

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

S.C. SUPREME COURT

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RODNEY ALEXANDER NASH      PETITIONER

v.

STATE OF SOUTH CAROLINA      RESPONDENT

APPELLATE CASE NO. 2015-000070

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PROSE PETITION FOR WRIT OF CERTIORARI

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RODNEY ALEXANDER NASH  
#292870  
MCCORMICK C.I.,  
386 REDEMPTION WAY  
MCCORMICK, S.C. 29899

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Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)

Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)

## ISSUE PRESENTED

Did the PCR COURT err in failing to find trial counsel ineffective for failing to obtain trial transcript of second trial so use it in impeaching the credibility of the primary state's witness at trial.

## STATEMENT

In January 2006, the Spartanburg County Grand Jury indicted Rodney A. Nash on the charges of murder and possession of a firearm during the commission of a crime of violence. On May 5-7, 2008, Nash proceeded to trial before the Honorable Thomas Russo and a jury. Nash was represented by William Godfrey, and the state was represented by Anthony C. Leibert and Ryan McCarty. App. 1. The jury found Nash guilty as charged, and the judge imposed concurrent sentences of forty years for murder and five years for possession of a firearm during the commission of a violent crime. App. 264, 11.2-12; App. 275, 11.5-16. Nash's attorney filed a notice of appeal which was perfected by the Office of Appellate Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Nash's appeal on March 17, 2010. State v. Nash. Op. No. 2010-UP-176 (Ct. App. filed March 1, 2010).

On July 20, 2010, Nash filed an application for post-conviction relief (PCR). The state filed a return on February 16, 2011. An evidentiary hearing was held on January 7, 2013 before the Honorable J. Derham Cole. Nash was represented by Alexandria M. Wolf, and the state was represented by Suzanne H. White. App. 314. November 30, 2014, Judge Cole issued an order denying Nash's PCR application and dismissing it with prejudice. App. 424-432. Nash's attorney filed a notice of appeal. This prose petition follows.

## ARGUMENT

Did the PCR Court err in failing to find trial counsel ineffective for failing to obtain trial transcript of second trial so use it in impeaching the credibility of the primary state's witness at third trial.

On June 30, 2005, Terrell Farr and Michael Wiggins were leaving the Linville Hills Subdivision after taking Wiggins' sister and her friend to Wiggins' house. As they were driving down the street, they allegedly saw Nash standing by a car holding a gun. Wiggins testified that as they rode by, he looked back and saw Nash with the gun. Wiggins ducked down. Wiggins didn't hear a gunshot because the music was up. His friend Terrell who was driving said he was hit. Wiggins had to stop the car because Terrell passed out. App. 94, 11.1 - App. 101, 11.18. Wiggins had no doubt that Nash was the person who killed Terrell. App. 103, 11.18-24. Dr. David Wren, the forensic pathologist, testified that Terrell died from bleeding to death from the gunshot wound to his left armpit and through his heart. App. 106, 11.10 - App. 107, 11.17.

Nash testified at the trial that he had gone to his brother's house on June 30, 2005, which was in the Linville Hills Subdivision. He left between 5:00 and 5:30 because he wanted to go see his sister's newborn baby. He wanted his wife to go with him so he went home. His wife had to go to Bible Study and choir practice that night but he did not know that until she called as she was leaving work. Nash went home

and cooked himself a pizza and watched television. He had no cigarettes so he went to the nearby store and then returned home. His wife came home and they went to visit his sister but the doors were locked as it was too late. They went to bed. The next morning, detectives from the sheriff's department came and took him in. Nash gave a statement and then was arrested and charged with murder. He testified that he did not kill Terrell Farr. App. 204, 11.12 - App. 213, 11.6.

At Nash's PCR hearing, Nash testified that his trial counsel was ineffective for failing to obtain the transcript from the second trial, so use it in impeaching the credibility of the primary state's witness at the third trial. App. 339, 11.21-25

In Michael Wiggins voluntary statement to the police, he stated that after they dropped his sister and her friend off at Wiggins' house, they went right back up Old Farm Road and saw Nash leaning against a car, holding a gun down by his side. They got two houses past where Nash was standing when he heard one shot. They ducked down. Terrell said they're shooting at us. Terrell sped up and said im hit. Exhibit #1.

