

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

United States of America ex. rel.)	
)	
BOBBY NIXON, Register No. B45916)	
)	
PETITIONER)	
)	No. 07 CV 1286
)	
vs.)	The Honorable
)	Samuel Der-Yeghiayan
)	Judge Presiding
STEVE WRIGHT,)	
Warden, Hill Correctional Center)	
)	
RESPONDENT)	
)	

**MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR ISSUANCE
OF A CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. § 2253(c).**

Petitioner Bobby Nixon through his attorney, Jennifer Bonjean, respectfully requests that this Court reconsider its summary dismissal of petitioner Nixon’s timely filed petition for a writ of habeas corpus. In the alternative, petitioner respectfully requests that this Court issue a certificate of appealability on the following claims where petitioner has made a substantial showing that

- I. Trial Counsel Provided Ineffective Assistance of Counsel When He Failed to Properly Investigate the Case and Secure Readily Available Exonerating Testimony from **Six** Eye Witnesses Who Confirm That Nixon Was Not the Shooter, One of Whom Identified Another Person as the Shooter from a Police

Line-up Shortly after the Shooting.

- II. Nixon Was Denied Due Process of Law When the Prosecution Knowingly Elicited False Testimony from Reginald Duncan; Failed to Disclose a Deal of Leniency with Duncan; Elicited False Testimony from Duncan Concerning That Deal; and Ambushed the Defense into Believing That Duncan Was Merely a Motive Witness Rather than a Eyewitness to the Crime.

Evincing an alarming misapprehension of the record below and the applicable state post-conviction standards, this Court alleges that Nixon is not entitled to an evidentiary hearing on his ineffective assistance of counsel and various prosecutorial misconduct claims because “Nixon has failed to show that he was precluded from a full and fair hearing” in the state court. (Dist. Ct. Order at 16-17)

There is simply no dispute over whether Nixon obtained a full and fair hearing in the state post-conviction proceedings. He did not. The state post-conviction judge allowed the State’s Motion to Dismiss without resolving a cornucopia of factual disputes that exist on the pleadings. In essence, the state court improperly dismissed Mr. Nixon’s state post-conviction petition on the pleadings *without* providing him an opportunity to establish his fully-supported and un rebutted claims of ineffective assistance of counsel and prosecutorial misconduct. Now this Court has done the same, and it should reconsider its decision.

I. Ineffective Assistance of Counsel

Nixon argues in his petition and supporting memorandum of law that he was unreasonably denied the effective assistance of counsel in the state court proceedings that resulted in his conviction when his trial attorney failed to call **six** separate eye witnesses to the

shooting all of whom would have verified that Nixon was not the culpable party but rather other individuals driving a dark-colored Chevy. Incredibly, one of those eye witnesses, Mario Rayyes, identified someone other than Nixon as the shooter from a line-up shortly after the shooting.

(State. P.C. C 41; 220-226)

This Court rejects Nixon's claim that counsel's performance was sub-standard when he failed to secure the exonerating testimony of Brown, Wilson, Mimms, Sylvester, and Reyes (all eye witnesses who would have testified that Nixon was not the shooter as the State claimed) since trial counsel is not "obligated to track down each and every possible witness or personally investigate every conceivable lead." (Dist. Ct. Order 7-8)

In making this finding, this Court seems to overlook that the state post-conviction judge and the Illinois Appellate Court expressly held that **these witnesses could have been located through due diligence**. See *People v. Nixon*, No. 1-04-1357 & 1-04-2368 (cons.) Unpublished Rule 23 Order at 20-21 (February 21, 2006) (*Nixon II*). Put another way, had trial counsel acted diligently, he would have located these eye witnesses, interviewed them, and presented their critical testimony.

Petitioner does not quarrel with the proposition that trial attorneys are not obligated to track down "every possible witness" or follow "every conceivable lead," but that argument misses the point. Nixon does not, nor has he ever claimed, that his attorney was obligated to pursue every possible lead. Nixon has never asked for that level of diligence from his attorney. Nixon would have been satisfied with even a cursory investigation by his attorney since these eye witnesses could have been located with a modicum of due diligence - a finding the state courts already made. *Nixon II* at 20-21.

