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Wrongly convicted, Elizabeth man spent 3 years in prison

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By [Richard Khavkine/The Star-Ledger](#)
on February 10, 2013 at 8:32 AM, updated February 14, 2013 at 7:06 PM

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

Aristide Economopoulos/The Star-Ledger

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

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

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

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

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

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

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

Although his mother was battling cancer before his arrest, he said his prosecution and subsequent incarceration added to her stress and sped her death. His sister, Shakia, who calls Mervilus her mentor, said she became powerless to keep their



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younger brother from getting himself into trouble with the law.

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

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

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

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

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

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

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

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

"It's a miraculous journey through the criminal justice system



for a man who always professed his innocence," he said.

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

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

Mervilus, though, went further.

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

"The victim is a liar."

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

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

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

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

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

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

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

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



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DINO!

Just like the Bob Dylan song went, "This is the story of Hurricane, the man the authorities came to blame, for something he had never done..."

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I14mmep

New Jersey:

Twice the amount of the exoneree's income in the year prior to incarceration or \$20,000 per year of incarceration, whichever is greater.

The wrongfully convicted person must show "he did not by his own conduct cause or bring about his conviction." This provision may prevent people who falsely confessed or pled guilty from receiving compensation.

Second to last paragraph:

Following his retrial, and before the verdict was read, prosecutors offered him a deal: time served, and probation, in exchange for a guilty plea. He refused.

Are they serious???????????

 Last Month · [Reply](#)

I14mmep



They convicted an innocent man to ease the mind of one victim and hurt a lot of families. Than they try to minimize their debauchery by ruining an innocent man's life even further.

👍  Michael McFadden likes this.

 Last Month · [Reply](#)



udonwannano

"A verdict of not guilty is not synonymous with innocence; innocence connotes a person free from blame. A not guilty verdict simply means the jury found that the State did not carry its burden of proof." State v. White, 360 N.J. Super. 406, 413 (App. Div. 2003).

 Last Month · [Reply](#)



assman cometh

Nobody is innocent.

 Last Month · [Reply](#)



ll4mmep

The state must prove a man is guilty to prevent this exact thing from happening.

 Last Month · [Reply](#)



oldmccop

He manipulated the system and got himself out of a jam, he pretends to be innocent by changing

the game.

 Last Month · [Reply](#)



youngclarkite

Ironic, the Union County Prosecuters can find an innocnet man guilty but cannot even indict a man who allegedly stole chain saws or find who used generators during Sandy. Connected to who?

 Last Month · [Reply](#)



I LoveLinden64

And, once again, the watchdog faithful inject a completely unrelated subject into another issue. Their pathetic obsession is still virulently running amok.

 Last Month · [Reply](#)



dubenezic

Polygraph tests are inadmissible at trial. So how could a jury use that to convict him?

 Last Month · [Reply](#)



bc

because the story is half written as usual - he was not convicted on that soley but the lawyer won an appeal on that issue regardimg the polygrapher. he probably had a public defender at his initial trial. its only admissable if both sides agree to let in again not a whole story written here anybody who

insists on a polygraph against or before talking to a lawyer should think again.

 Last Month · [Reply](#)



Joe P

So let me see if I got this right. The guy was at a Dunkin Donuts, another guy gets slashed, guy one was picked up out of the blue (at least the SL left that part out)

And the SL does not give us ANY other evidence but he is convicted, right?

Now, guy one has a noteworthy record, if not the SL would have put it in bold caps, he has no substantial alibi, fails a polygraph, there will be NO civil suit, I'm gonna say this guy hit the lottery and beat the system.

No? Great, lets see a civil suit.....

Too many folks comment on stuff they have no clue about.....

 Last Month · [Reply](#)



mfishers

Another example of the police, prosecutors and judges being totally inept, corrupt and stupid.

  Michael McFadden likes this.

 Last Month · [Reply](#)



darkhorse

Inept is not a strong enough word. This man's life and countless others are destroyed and sidetracked for years due to a justice system that is broken.

  Michael McFadden likes this.