In Nash's first trial, Michael Wiggins testified that when they went back up the street, Wiggins saw Nash holding a gun and then told Terrell that Nash got a gun but he guessed that Terrell didn't hear him because the music was up. They got past the house then Terrell said they're shooting at us. Terrell ducked and Wiggins ducked, then Wiggins heard

the last shot that was the one that hit Terrell. App. 383, 11.22 - App. 384, 11.1-7. Wiggins then testified that he didn't hear a shot. App. 394, 11.19 - App. 395, 11.1-9. Wiggins testified that before June 30, 2005, he seen Nash only a couple of times. App. 386, 11.13-15. Wiggins didn't see Nash at a christmas function to seeing Nash once at a christmas function. App. 389, 11.23 - App. 390, 11.21 ; App. 396, 11.15-19.

In Nash's second trial, Michael Wiggins testified that when they past the house, leaving out the subdivision, he never ducked down, but glanced back and actually saw Nash shoot a gun. Wiggins testified that he didn't put it in his statement to the police because he was probably too nervous. He stated that he heard the shot. App. 420, 11.6 - App. 421, 11.2. Wiggins testified that he saw Nash a couple of times in the neighborhood and at one family event. App. 409, 11.15-17. Wiggins testified that he didn't see Nash for probably more than three years at a Christmas function. App. 416, 11.9-15.

At Nash's third trial, Michael Wiggins testified that he did not hear a shot because the music was up. App. 99, 11.21-25. Wiggins testified that he looked back, saw Nash with the gun, ducked down, then Terrell said he was hit. App. 100, 11.1-5. Wiggins testified that he saw Nash at a christmas function years ago and before and between that time and the shooting, he saw Nash in the neighborhood all the time. App. 102, 11.21 - App. 103, 11.17. Wiggins testified that he and Nash played basketball together. App. 105, 11.11-13.

At Nash's PCR hearing, Nash testified that he received the

transcript from his second trial through his PCR counsel. Nash testified that he thought trial counsel obtained a copy of the transcript from the second trial but subsequently learned that trial counsel didn't request, receive or have a copy of the transcript from the second trial available to him. Nash testified that he and his trial counsel didn't review the transcript of the second trial to prepare for the third trial. App. 340, 11.1 - App. 341, 11.21.

At Nash's PCR hearing, trial counsel testified that the reason why he didn't procure the transcript from the second trial and use it to attack Michael Wiggins every way possible was because he didn't see very much difference in Michael Wiggins testimony between the first and second trial and he didn't see the necessity of getting another transcript for the sake of trial to get ready for the third trial. He testified that he thought he did what he needed to do and if he missed something then he missed it, and the transcript will have to speak for itself. Trial counsel and solicitor Anthony Leibert was going to get a transcript, then trial counsel was going to get a transcript too. App. 371, 11.16-23; App. 370, 11.14-21; App. 371, 11.24- App. 372, 11.1-3.

The PCR Judge ruled that he found trial counsel's testimony to be more credible than the testimony of Nash. The Judge found that counsel was thoroughly competent in his representation. Nash failed to prove that trial

counsel was ineffective, nor that Nash was prejudiced by counsel's performance. App. 431 - App. 432.

The PCA Judge stated that Nash did not proffer any questions Counsel allegedly failed to ask Michael Wiggins and did not present any testimony showing Wiggins answers at trial would have been different. Also that Nash did not show that a different approach to cross-examination would have been beneficial to the defense, and that Nash had failed to offer any testimony or evidence to demonstrate that the outcome of the trial would have been different had counsel obtained that transcript. App. 431.

Section 16-9-10 of the South Carolina code provides in pertinent part: (A)(1) It is unlawful for a person to wilfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this state. (2) It is unlawful for a person to wilfully give false, misleading, or incomplete information on a document, record, report, or form required by the laws of this state.

SCRE under Rule 608(c) "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced". This subsection of Rule 608 preserves South Carolina precedent holding that generally, "anything having a legitimate tendency to throw light on the accuracy,

truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony." State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976).

"If a witness admits a prior inconsistent statement, he has impeached himself and further evidence thereon is inadmissible". State v. Lynn, S.C. 284 S.E. 2d 786 (1981).