Incredibly, Jose Reyes, one of the witnesses who confirms that Nixon could not have been the shooter was named in the police reports, three of the witnesses either worked or lived on the *exact* corner where the shooting occurred, and the remaining witnesses lived in the neighborhood as well. (State P.C. C. 220-226) How could it possibly be reasonable to overlook witnesses who lived or worked on the corner where the shooting occurred? Astoundingly, Jose Reyes, one of those eye witnesses, not only lived across the street from the shooting but made a statement to police describing the offenders and the get-away car (including giving a partial licence plate number) and gave the police all of his identifying information, including his address and phone number. (State. P.C. C. 263) There simply can be no justification for failing to interview Jose Reyes - a point this Court does not deny.

Given that the state court already concluded that these witnesses could have been located had trial counsel showed due diligence and *all* of the witnesses lived or worked in the area of the shooting - three of them on the exact corner of the shooting, *and* at least one of the witnesses was listed in the police reports - this Court should reconsider its position that trial counsel's performance was reasonable.

This Court also claims that trial counsel's performance was not deficient for failing to secure Mario Rayyes' testimony since counsel made efforts to locate Rayyes and only later learned that Rayyes had moved to Washington DC. (Dist. Ct. Order at 6-7) This Court's reading of the record is *seriously* flawed on this point. Mario Rayyes worked at the corner store on Augusta and Avers and witnessed the shooting. (State P.C. C. 272 & 278) He immediately reported what he saw to the police and identified a person named Brandon Frazier as the shooter from a line-up. (State P.C. C. 272 & 278) Frazier was arrested in the car that was pulled over

fleeing the scene at Avers and Augusta. Rayyes also confirms that Nixon was not in the car nor was he one of the persons he saw involved in the shooting.

Although Nixon concedes that trial counsel made an effort to locate Rayyes' *prior* to trial, the record unequivocally shows that trial counsel discovered Rayyes' whereabouts *during* Nixon's commenced and continued bench trial but failed to secure his pivotal testimony - a failing that cannot be justified by trial strategy. On the second day of trial, counsel discovered through a third-party that Rayyes was living in Washington DC. (Tr. R. N 3) Although trial counsel told the court that he *heard* that Rayyes would not "consent" to come in to Chicago, counsel made no effort to confirm this third-party information nor did he attempt to interview the witness or subpoena him to testify. Critically, Rayyes asserts in an affidavit offered in support of Nixon's state post-conviction petition that he was never interviewed by Nixon's attorney and *would* have testified if asked to. (State P.C. C. 230)

Trial counsel exhibited an astounding level of indifference to Nixon's case when he forfeited Rayyes's undeniably compelling testimony - blindly accepting a third-party statement that Rayyes wouldn't "come in" to testify for Nixon. A competent attorney would have requested a short continuance to interview the witness (by telephone if necessary), determine his willingness to testify, and subpoena him to testify if necessary. After all, Nixon enjoys the right to compulsory process. Trial counsel's failure to do any of the above was not a strategic decision; it was a lazy and indefensible one.

This Court also concludes that Nixon cannot show that he was prejudiced by counsel's failings. This Court's scant prejudice analysis is at odds with the record in the case. The State presented the following evidence against Nixon at trial.

- Repudiated prior grand jury testimony of Tarrill Peters naming Nixon as the shooter
- Repudiated prior grand jury testimony of Salatheo Moss naming Nixon as the shooter
- The (now-recanted) surprise testimony of Reginald Duncan identifying Nixon as the shooter

The defense offered officer O'Malley's testimony showing that immediately after the shooting, Chicago police officers pulled over a dark-colored Chevy at Avers and Augusta, containing three individuals fleeing the scene. Counsel presented no additional evidence supporting his meager effort at identifying the individuals from the Chevy as the true culprits.

Had counsel conducted even the slightest investigation or showed a minimal level of due diligence, he would have presented the following evidence in Nixon's defense.

