

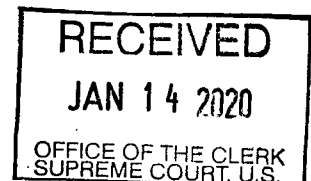
PETITION FOR REHEARING.

MEYERS VS. CLARKE
No. 18-971118-9711
NATURE OF THE CASE

Both the Virginia and United States Constitutions protect the fundamental right to counsel in criminal proceedings. This fundamental right extends at least to a criminal defendant's appeal as of right. David Meyers's appeal as of right was to the Court of Appeals, but the Court of Appeals deprived Meyers of his constitutional right to have counsel present meritorious appellate issues to that tribunal. This Petition provides this Court the opportunity to remedy that wrong.

This Petition arises from a narrow issue: did the Court of Appeals err in holding that Meyers's case presented no meritorious appellate issues and was instead "wholly frivolous"? The answer to that question is yes. The Court of Appeals was required to independently review the totality of the circuit court proceedings. Such a review, properly accomplished, would have revealed meritorious appellate arguments regarding (1) the circuit court's exclusion of Ernest Jones as an alibi witness and (2) the circuit court's entry of Meyers's concurrent sentences. However, the Court of Appeals failed to even recognize that these meritorious arguments existed.

The Court of Appeals' error deprived Meyers of his constitutional right to have counsel present these meritorious arguments to an appellate tribunal. This error can be corrected one of two ways: either counsel can



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argue these issues to this Court so that it can resolve this case on its merits, or this Court can remand the case to the Court of Appeals so that counsel can argue these issues to that tribunal in the first instance. Either action restores Meyers's constitutional right to counsel during the appellate process, and provides for a proper resolution to this appeal.

ASSIGNMENTS OF ERROR-GROUNDS FOR Petition.

1. Because a meritorious appellate argument exists regarding the circuit court's exclusion of Ernest Jones as an alibi witness, the Court of Appeals erred by failing to act in accordance with *Anders v. California*. (Preserved at: 03/06/14 Tr. at 14:19-23:10.)
2. The Court of Appeals erred by failing to reverse the circuit court's exclusion of Ernest Jones as an alibi witness, and by failing to remand for a new trial. (Preserved at: 03/06/14 Tr. at 14:19-23:10.)
3. Because a meritorious appellate argument exists regarding the circuit court's imposition of consecutive sentences, the Court of Appeals erred by failing to act in accordance with *Anders v. California*. (Preserved at: 07/10/14 Tr. at 3:23-10:3.)
4. The Court of Appeals erred by failing to reverse the circuit court's entry of consecutive sentences, and by failing to remand for new sentencing. (Preserved at: 07/10/14 Tr. at 3:23-10:3.)

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS BELOW

A. The Criminal Event

What is not in serious dispute is that between approximately 8:30 and 8:45 on a Sunday night, Maurice Rives, Shereasa McDaniel Rives, and Edward Fox were at the Rives's home in Petersburg, Virginia. (03/06/14 Tr. at 59:2-61:5, 79:17-82:13, 99:17-100:9; 03/07/14 Tr. at 51:18-52:1.)

Two men with guns—one with a partial mask underneath a hoodie, the other completely obscuring his face with a hoodie so only his eyes could be seen—forced their way into the home. (03/06/14 Tr. at 61:6-62:11, 82:14-83:4, 89:10-91:17, 101:13-18, 102:4-7.) One intruder hit Maurice with a gun, and forced Maurice to give up approximately \$700 in cash. (*Id.* at 82:21-84:12, 102:8-103:9.) The second intruder stuck a gun in Edward's face, and then pointed that gun at Shereasa and demanded that Shereasa take him to get more money located in the home. (*Id.* at 62:12-63:23, 84:18-85:17.) Maurice and the first intruder began to struggle, and the second intruder returned from the back of the home to assist his accomplice, and did so by shooting Maurice three times. (*Id.* at 63:24-64:2, 85:21-87:1, 103:19-105:23.) The two men then left the home. (*Id.* at 64:4-21, 77:22-78:10, 88:9-12, 106:6-13.)

