he seen Antawn Bradley, Alexander Mattlock ("Little Al"), Edward Willis ("Little Edward") and Marcus Bradley ("Little Mark") running from the crime scene the night of the shooting incident. Petitioner also

presented evidence he was never known as "Diwane Smith".

REASONS FOR GRANTING THE PETITION

After diligently working to retrieve new evidence to establish trial counsel's ineffectiveness, for failing to call critical witnesses who could prove petitioner did not commit this crime, appellate post conviction counsel abandon petitioner's claims. There being no room left to go back to the lower courts to raise a claim of ineffective assistance of appellate post conviction counsel. Because there is no constitutional protection for counsel on appeal in a post conviction proceedings, Petitioner finds himself pleading with this Court to review the new evidence under the fundamental miscarriage of justice standard of actual innocence.

In this instant matter, petitioner asserted before the district court, that it would be a fundamental miscarriage of justice not to consider his procedurally defaulted ineffective assistance of trial and appellate counsels arguments. Perruquet v. Briley, 390 F.3d 505, 514-515 (7th Cir. 2004).

To implement the general principle that "comity and finality ... 'must yield to the imperative of correcting a fundamentally unjust incarceration,'" Murray v. Carrier, 477 U.S. 478, 495, 106 S.Ct. 2639, 91 L.Ed.2d 397, this Court has ruled that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," Schlup, 513 U.S., at 327, 115 S.Ct. 851. Several features of Schlup's standard bear emphasis here. First, while the gateway claim requires "new reliable evidence ... not presented

at trial," *id.*, at 324, 115 S.Ct. 851, the habeas court must assess the likely impact of " 'all the evidence' " on reasonable jurors, *id.*, at 327-329, 115 S.Ct. 851. Second, rather than requiring absolute certainty about guilt or innocence, a petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror, would find him guilty beyond a reasonable doubt.

The jury after hearing all the evidence in this case, sent out a note informing the judge it was hung. The jury was sent back to deliberate further and ultimately reached a verdict of guilty. However, the jury did not have the benefit of knowing that various key state witnesses had not been telling the truth.

Petitioner contends that trial counsel was ineffective for failing to interview/investigate and call Barbara Hunter, Feron Stanley and Mario Fulgham to testify at his trial. Had trial counsel interviewed Barbara Hunter, counsel would have learned that Ms. Hunter seen four men running from the crime scene and that petitioner was not one of them. Also, Counsel would have discovered by interviewing Ms. Hunter that she could have gave information leading to another witness, Feron Stanley.

Ms. Hunter could have provided damaging testimony regarding the state's witness Mario Stanley. Mario Stanley claimed that he was looking out the front window of his house when he seen petitioner and three other men running from the crime scene. At the post-conviction evidentiary hearing, trial counsel testified that he did not know that Ms. Hunter could have

provided testimony that one of the State's witnesses Mario Stanley was not in the house looking out the window as he claimed. Counsel was unaware because he did not investigate. However, Ms. Hunter testified at the Bradley trial that Mario Stanley was not there in the house looking out the front window but she was. Because counsel failed to interview Ms. Hunter, he did not learn that Feron Stanley, brother of Mario Stanley, testimony supported Ms. Hunter's testimony regarding Mario Stanley not being there. Feron Stanley testified at the Bradley trial, that his brother did not show up at the house until about 8:00 a.m. when Feron was leaving to go back to work. Although, at the post conviction evidentiary hearing, his testimony differed in some respects, Feron Stanley's testimony was consistent with Ms. Hunter's testimony that Mario Stanley could not have seen petitioner running.

from the crime scene as he claimed.

Counsel failed to interview another potential witness Mr. Fulgham. Mr. Fulgham gave a statement to the police that shortly after the shooting, Akhenaton Wallace, another state witness, told him that he seen (Antawn Bradley, Alexander Matlock ("Little Al") Edward Willis ("Little Edward") and Marcus Bradley ("Little Mark") run from the house where the victims were shot.

This witness testimony could have further established that petitioner was not there and that Akhenaton Wallace initially did not identify petitioner as one of the four men he seen running from the crime scene. In short, counsel did not investigate any potential witnesses who was not a relative of petitioner. These witnesses had valuable information.

The Respondent's in there answer before the district court suggested that perhaps counsel did not interview or call Mr. Fulgham to testify is because Mr. Fulgham could have offered some incriminating information against the petitioner. This would have been highly on likely, because Mr. Fulgham did not see who ran from the crime scene. Mr. Fulgham testimony would have been damaging only to the state, because it would have been contradicting one of the state's witnesses testimony, of seeing petitioner running from the crime scene. Mr. Akhenaton Wallace was given a deal to testify.

Counsel's failure to investigate and or interview these witnesses becomes even more heighten because during deliberations the jury sent out a note saying it was hung. That means all of the jurors did not immediately find petitioner guilty of this

Crime, Jurors did not have the benefit of knowing that Mario Stanley lied when he said he was at home and was looking out the front window, when he said he saw petitioner running from the crime scene. And jurors also did not have the benefit of knowing that Akhenaton Wallace initially told Mario Fulgham who the four men were he seen running from the crime scene and petitioner was not one of them. Had the jurors who were initially holding out and other jurors, had knowledge that two of the prosecutor's key witnesses testified untruthful, it's likely that the jury would not have convicted petitioner of this crime.

In this present case, Counsel conducted no form of a reasonable investigation and appellate counsel was also ineffective. Petitioner believes counsels performance fell below a reasonable objective standard and petitioner

believes he has met the prejudice
prong as well. Strickland v. Washington,
104 S.Ct at 2064.

CONCLUSION

Petitioner request this Honorable
Court grant review of this petition.

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