- Testimony of Mario Rayyes identifying Brandon Frazier as the shooter and not Bobby Nixon
- Testimony of Johnny May Wilson showing that individuals driving a dark-colored Chevy carried out the shooting and not Bobby Nixon
- Testimony of Ida Brown showing that individuals driving a dark-colored Chevy carried out the shooting and not Bobby Nixon
- Testimony of Stephanie Mimms showing that individuals driving a dark-colored Chevy carried out the shooting and not Bobby Nixon
- Testimony of Jon Sylvester showing that individuals driving a dark-colored Chevy carried out the shooting and not Bobby Nixon
- Testimony of Jose Reyes showing that individuals driving a dark-colored Chevy carried out the shooting and not Bobby Nixon
- Testimony of officer O'Malley corroborating these witnesses' testimony and confirming that immediately after the shooting he curbed a dark-colored Chevy at the scene, containing Brandon Frasier (the individual identified as the shooter by Rayyes), two other individuals but NOT Bobby Nixon

This Court simply ignores this compelling record of innocence when it concludes that Nixon has failed to show prejudice from trial counsel's failure to present the foregoing evidence in his defense. The State's case was slim at best where it relied on the repudiated grand jury testimony of two convicted felons and the patently suspect testimony of another convicted felon who never told the police or anyone else that he had even witnessed the crime and only belatedly identified Nixon as the shooter after being arrested on his sixth narcotics offense - a witness who now admits that he lied at Nixon's trial in exchange for leniency in his own case. A fair and honest review of this record leads to no other conclusion than had the trier of fact heard the testimony of six eye witnesses (and the corroborating testimony of a first-responding police officer) that points to an offender other than Nixon - it would have rejected the inherently suspect testimony of three convicted felons, all with motives to lie, and probably acquitted Nixon.

Accordingly, this Court should reconsider its decision dismissing this claim without an evidentiary hearing, and without hearing testimony from these vital witnesses and trial counsel himself. Alternatively, Nixon respectfully asks that this court grant a certification of appealability on this issue since Nixon makes a substantial showing of the denial of his constitutional right to effective assistance of counsel.

II. Prosecutorial Misconduct Claims

Rather than conduct its own independent and thoughtful analysis, this Court adopts the poorly reasoned unpublished order of the Illinois Appellate Court in denying Nixon's prosecutorial misconduct claims. This Court claims that "Nixon has failed to provide any compelling evidence that the prosecutor knowingly presented perjured testimony at his trial." (Dist. Ct. Order 12)

Like the state court post-conviction judge and the Illinois Appellate Court, this Court puts the cart before the horse - erroneously denying Nixon the evidentiary hearing to which he is entitled. Duncan clearly states in a video-recorded statements that he:

- 1) Lied at Nixon' trial when he belatedly identified Nixon as the shooter.
- 2) He only agreed to lie and implicate Nixon after being arrested on his sixth narcotics offense for which he faced mandatory prison time of 6 to 30 years.
- 3) He negotiated a deal with the Assistant State's Attorney who agreed to help Duncan obtain leniency in exchange for his false testimony.
- 4) Lied during his testimony when he denied having an agreement of leniency with the prosecution.

Transcripts from Duncan's sentencing hearing unequivocally show that his sentencing judge considered Duncan's testimony at Nixon's trial and gave him leniency in his drug case. Indeed, Duncan ended up with a 33 month sentence - a far cry from the mandatory 6 to 30 years he originally faced. The prosecution did not object, nor did it request, an enhanced sentence for Duncan. Indeed, the prosecution did not even argue in aggravation at Nixon's sentencing hearing. These facts are simply not in dispute.

While the prosecution in Duncan's case denied the existence of an express deal with Duncan, this claim is belied by the record and expressly refuted by Duncan's video-recorded statement and handwritten notes from Duncan's trial attorney found in Duncan's trial folder. These competing facts create a dispute that *must* be resolved in an evidentiary hearing. Moreover, if Duncan and Nixon's statements are accepted as true, then Nixon is certainly entitled to relief under *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963)

Napue v. Illinois, 360 U.S. 264 (1959). Accordingly, the state court, and this Court, have erred by refusing to allow Nixon to prove these allegations in an evidentiary hearing. This Court and the Illinois State Courts may find Duncan's video-recorded statement suspect, but this Court (and the state courts) have no discretion to reject his statement without holding an evidentiary hearing to assess its truth and reliability.