David Meyers was indicted for these events. The main dispute of Meyers's criminal trial was whether Meyers was actually one of the men who committed these alleged crimes.

B. The Excluded Witnesses

A hearing was held prior to jury selection. Before accepting Meyers's pleas, the circuit court asked Meyers a series of questions. (03/06/14 Tr. at 13:22-23.) One of these questions was whether there were any witnesses

Meyers—not *Meyers's counsel*—wanted to have called. (*Id.* at 14:19-21, 16:19-17:4.) *Meyers* identified Ernest Jones as an alibi witness who could testify that he had dropped *Meyers* off at Sheila Crockett's home at 7:30 on the Sunday night of the shooting. (*Id.* at 15: 11-16, 16:21-22:14.)

Meyers's counsel explained to the court that he did not intend to call Ernest, or any other alibi witness that was not Sheila, because these witnesses could not account for *Meyers* at the exact time of the alleged crimes. (*Id.* at 15:17-16:12, 17:11-18:10, 22:20-23:6.) *Meyers's counsel* also explained that he did not intend to call Sheila because of her changed testimony, described in more detail below (Sheila was called by the Commonwealth).¹ (*Id.* at 16:1-5, 17:5-10, 18:13-21:2.)

Upon hearing counsel's explanation, and in considering *Meyers's* desire to call Ernest, the circuit court held that Ernest would not provide "alibi testimony," and thereafter continued on with its questioning to determine whether to accept *Meyers's* not guilty pleas. (*Id.* at 23:7-9.)

C. The Parties' Competing Theories of the Case

At trial, the Commonwealth asserted that *Meyers* was the intruder who shot Maurice under the theory that *Meyers* had visited the Rives's

¹ During the pre-trial hearing, *Meyers's counsel* went into detail regarding Sheila's claim that *Meyers* left her home on the Sunday of the shooting, and gave notice that Sheila may testify that *Meyers* was not at her home at all on that Sunday.

home the prior week. (03/07/14 Tr. at 78:25-79:5.) Edward Fox could not identify either of the two intruders. (03/06/14 Tr. at 85:18-20, 86:17-18, 87:23-88:8, 94:5-11.) Only Maurice and Shereasa could provide eyewitness testimony going to identification of the intruders.

Maurice was initially interviewed by law enforcement officers on the Sunday night that he was shot, and under the influence of medication only identified one of the intruders as a delivery man for China Wok; Maurice did not identify Meyers. (*Id.* at 106:14-107:1, 113:21-115:23, 125:17-126:11, 127:3-15.) It was two days later that Maurice identified the other intruder as Meyers, who Maurice has known for about twenty years. (*Id.* at 107:4-108:2, 128:18-129:20.)

Shereasa was interviewed multiple times by law enforcement officers. She alternatively stated that she did not know who the intruders were, or that she thought that one of the intruders was an individual named Zo. (*Id.* at 65:10-66:5, 70:15-72:14; 03/07/14 Tr. at 9:11-10:7, 42:5-43:4.) It was not until the day of trial that Shereasa said that she independently knew that Meyers was one of the intruders, but did not explain how she came to this conclusion independent of her husband Maurice's opinion. (03/06/14 Tr. at 72:15-74:12; 03/07/14 Tr. at 45:17-46:21.)

In response, Meyers asserted that he was not one of the intruders under the theory that Maurice and Shereasa identified Meyers not out of truthfulness, but because they had a grudge against Meyers borne out of a belief that Meyers had shot or robbed Maurice several years prior but had never been punished for that crime. (03/07/14 Tr. at 46:18-47:8, 53:15-54:19, 90:18-91:3.) To aid his position, Meyers introduced evidence that Shereasa told law enforcement officers that neither of the intruders had a limp. (*Id.* at 7:24-9:1.) This evidence was probative of identity because Meyers had various physical ailments progressing over the years that caused him to be in a wheelchair at the time of trial, about two and a half years after the shooting.² (03/06/14 Tr. at 108:3-6, 151:19-152:6.) Meyers also introduced evidence of Maurice's and Shereasa's felony drug convictions to undermine their credibility. (*Id.* at 74:21-75:2, 109:23-110:3.)