 Last Month · [Reply](#)



brosoldier

The article states that: Following his retrial, and before the verdict was read, prosecutors offered him a deal: time served, and probation, in exchange for a guilty plea. He refused

The following video entitled "It's My Job" completely explains why the Prosecution offered him a plea deal in lieu of a retrial. It's from the ebook, "The Collective Writings Of Nostonun".

<http://www.youtube.com/watch?v=TYF1s9k8Bf8>

score09 likes this.

Last Month · [Reply](#)



brosoldier

That title is "Realizations" The Collected Writings of Nostonun.

Last Month · [Reply](#)



Michael McFadden

the criminal justice is biased against the poor;

<http://www.huppi.com/kangaroo/L-CJSpoor.htm>

👍 🐾 score09 likes this.

👤 Last Month · [Reply](#)



jerzeyjolt

Michael, just another reason not to be poor as if someone needed any more.

👍 🐾 Tingles likes this.

👤 Last Month · [Reply](#)



Michael McFadden

Like some people have a choice, as if they are born into poverty or not, or for that matter the color of their skin. But when you're biased like you are, it comes natural when you're ignorant.

👤 Last Month



Dale

While there are some who choose to be poor, due to laziness, there are many who work, or want to work, but are still poor. There are many people born into middle-class families, have a college degree, and are thousands of dollars in debt due to obtaining this college degree, but are still unable to find gainful employment.

While everyone should be

responsible for his/her own actions, there are things that affect individuals that are beyond their control. It is up to us, as participants in a democratic republic, to identify instances where citizens are treated unjustly and then work to correct these issues.

  ILoveLinden64 and  score09 like this.

 Last Month



bospherus

I wonder what the ratio of low income/ low education wrongly convicted to mid-high income/higher education wrongly convicted is? There is no easy solution in society when you have been wrongly accused or black-listed. You have Mervilus's situation where he professes his innocence during acquittal and now has to deal with employers black-listing him. On the other hand, you have Charles Dorner using extreme violence to prove his innocence. One thing for sure, the system is far from perfect.

  Dale likes this.

 Last Month · [Reply](#)



assman cometh

"Following his retrial, and before the verdict was read, prosecutors offered him a deal: time served, and probation, in exchange for a guilty plea."

How low can you go?

  NJNANNA and  marylou stark like this.

 Last Month · [Reply](#)



Tingles

ass:

That happens and is offered every single day in every courtroom in America. You'll find a very good percentage take the deal. They know they're guilty they know they're done. How about those who are able to stop the trial when they know they're going to lose and take the deal. You missed them guys.

 Last Month · [Reply](#)



assman cometh

Plea bargaining when you're innocent makes no sense. Luckily this guy was smart enough to hold out for real justice.

  marylou stark,  Dale and  Michael McFadden like this.

 Last Month



mmw826

Either eliminate lie detectors or allow their readings in court. Make a decision.

 Last Month · [Reply](#)



sadpunkin

I thought polygraph evidence was not admissible?

 Last Month · [Reply](#)



mfishers

It's not, but the dishonorable judge in this case did what they all do...broke the law. He should be in jail.

 Last Month · [Reply](#)



MovingMoreRight

That's why he got the retrial and was found not guilty. Using the testimony of the polygraph technician is just plain illegal. What testimony could they offer?

 Last Month · [Reply](#)



rcp4961

The best thing to do when situations like this happens is put the Prosecutor and the ADA in jail for the same amount of time, along with the detectives and police associated with the case.. most are more interested in winning than getting at the truth

  shut up shuttin up likes this.

 Last Month · [Reply](#)



BrassBand5

Why is that the crew that typically praises Christie, bashes cops and other public workers,

etc., still insist on portraying a man cleared of all charges as guilty?

  Dale likes this.

 Last Month · [Reply](#)



Tingles

One out of 100 thousand, isn't a bad track record. The system isn't perfect nothing is. But it is the best system in the entire world.

  tpreview2006 likes this.

 Last Month · [Reply](#)



notloranda

you wouldnt say that if it were your kid

  Dale and  Michael McFadden like this.

 Last Month · [Reply](#)



Tingles

I have two. born and in the city. The object is to not commit a crime or hang with those who do commit crimes or will commit crimes.