Again adopting the faulty reasoning of the Illinois Appellate Court, this Court holds, "even if Nixon could show that Duncan's testimony was perjured, and that the prosecutor knew of the perjury, Nixon has failed to show that the alleged perjury would have altered the verdict" since "the trial court did not base its decision solely on Duncan's testimony that Nixon was the shooter, but rather also on the testimony of Peters and Moss." (Dist. Ct. Order at 13) This Court holds Nixon to an absurdly high standard that finds no support in the law. As this Court acknowledges, Nixon need only show that "some likelihood" exists that the false testimony impacted the verdict. (Dist. Ct. Order at 12) Nixon is certainly not required to show that the verdict was premised *solely* on the false testimony to establish a due process violation - as this Court holds.

Under the proper legal standard, it is simply undebatable that had the trier of fact known of the false testimony of the State's only live eye witness, there is "some likelihood" that the outcome would have been different. While Nixon concedes that the trial court credited the repudiated prior statements of Moss and Peters, the trial court also expressly stated that its finding of guilt relied on Duncan's testimony. Thus, it is simply disingenuous for this Court to suggest that Duncan's false testimony played absolutely no role in the court's finding of guilt.

Finally, this Court rejects Nixon's due process claim that the prosecution ambushed

Nixon with Duncan's (false) testimony for the purpose of gaining a tactical advantage. This Court contends that the record does not show that the prosecution misrepresented Duncan as a motive witness and that even if he had, the prosecution committed no wrongdoing since it was not required to disclose the witness in the first place. (Dist. Ct. Order at 13)

This Court misses the point of Nixon's argument. Nixon does not claim that the State had an obligation to disclose Duncan as a witness or even the nature of Duncan's testimony. Nor does Nixon claim that a defendant's due process rights are violated when the State fails to disclose the nature of a witness's testimony. Rather, Nixon alleges that the due process clause will not tolerate calculated trickery on the part of the prosecution that is designed to interfere with a defendant's ability to defend against the charges.

The State is simply *not* permitted to prevent the defense from interviewing a witness or investigating the veracity of a witnesses' testimony by purposefully duping the defense into believing a witness will testify to something fairly innocuous (like a purported motive for the crime) when in fact the witness will identify the defendant as the offender of the crime. Nixon has never claimed that he was unaware that Duncan was a potential witness. But the question does not turn on whether Nixon was aware that Duncan was potential state witness or not. Rather, the State told Nixon, via a memorialized hand-written statement, that Duncan would *only* testify that he witnessed a fight between Nixon and the victims. However, at trial, the prosecution elicited highly damning testimony from Duncan that Nixon was the actual shooter. While Duncan was impeached by omission for failing to disclose this information previously, defense counsel had no opportunity to investigate the surprise testimony and Nixon was greatly prejudice by this lack of opportunity to investigate Duncan's motives since Duncan was the only live eye

witness to the crime.

This Court suggests that Duncan did not suffer any prejudice since trial counsel was permitted to cross examine Duncan, but again this Court misses the gravamen of the error. A cross-examination is only effective if it is preceded by preparation and an investigation that results in evidence that may be used to impeach a witness. Because the State ambushed Nixon with Duncan's testimony, trial counsel had no evidence with which to impeach Duncan. Accordingly, this Court must reconsider its decision and allow Nixon the opportunity to prove his due process claims in a full evidentiary hearing. It took two days to convict Nixon and send him to prison for 50 years. Given the overwhelming evidence in support of Nixon's constitutional claims, Nixon is minimally entitled to a hearing where he may prove those claims.

CONCLUSION

Petitioner, Bobby Nixon, respectfully requests that this Court grant this Motion to Reconsider and order an evidentiary hearing on his claims. Alternatively, Nixon respectfully requests that this Court grant him certificates of appealability on the claims raised herein pursuant to its authority under 28 U.S.C. §2253(c).

Respectfully Submitted,

JENNIFER BONJEAN
Attorney for Petitioner

BY: /s/ JENNIFER BONJEAN
JENNIFER BONJEAN
750 Lexington Ave., 15th Fl.
New York, NY 10022
917-566-3926