D. A Potential Tie-Breaker: Meyers's Alibi

The jury was entitled to weigh these competing theories on their merits. However, these theories would have been considered in the context of the trial as a whole, including Meyers's alibi: Meyers had stated to law enforcement officers that he had been at Sheila Crockett's house on the Sunday night of the shooting. (*Id.* at 129:21-131:7.)

² Meyers currently walks with the assistance of a rolling walker.

Sheila provided testimonial evidence probative of Meyers's alibi, and consequently her testimony could have swayed the jury to determine which theory of the case to believe. The jury heard three different accounts from Sheila regarding Meyers's whereabouts on the Sunday of the shooting.³

First, the jury heard a taped interview in which Sheila stated that Meyers had been with her on the Sunday of the shooting, having arrived at Sheila's home at approximately 7:00 or 7:30 that evening. (03/07/14 Tr. at 23:1-24:15.) Sheila stated that Meyers had stayed the entire Sunday evening at her house, and did not leave. (*Id.* at 24:21-25:10.)

Second, the jury heard a taped interview in which Sheila stated that Meyers had been with her on the Sunday of the shooting, but that Meyers left her house at approximately 8:00 in the evening for one to one-and-a-half hours, and returned with a hot sub sandwich. (*Id.* at 25:11-28:16.)

Third, the jury heard Sheila's live testimony in which Sheila stated that Meyers had not been at her house at any point on the Sunday of the shooting, and instead he had been at her house only on the prior Friday and Saturday. (03/06/14 Tr. at 138:13-140:10, 141:16-142:5.)

³ Although recited here in the chronological order in which Sheila gave these accounts, the jury actually heard the third account first, the first account second, and the second account last.

At trial, Sheila was confronted with her multiple accounts. Prior to hearing her taped interview, Sheila was adamant that Meyers had not been at her house on the Sunday of the shooting. (*Id.* at 142:6-144:12.) Although Sheila testified that hearing her taped interview would refresh her memory, after hearing that interview Sheila maintained her newest position that Meyers had not been at her house on Sunday, and attributed her taped interview statements to her being confused at the time because of family issues. (03/07/14 Tr. at 21:3-8, 38:19-40:18.) Notably, during this testimony Sheila stated that Meyers got her a sub sandwich on the Saturday prior to the shooting, not on that Sunday. (*Id.* at 39:22-40:3.)

E. Verdict and Sentencing

The jury found Meyers guilty of all eight counts: robbery of Maurice with a recommended five year sentence; use of a firearm during that robbery with a recommended three year sentence; malicious wounding of Maurice with a recommended five year sentence; use of a firearm during that malicious wounding with a recommended five year sentence; abduction of Shereasa with a recommended one year sentence; use of a firearm during that abduction with a recommended five year sentence; abduction of Edward with a recommended one year sentence; and use of a

firearm during that abduction with a recommended five year sentence. (*Id.* at 104:15-107:6, 125:13-128:12; see also CC R. 461-66.)

After considering the presentence report, case law, and the parties' arguments, the court accepted the jury's recommendation for a total of 30 years imprisonment. (07/10/14 Tr. at 12:11-13:5; see also CC R. 456-57.) The court entered the sentences to be served consecutively. (CC R. 457.)

F. Appellate Proceedings

Meyers timely appealed to the Court of Appeals. Meyers's appointed counsel moved to leave to withdraw under *Anders v. California*, 386 U.S. 738 (1967). (COA R. 5-6.) Meyers subsequently filed a supplemental pro se petition for appeal. (COA R. unnumbered.) Upon review of the petition for appeal, the supplemental petition for appeal, and all of the circuit court proceedings, the Court of Appeals concluded that Meyers's case was wholly frivolous. (COA R. 28-31.) The Court of Appeals denied the petitions for appeal, granted counsel's motion to leave to withdraw, and denied Meyers's petition for rehearing. (COA R. 28-32.)

Meyers appealed to this Court. After filing a petition for appeal, Meyers filed a motion for the appointment of counsel. This Court granted that motion, and this Supplemental Petition has been filed by the undersigned counsel on Meyers's behalf.