My Grandfather had a saying. Show me your friends, I'll tell you who you are. I can proudly say, my kid's have a better chance of hitting the mega millions than to get arrested. Not ever happening.

  tpreview2006 and  bc like this.

 Last Month



marylou stark

Your kids may never commit a crime because of the way their were raised and the lives that they now lead. But, they could be arrested. Not everyone who is arrested is guilty. I have a friend whose son was murdered. The 1st person who was arrested and charged with the crime was not the 1 who actually did it. And she is not the type of person who wanted to see just anyone convicted. She wanted the one who really did it to pay for the crime.

 Last Month



tpreview2006

I agree. When things like this happen, people tend to forget the good aspects of our justice system.

 Last Month · [Reply](#)



FreeAllSheeple

Remember at least one thing. There is NO such thing as a lie detector. That has always been a scam.

  rcp4961 likes this.

 Last Month · [Reply](#)

briefster



"acquitted" does not equal "innocent"

👍 jerzeyjolt, rcp4961 and Tingles like this.

Last Month · [Reply](#)



compujas

It also doesn't equal "guilty".

👍 ILoveLinden64, notloranda, Michael McFadden, ru4knights, Dale and **4 more** like this.

Last Month · [Reply](#)



blazinblueyes

acquittal legal definition

noun

In criminal law, the legal finding, by judge or jury, that an accused person is not guilty of the crime he is charged with. Once the acquittal is reached, the defendant may not be prosecuted again for the same criminal act or transaction. The legal and formal certification of the innocence of a person who has been charged with a crime.

Acquittals in fact take place when a jury finds a verdict of not guilty. Acquittals in law take place by operation of law such as when a person has been charged as an Accessory to the crime of Robbery and

the principal has been acquitted.

West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc. All rights reserved.

  Dale and  avxnj like this.

 Last Month



Knute60

If he was wrongly convicted he should be given a state government job and a pension. Just use the money it takes to feed Christie lunch every day, that should hold Mervilus for another 20 years.

  dawgtownbrother likes this.

 Last Month · [Reply](#)



Austinpwrs

I'm sure his pervious arrests / convictions would prevent any state job

 Last Month · [Reply](#)



Austinpwrs

Simple search of DOC website will prove it. Also , if he had a clean record , you could bet that the article would have stated that he was" never arrested before this incident "

 Last Month



Austinpwrs

FYI be sure to note the fact that he has 5 documented alliaes . That is an excellent clue of someone with a criminal record .

 Last Month



pirate39

You people talking about his "innocence" and being convicted for "a crime he didn't do" need to look beyond the SL's clear bias against law enforcement before you make such statements. He wasn't found "innocent", he was found "not guilty", these are two distinct things. This guy was convicted in one trial, a trial which was overturned on some kind of polygraph technicality it sounds like. He was retried, and this time a second jury found him not guilty. Any of you ever stop to think that the second jury got it wrong, and that he was guilty as found in his first trial? The SL does a one sided story recounting his side of the story, but when it comes to the Prosecutor's side, they say that they talked to him and he "recounted the case facts" yet the SL doesn't explain what those facts were. Listen, if this guy was wrongfully convicted everyone should feel for him. But given the SL's proven anti law enforcement bias (as demonstrated above) how can you trust this reporting? Are you really surprised that this guy, when interviewed by the SL, proclaims he's innocent? I bet 99% of those convicted do the same. Also, any of you seriously think he's not just laying the groundwork for some kind of "unlawful conviction" payday? Please. Everyone wake up and stop spreading these "he's innocent" claims when the SL only gives you one

side of the story.

  jimnj1 likes this.

 Last Month · [Reply](#)



jerzeyjolt

marylou, many people probably do, but it also true that not everybody does [your statement is consistent with this].

 Last Month · [Reply](#)



marylou stark

Yes, it is. Read the comments. There are more than a few people on this site who think he should have to prove his innocence, not that the prosecution should have to prove his guilt. The fact that he may have committed other crimes and been convicted of those doesn't really matter. It could not be proven that he was guilty of this particular crime.

 Last Month



I Love Linden64

pirate - that is a ridiculous argument. By your standards, there is not an innocent man or woman that has ever been brought to trial. Charged/tried does not equal guilty.