State v. Bethune, 104 S.C. 353, 89 S.E. 153, 154, held that a new trial should have been granted because of the affidavit of the assistant solicitor to the effect that he talked with the state's chief witness before the trial, that the statement then made by the witness was essentially differently from his testimony on examination by the solicitor at the trial. "The theory of the law is that the duties of the solicitor are quasi judicial, and that, while it is more especially made his duty to conduct the prosecution so as to present the facts upon which the state seeks a conviction, nevertheless the rest upon him to see that no act on his part shall prevent the prisoner from having a fair and impartial trial. The state does not desire a conviction in any case unless the prisoner has been accorded those rights that entitle him to a fair trial. When the assistant solicitor heard the witness testify differently, from the statements which he had already made, it was his duty to bring such facts to the attention of the solicitor in order that he might take such steps as might be necessary to enable the prisoner to have a fair trial!"

Due process is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured". Mooney v. Holohan, 294 U.S. 103.

"The testimony of a witness on trial may be discredited by contradictory testimony given by him at a preliminary hearing. However, such former testimony must be established by legal, competent and proper proof". State v. Hicks, 261 S.C. 247, 199 S.E. 2d 304 (1973).

"The failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment". State v. Mayfield, 109 S.E. 2d 716 (1959)

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 384 S.E. 2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, supra; Butler v. State, supra.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, that result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial, Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Nash testified at his PCR hearing that the primary state's witness Michael Wiggins' testimony had changed over the course of the three trials, from Wiggins saying that he didn't hear a gunshot, to Wiggins saying that he didn't hear a gunshot and actually saw Nash shoot a gun. App. 345, 11.5-24. Nash testified at PCR that his trial counsel should have cross-examined Michael Wiggins using his prior inconsistent statement and that if his trial counsel would have used the voluntary statement from Michael Wiggins, and the testimony from Wiggins' from the first and second trial transcripts. to attack Michael Wiggins credibility at the third trial, the jury would have rendered a different verdict. App. 345, 11.25-App. 346, 11.21.

The testimony of Michael Wiggins at trial was not accurate when he was asked whether or not he heard a gunshot

after passing the residence that he allegedly saw Nash holding a gun before his friend was shot. Trial counsel should have offered Michael Wiggins' voluntary statement at trial along with Wiggins' testimony from Nash's first and second trial to allow counsel to cross-examine Michael Wiggins differently.

Trial counsel prejudiced Nash when he failed to obtain the transcript from Nash's second trial. In the second trial, Michael Wiggins' testimony was that he heard a shot when they passed the residence which was different from Wiggins' testimony in Nash's first trial which his testimony was that Wiggins heard a shot and then suddenly changed his testimony to not hearing a shot. Michael Wiggins was specific in his voluntary statement when he stated that he only heard (1) one shot. At Nash's third trial, Wiggins testified that he did not hear a shot because the music was up, which is different from Wiggins' voluntary statement and Wiggins' testimony in Nash's first and second trial.

At Nash's third trial, one of the questions from the jury during deliberation was to see the voluntary statement that was made by Michael Wiggins at the police station. App. 260, 11. 18-19.

The prosecution was allowed to build a case and obtain a firm contradicted testimony given by the only crucial witness the state presented against Nash's defense which was Michael Wiggins. Wiggins' credibility was the foundation for Nash's arrest and conviction.

A different approach to cross-examination would have been beneficial to the defense had trial counsel obtained the transcript from Nash's second trial to prepare for Nash's third trial to attack Michael Wiggins' credibility in more ways than attacking his identification credibility. App. 373/11.23-APP.374/11.1-2. Nash did not receive effective assistance of counsel for this reason.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully Submitted,

Rodney Alexander Nash

Rodney Alexander Nash

Petitioner

CASE#	VOLUNTARY STATEMENT		PAGE of
STATEMENT OF: Michael Poon Wiggins	AGE: 19	DATE: 6/30/05	
ADDRESS: 707 old farm rd			
PHONE# 864-576-8834	DOB: 12/5/85	SSN: 251-61-7715	