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations

$$\frac{dx}{dt} = f(x, y, z), \quad \frac{dy}{dt} = g(x, y, z), \quad \frac{dz}{dt} = h(x, y, z),$$

where f, g, h are continuous functions of x, y, z and satisfy certain conditions.

2. In the second part, we consider the case where the functions f, g, h are linear in x, y, z and the system can be written in the form

$$\frac{dx}{dt} = a_1x + a_2y + a_3z, \quad \frac{dy}{dt} = b_1x + b_2y + b_3z, \quad \frac{dz}{dt} = c_1x + c_2y + c_3z,$$

where a_i, b_i, c_i are constants. We show that the system has a unique solution for any initial conditions.

3. In the third part, we consider the case where the functions f, g, h are quadratic in x, y, z and the system can be written in the form

$$\frac{dx}{dt} = a_1x + a_2y + a_3z + a_4x^2 + a_5xy + a_6xz + a_7y^2 + a_8yz + a_9z^2,$$

where a_i are constants. We show that the system has a unique solution for any initial conditions.

4. In the fourth part, we consider the case where the functions f, g, h are cubic in x, y, z and the system can be written in the form

$$\frac{dx}{dt} = a_1x + a_2y + a_3z + a_4x^2 + a_5xy + a_6xz + a_7y^2 + a_8yz + a_9z^2 + a_{10}x^3 + a_{11}x^2y + a_{12}xy^2 + a_{13}y^3 + a_{14}x^2z + a_{15}xyz + a_{16}y^2z + a_{17}yz^2 + a_{18}z^3,$$

where a_i are constants. We show that the system has a unique solution for any initial conditions.

5. In the fifth part, we consider the case where the functions f, g, h are of higher order in x, y, z and the system can be written in the form

A meritorious argument for appeal existed regarding (1) the exclusion of Ernest Jones's alibi testimony, and (2) Meyers's consecutive sentences.

1. A/Es 1 & 2: The Exclusion of Ernest Jones's testimony

A review of the hearing immediately before trial reveals a meritorious appellate issue that saved Meyers's appeal from being wholly frivolous: the court's decision to deny admission of Ernest Jones's testimony.⁴

Meyers was entitled to put to the jury evidence corroborating his alibi that he had been at Sheila Crockett's house on Sunday at the time of the shooting. See *Cooper v. Commonwealth*, 277 Va. 377, 384-85 (2009) (an alibi is a defense to a criminal prosecution that "should be left to the jury in an appropriate instruction on the subject"); *Abbott v. Peyton*, 211 Va. 484, 486-86 (1971) ("Unless evidence as to alibi covering the time at or before the crime is sufficient to render the presence of an accused impossible or highly improbable, it proves nothing."). But the circuit court, upon questioning Meyers directly, held that it would not allow Meyers to call Ernest Jones because he would not actually provide "alibi testimony." (03/06/14 Tr. at 14:19-23:8.) A meritorious argument exists that the circuit court committed reversible error in excluding Ernest's alibi testimony.

⁴ As the court's action is challenged, this is not an argument regarding the ineffective assistance of counsel. See *Sigmon v. Director of Dept. of Corrections*, 285 Va. 526, 533 (2013). *Ernest Jones: AFFIAN 4*

October 19th 2019

IN The Supreme Court OF The United States

MEYERS VS. CLARKE; WARDEN CARL MANIS, VADOC:

No. 18-9711

Petition For Rehearing.

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REASONS FOR GRANTING THE PETITION FOR REHEARING:

I now, The Petitioner, DAVID MEYERS Submitting This
Petition For Rehearing For Writ OF CERTIORARI OF No. 18-9711
OF The Supreme Court OF VIRGINIA'S FRAUD UPON The Court,
INTRINSIC FRAUD AND PERJURY IN The Court Perjury
And INTRINSIC FRAUD IN Dismissing My 1st State Habeas
Corpus Record No. 170505 ON My Attorney PAUL ROSKINS
INEFFECTIVE ASSISTANCE OF COUNSEL IN My WRONGFUL
CONVICTIONS OF Petersburg Circuit Court CRIMINAL
Cases Nos. CR12001211-00, CR12001248-CR12001255-00,
AND My Supreme Court OF VIRGINIA Court Appointed Attorney
TRAVIS GUNN Collusion With Assistant Attorney General's
Benjamin KATZ, Eugene Murphy The Respondent's
Attorneys And Supreme Court OF VIRGINIA Judges
Related To Petersburg General District Court's Judge
LUCRETIA CARRICO That I Filed A Civil Action Lawsuit
ON Along With My Court Appointed Attorney Terry
DRISKILL For Them And Petersburg Circuit Judges And
Petersburg Commonwealth Attorney Cassandra
CONOVER'S Malicious Prosecution ON Me And Denying
Me Impartial Mental Health Evaluations By Other Psychologist
AND Mental Health Examiners Because DR. EVAN S. NELSON
SLANDERED That I WAS Competent To Stand TRIAL IN
August 2013 And I WAS Insane And Incompetent
To Stand TRIAL At My 03/06/14 And 03/07/14 Jury TRIALS,
And Attorney Paul ROSKINS Did Not Make AN Objection
To My Insanity And Tell The Jury I WAS Eating And
Drinking My Own Feces At The River Side Regional Jail
Awaiting My Jury TRIALS, And Attorney ROSKINS Refused
To Subpoena My Alibi Witnesses Earnest Jones, Greg Brown,
Tommy Williams, Timmy Browder, Richard Pride, And
Latitia Browder Who Eyewitness Terrance Smith Confessions
That He Terrance Smith And His Nephew Robbed And Shot
Druglord MAURICE RIVES ON 01-29-12 ON 01-30-2012 And
Attorney GUNN WAS Ineffective Assistance OF Counsel
Because He Refused To Obtain Ms. Browder's Affidavit ON
Attorney ROSKIN Leaving Out The Courtroom At My 03/07/14
Jury TRIAL While The Druglord's Wife She REASA RIVES WAS
Still ON The Stand Giving False Testimony ON Me. I Mailed
Attorney For The Respondent Eugene Murphy 2 Notices Notifying
Opposing Counsel That This Case WAS Docketed ON 06-24-19 AND ON 08-08-19.
Respectfully Submitted David Meyers DAVID MEYERS.

FOR: Petition FOR Rehearing:

PRAYER

Comes Now, The Petitioner, DAVID MEYERS, Submitting
To This Honorable Court A PRAYER FOR Petition
FOR REHEARING TO Be GRANTED AND FOR 6 Members
OF The Court To Constitute A QUORUM PURSUANT
TO Rule 4 - Sessions AND QUORUM OF The SUPREME
COURT Rules TO GRANT Petition FOR REHEARING AND
GRANT Below Relief.

RELIEF.

The Petitioner Seeks The Relief That The 6 Member Quorum
Review AND GRANT REHEARING AND Review AND GRANT Certiorari 18-9711.

CONCLUSION

The Petitioner WAS DENIED HIS 4th AND 5th Amendment
U.S. Constitution Rights TO Effective Assistance OF Counsel,
AND TO Summon Witnesses AND EVIDENCE IN HIS FAVOR AND A FAIR TRIAL.
The petition for a writ of certiorari should be granted, AND

Petition FOR REHEARING Should Be GRANTED
BASED ON THE TRUE FACTS IN Petition FOR REHEARING

Respectfully submitted,

David Meyers

Date: 10-19-2019

CERTIFICATE OF SERVICE

I The Undersigned Did MAIL Copies OF

1. PROOF OF SERVICE
2. AFFIDAVIT OR DECLARATION IN Support OF Motion
FOR Leave TO Proceed IN FORMA PAUPERIS.
3. Exhibit # 100, Exhibit # 101A, Exhibit # 101B
4. Petition FOR REHEARING OF No. 18-9711
5. PRAYER
6. RELIEF
7. Conclusion

WAS MAILED TO Assistant Attorney General Eugene Murphy
OFFICE OF THE Attorney General 202 N. 9th St. Richmond, VA. 23219,
AND Delivered TO The Respondent's Counsel BY The U.S. Postal Service,
ON THIS 19th DAY OF October 2019. David Meyers 1039777
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