 Last Month · [Reply](#)



perfectogether

What a botched investigation and prosecution. This man lost 6 years of his life (3 before the trial and 3 in prison). His family lost their son, brother, friend, etc. Ever been accused of saying or doing something that you didn't do? It's frustrating, isn't it? Imagine going to prison for it. Wish this guy the best in his future, but the state needs to compensate. Tired of hearing, "not my tax dollars". Oh shut up people. Your paying taxes, whether this man files a case or not. This man deserved to have "tax dollars" and didn't.

Dale likes this.

Last Month · [Reply](#)



Austinpwr

Perfect . Where does this article say he is Not Guilty ?

Last Month · [Reply](#)



marylou stark

Ever been accused of saying or doing something that you didn't do?

Yes,I have,and for something that happened when I wasn't even there when it occurred.Frustrating is not the word for it.Feeling helpless,not able to convince someone who has known you for years and doesn't believe you.Something bad happened and someone has to be held responsible for it.If the person who actually committed the act can't be determined,just find someone to hold responsible.

Dale and BrassBand5 like this.

 Last Month · Reply



JA

FIRE the police, prosecutor and judge.

REMOVE their pensions, benefits and everything else they get.

PUT THEM IN JAIL for the same amount of time that they robbed from this man times 3.

BAR THEM from ever having a job where they are even 3 degrees removed from salary coming from taxpayer money.

BE TOUGH ON THIS EPIDEMIC @govchristie

Otherwise, this will go on and on and continue to be one of the obstacles to our maintaining a civilized society.

  shut up shuttin up and  blazinblueyes like this.

 Last Month · Reply



Dale

If the police, prosecutor, and/or judge purposely or negligently lied, failed in providing due process, and/or committed other legal/ethical violations, then they should be removed from power. However, from the article, it seems that a polygraph test technician and the alleged victim who misidentified Mervilus are the ones who are at fault for this situation.

  jerzeyjolt,  BrassBand5 and  marylou stark like this.

 Last Month · Reply



Tingles

JA:

That ain't happenin. Since you're not satisfied, why not try the judicial system in North Korea. Give it a shot. Planes leave Kennedy 3 times a week. Enjoy your flight.

Last Month · [Reply](#)



jim290

Tingles, if the shoe was on the other foot, like your foot, you wouldn't be so quick to judge other people's opinions. If this injustice happened to you or someone in your family, you would be "singing a different tune."

Dale,
 Michael McFadden and
 marylou stark like this.

Last Month



Current Events Man

An injustice is still an injustice. Compensation is due. An overzealous Prosecutor is a danger to society. They are as criminal as true criminals. This gentleman was right to refuse their deal.

Michael McFadden and blazinblueyes like this.

Last Month · [Reply](#)



Austinpwrs

If compensation is due the it should

come from the victim . He is the one that lied , compensation should come from him NOT the taxpayers.

 Last Month · [Reply](#)



sadpunkin

except the police and the prosecutors are responsible for determining the veracity of witnesses

  Michael McFadden likes this.

 Last Month



sadpunkin

above commnt meant for austin comment that victim lied so victim should pay

 Last Month



broadwaybill

Yes he could have been an oil technician....and then he could have been laid off when the economy went bad or because of something related to Hurricane Sandy.....things happen.....

I wish I had a \$1 for every job I ALMOST had....

 Last Month · [Reply](#)



clarkchik

How many jobs did you lose because you were arrested and tried for a crime you didn't do?

  scorpio27,  Michael McFadden,  BrassBand5 and  Dale like this.

 Last Month · [Reply](#)



marylou stark

yeah, thyer, and some of them are telling the truth.

  Michael McFadden,  Dale and  BrassBand5 like this.

 Last Month



broadwaybill

Mmmm....let's see....NONE!
Somehow I have managed to get through 48 years of my life NOT being arrested or charged with anything! And, frankly, neither have most of my friends....

 Last Month



scorpio27

You don't get it do you. A young man's life with so much promise was ruined. And it affected not only his, but the rest of his family. How many others do you think this has happened to. I'm sure those 3 years were a living hell. Get over yourself

  Michael McFadden and  Dale like this.