I (Michael Wiggins), Terrell Furr and my sister Tai Herbert and her friend Tiquialla were going home. We were in Terrell's car. We came up a street before road turn right & went down old farm road. Went by the house at the corner of old farm & rdwy. I saw a black male who is married to my cousin Tamara Wiggins. I said to Terrell that he is looking at us. Terrell said I see him we went down the road & dropped off two girls. We turned around & went right back up old farm rd. As we went back to the house I saw the same black male again leaning back on the white car. I saw a large hand gun with a long clip in his right hand. He was holding the gun between his legs. We were about 2 houses down where the black male was standing when I heard a shot we both ducked down. Terrell said there shooting at us. Terrell sped up and said I'm hit I'm hit. I said <sup>for</sup> <sup>(P) MW</sup> ~~real~~. I told him to stop I had to stop the car for him. I saw the blood on Terrell. I fled down a black lady and let me use her phone. I called 911. I checked Terrell and waited for help. A lot of people were running up the street. I only heard 1 shot. Terrell and the black male had a problem with (Alex & his brother). Terrell told me that Alex and some other boys shot up his car <sup>(P) MW</sup> the first & second shooting. He also told that Alex & his brother were shooting at him when he rode pass their mother's house on <sup>MW</sup> ~~Chelsa~~ <sup>(P)</sup> Chelsa. I don't know why there are beating.

Terrell  
of [unclear]

I have read this statement consisting of 1 page(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

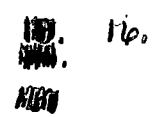
This statement was completed at 11 10 P M. on the 30 day of June 2005.

WITNESS: Michael Wiggins [Signature]

[Signature]  
Signature of person giving voluntary statement

FORN to before me this 30th day of June 2005

[Signature] (Seal)  
Notary Public of South Carolina



09-01-2005 0049

CASE# 2005061923		<b>VOLUNTARY STATEMENT</b>		Page 1 of 1
STATEMENT OF: Michael Dean Wiggins		AGE: 19	DATE: 6/30/05	
ADDRESS: 707 Old Farm Rd.				
PHONE# 864-576-8834	DOB: 12/5/85	SSN: 251-61-7715		

I (Michael Wiggins), Terrell Farr my sister Toi Herbert and her friend Taquialla were going home. We were in Terrell car. We came up a street before Rodney turn right and went down Old Farm road. Went by the house at the corner of Old Farm Rd. and Rodney. I saw a black male who is married to my cousin Tamera Meadows. I said to Terrell that he is looking at us. Terrell said I see him we went down the road to dropped off the two girls. We turned around and went right back up Old Farm Rd. As we went back by the house I saw the same black male again lending back on the white car. I saw a large hand gun with a long clip in his right hand. He was holding the gun down by his side. We were about 2 houses down were the black male was standing when I heard a shot we both ducked down. Terrell said there shooting at us. Terrell speed up and said I'm hit, I'm hit. I said for real. I told him to stop I had to stop the car for him. I saw the blood on Terrell. I flagged down a black lady and let me use her phone. I called 911. I checked Terrell and waited for help. Not of people came running up the street. I only heard (1) shot. Terrell and the black male had a problem with (Alex and his brother) Terrell told me that Alex and some other boys shot up his car the first or second shooting. He also told that Alex and his brother was shooting at him when he road pass there mother's house on Chelse. I don't know why there are beefing. END OF STATEMENT.

I have read this statement consisting of 1 page(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement. This statement was completed at 11:10 P M. on the 30TH day of JUNE 2005.

WITNESS: \_\_\_\_\_

\_\_\_\_\_  
Signature of person giving voluntary statement

SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.  
\_\_\_\_\_  
(Seal)



17.  
Notary Public of South Carolina  
My Commission Expires: \_\_\_\_\_

Typed by: TJ

09-01-2005 0047

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STATE OF SOUTH CAROLINA  
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J. Derham Cole, Circuit Court Judge

S.C. SUPREME COURT

RODNEY ALEXANDER NASH

PETITIONER

v.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2015-000070

CERTIFICATE OF SERVICE

I certify that a true copy of the prose petition for writ of certiorari have been served on Daniel E. Shearouse, Clerk of court this 30 day of November, 2015

Affidavit

SWORN TO BEFORE ME this 30 day of November, 2015

J. Frank

Notary Public for South Carolina

My Commission Expires 12-16-2019

SI Rodney A. Nash

Rodney Alexander Nash  
#299870

PETITIONER