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5812-07T3

STATE OF NEW JERSEY,
APPROVED FOR PUBLICATION

February 15, 2011

APPELLATE DIVISION
Plaintiff-Respondent,

V.

EMMANUEL MERVILUS a/k/a EMMANUEL
MERVILOUS a/k/a EMANUEL MERVILUS
a/k/a EMMONVEL MERVILUS a/k/a
EMMANUEL MERVELOUS,

Defendant-Appellant.

February 15, 2011

Submitted January 18, 2011 - Decided

Before Judges Lisa, Reisner and Alvarez.

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

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

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

The opinion of the court was delivered by
REISNER, J.A.D.

Defendant Emmanuel Mervilus appeals from his conviction for first degree robbery, N.J.S.A. 2C:15-1, and aggravated assault, N.J.S.A. 2C:12-1b(1), -1b(2). Based on improper expert testimony concerning polygraph evidence, we reverse the conviction and remand for a new trial. If the State intends to rely on polygraph evidence at the re-trial, the State must first establish the reliability of polygraph evidence at a Frye hearing. At the N.J.R.E. 104 hearing, the defendant may also challenge the reliability of his

individual polygraph test, e.g., whether the machine was working properly or the expert administered the test correctly. However, as we construe *State v. A.O.*, 198 N.J. 69 (2009), a Frye hearing is mandatory.

I

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

Relying on *State v. Ruffin*, 371 N.J. Super. 371 (App. Div. 2004), the judge denied a Wade³ hearing because defendant presented "no evidence . . . which alleges that the officers were, in any way, suggestive" and "[i]n fact, there is no evidence that they said anything to the victim prior to his identifying" the two suspects.

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

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

According to Officer Benenati, he was passing by in his patrol car when Abreu rolled his bicycle into the street in front of the police vehicle, showed the officer his stab wound and asked for help.⁵ When Benenati asked who stabbed him, Abreu pointed to two men who were walking about 100 yards away. After Benenati's partner recovered a knife about ten feet from the two suspects, Abreu was able to identify it as the knife used to stab him.⁶ The suspects, later identified as defendant and Desire, were photographed at the police station. Benenati then showed copies of those photographs to Abreu, who identified the subjects as his attackers. In his testimony, Benenati also identified the men in the photographs as being the persons he arrested on the night of the assault.

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

After next describing the results of defendant's polygraph test, during which defendant denied involvement in the robbery, Kaminskas was asked if he was "able to develop an opinion whether or not Mr. Mervilus was telling the truth." Summarizing his views, Kaminskas testified that "in my opinion . . .

he wasn't telling the truth." Under questioning from the prosecutor, Kaminskis also testified that in his extensive experience as a polygrapher, in "between 60 and 70 percent of the . . . tests I conduct[,] I find the . . . people are truthful." In those cases, he would report the results to the "investigating officers" and "a lot of times the case is terminated or charges against the person are dropped."

On cross-examination, Kaminskis referred to the test as "not just a lie detector [but] also a truth indicator." He testified that he had never encountered a situation in which he had opined that "someone was . . . showing signs of deception, and [it later] came out that they were truthful." He also described a "guilty" suspect as being "a little more anxious . . . because they know that the truth is going to be found out."

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

II

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

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

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

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

B. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO OFFER IMPROPER EXPERT TESTIMONY THEREBY PREJUDICING THE DEFENDANT'S RIGHT TO A FAIR TRIAL (NOT RAISED BELOW).

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

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

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

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

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

H. THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY THAT IT COULD FIND DEFENDANT GUILTY OF SECOND DEGREE ROBBERY UNDER A THEORY OF ACCOMPLICE LIABILITY.

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

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

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

In considering whether to go further and bar polygraph evidence altogether, the Court acknowledged that such evidence might be unreliable.⁷

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

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

[*Id.* at 91-92 (citations omitted).]

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

While the Court declined to prohibit the use of polygraph evidence altogether due to the lack of a sufficient factual record in the case before it, the *A.O.* opinion required that such a record be made in any future case where a party sought to introduce polygraph evidence:

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

[Ibid. (emphasis added).]

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

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

In explaining how a polygraph exam is administered, the expert also used the terms "guilty" and "innocent." For example, in explaining the difference between "control questions" and "relevant questions" pertaining to the crime, he stated that "a person [who] actually did the crime, or was participated in the incident, will react to [relevant] questions . . . [whereas] a person who is innocent, or had no involvement in the incident, will react to [other types of] question[s]." He testified that a person who "reacts more" to the relevant test questions was "lying." Kaminskas also opined that defendant reacted to relevant questions and his answers, indicating that he had no involvement with the robbery, showed deception, meaning the defendant "wasn't telling the truth." Although the expert did not explicitly state that he believed defendant was guilty, his testimony implicitly constituted an opinion on defendant's guilt.

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

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

We have repeatedly and consistently recognized that a jury's determination of criminal guilt or innocence is its exclusive responsibility. A jury's verdict of ultimate criminal liability can never be equated simply with its determination of underlying facts; the determination of guilt or innocence transcends the facts on which it is based, no matter how compelling or inexorable those facts may be. The determination of facts that serve to establish guilt or innocence is a function reserved exclusively to the jury. Hence, an expert's testimony that expresses a direct opinion that defendant is guilty of the crime charged is wholly improper.

[Id. at 77 (citations omitted).]

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

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

We conclude that admission of the improper polygraph evidence was prejudicial error warranting reversal of defendant's conviction. While this is a closer case than A.O., in which there were significant weaknesses in the State's case, we cannot describe the State's evidence against defendant as overwhelming. This is not a case in which, for example, a defendant was caught red-handed selling drugs to an undercover police officer. See, e.g., *State v. Nesbitt*, 185 N.J. 504, 508 (2006). Here, the police came on the scene after the assault, and the State's case hinged to a great degree on the victim's testimony. The victim claimed to have gotten a good look at the assailants but mis-identified a courtroom spectator as being one of the robbers, and he could not identify defendant in the courtroom. A knife was found moments after the stabbing, but it bore no traces of blood and no fingerprints. Defendant testified, and thus his credibility was in issue. The improper polygraph testimony could have made a difference to the outcome. *State v. Macon*, supra, 57 N.J. at 336. Therefore, we reverse defendant's conviction and remand this case for re-trial.

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

We add the following comments for the trial court's guidance on remand. In considering whether polygraph evidence should be banned altogether, the Court stated that any future attempts to introduce polygraph evidence in a criminal trial would require a preliminary determination as to its reliability. A.O., supra, 198 N.J. at 92. Therefore, if the State intends to rely on polygraph evidence, it must first prove the reliability of such evidence at an N.J.R.E. 104 hearing. *Ibid.*

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

R
eversed and remanded.

- 1 *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).
- 2 Mr. Abreu's full name is Miguel Abreu Barrientos, but he ordinarily uses Abreu as his last name.
- 3 *United States v. Wade*, [388 U.S. 218](#), 87 S. Ct. 1926 18 L. Ed. 1149 (1967).
- 4 Both sides stipulated before the jury that this individual was not the co-defendant, Daniel Desire.
- 5 Abreu testified that he encountered a passerby who called the police for him. Benenati testified that no one summoned him to the scene; he just happened to be on patrol in that area.
- 6 The State stipulated that tests performed on the knife revealed no blood or fingerprints.
- 7 See *State v. A.O.*, 397 N.J. Super. 8, 30 (App. Div. 2007) (Weissbard, J.A.D., concurring)(urging the Court to bar the use of polygraph evidence due to its unreliability).

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Emmanuel Mervilus

Mugshots.com ID: 37908036

Race: Black

Ethnicity: Black

Gender: Male

Hair Color: Black

Eye Color: Brown

Height: 6' 0" (1.83 m)

Weight: 211 lb (96 kg)

Birth date: 2/07/1984

SBI Number: 000748602C

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Open Government / Aaron Swartz

Government Accountability

Admission Date: 3/28/2008

Current Facility: Released by Court - SWSP

Current Max Release Date: N/A

Current Parole Eligibility Date: N/A

Sentence Information:

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

Incarceration History:

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

Aliases:

- Merivlous, Emmanuel
- Mervelous, Emmanuel
- Mervilous, Emmanuel
- Mervilus, Emanuel
- Mervilus, Emmonvel

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