

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM MARLBORO COUNTY  
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

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Appellate Case No. 2013-000588

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**RECEIVED**

OCT 30 2013

**S.C. Supreme Court**

Brandon L. Ray, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Did the PCR judge properly find Petitioner failed to carry his burden of proving trial counsel was ineffective because trial counsel's objection to the introduction of a co-defendant's statement was specific enough to apprise the appellate court of the nature of the objection and the statement was merely cumulative to other evidence against Petitioner?

## STATEMENT OF THE CASE

In July 2007, the Marlboro County Grand Jury indicted Petitioner for murder (2007-GS-34-0657). (App. p. 598-600). Petitioner also waived indictment to possession of a weapon during commission of a violent crime (2007-GS-34-0658). (App. p. 604-05). Michael S. Holt, Esquire, (“trial counsel”) represented Petitioner. (App. p. 1). After the State called the case to trial, the jury found Petitioner guilty of the weapons charge and the lesser included of voluntary manslaughter. (App. p. 601, 606). On September 13, 2007, the Honorable Howard P. King sentenced Petitioner to concurrent terms of twenty-two (22) years for voluntary manslaughter and five (5) years for possession of a weapon during the commission of a violent crime. (App. p. 602, 607).

A notice of appeal was timely filed and Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal by way of an Anders<sup>1</sup> brief. (App. p. 526). The Court of Appeals dismissed the appeal on February 3, 2010. State v. Ray, Op. No. 2010-UP-089 (S.C. Ct. App. filed February 3, 2010). (App. p. 539).

Petitioner filed this Post-Conviction Relief action on November 1, 2010. (App. p. 541). Respondent filed a Return on March 25, 2011. (App. p. 549). Petitioner amended his application on December 14, 2011. (App. p. 553). The Honorable J. Michael Baxley (“PCR judge”) convened an evidentiary hearing on the application on September 10, 2012. (App. p. 558). Petitioner was present and represented by Charles T. Brooks, Esquire. (App. p. 558). Tyson A. Johnson, Esquire, represented Respondent. (App. p. 558). The PCR judge dismissed the application by written order dated November 29, 2012, and filed December 6, 2012. (App. p. 591).

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

## ARGUMENT

### **I. Probative evidence supports the PCR judge's finding trial counsel's objection was sufficiently specific to apprise the appellate court of the nature of the objection and the statement was merely cumulative to other evidence against Petitioner.**

Petitioner asserts the PCR judge erred by finding trial counsel was not ineffective for failing to preserve for appellate review an objection to an out-of-court statement by Petitioner's co-defendant. However, the record indicates probative evidence exists to support the PCR judge's findings. Therefore, Respondent submits the PCR judge properly denied Petitioner's application.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. The court presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 668). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

The court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. First, the applicant must prove that counsel's performance was

deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the circuit judge's denial of post-conviction relief when there is probative evidence to support the findings of the circuit judge. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

Petitioner was charged with murder along with a co-defendant. (App. p. 597). At Petitioner's trial, the State presented the testimony of six (6) individuals who testified to seeing Petitioner shoot the unarmed victim: Ms. Davis (App. p. 81); Mr. Wilkes (App. p. 126); Willie Covington (App. p. 213); Johnathan Covington (App. p. 244); Mr. Hailey (App. p. 277); and Mr. McCrae (App. p. 319). The State also introduced a statement from Petitioner's co-defendant that indicated Petitioner shot the unarmed victim. (App. p. 303). Trial counsel lodged an initial objection to the statement the day before its introduction. (App. p. 303). The trial court allowed trial counsel to argue the objection the next morning. (App. p. 305). Specifically, trial counsel objected to the statement on two grounds. First, that it was premature to rule the co-defendant was unavailable because he planned to call the co-defendant as a defense witness. (App. p. 306, lines 3-5). Second, he objected to the introduction of some specific language in the statement under Rule 403, SCRPC. (App. p. 603, lines 6-7). Thus, trial counsel lodged an objection to the introduction of the statement and an objection to the specific language. (App. p. 306, lines 10-13).

The trial court ruled the statement itself was admissible under Rule 804(a)(1), SCRCF, because the declarant was unavailable by virtue of invoking his right against self-incrimination. (App. p. 307). The trial court further ruled the specific language objected to by trial counsel was to be redacted. (App. p. 308).

Petitioner alleges trial counsel should have further argued the statement itself was not admissible under Crawford v. Washington, 541 U.S. 36 (2004), because he had no opportunity to cross-examine the co-defendant. However, the PCR judge ruled at the hearing that the issue was not a meritorious one. (App. p. 587). He further ruled there was no support for the confrontation clause argument because the outcome of the trial would not have been different. (App. p. 587). In his order, the PCR judge found the statement was merely cumulative in light of the other testimony against Petitioner. (App. p. 594). He further found the statement was specific enough to apprise the court of the nature of the objection. (App. p. 594).

The PCR judge properly found trial counsel's objection was sufficient to preserve the issue for appellate review. "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) (citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)). Instead, trial counsel must merely "raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." Id., 697 S.E.2d at 595-96 (citing Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939)). In State v. Mitchell, the Court of Appeals acknowledged persuasive authority exists indicating an assignment of error under Crawford requires more than a standard hearsay objection. State v. Mitchell, 378 S.C. 305, 313, 662 S.E.2d 493, 498 (Ct. App. 2008). However, the court rejected that position and held that the defendant asserted a sufficient

basis for his objection even though he did not cite Crawford during trial or in his appellate brief. Id. Here, trial counsel sufficiently objected to the introduction of the statement. He lodged his objection after co-defendant's proffered testimony where he invoked the Fifth Amendment in response to trial counsel's questions. (App. p. 300). He also stated he was concerned it was premature to rule the co-defendant was unavailable under Rule 804. (App. p. 306). Thus, he sufficiently raised to the trial court his objection to the statement on the grounds the co-defendant was unavailable to testify.

More importantly, the PCR judge properly found there was no evidence in the record to indicate the outcome of Petitioner's trial would have been different had the statement not been admitted. (App. p. 594). Even if the statement should have been excluded, Petitioner must still show he was harmed by its introduction. See State v. Davis, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006) ("A violation of a defendant's Sixth Amendment right to confront the witness is not *per se* reversible error[.]). In determining whether Petitioner was harmed by the admission of the statement, the Court looks to "the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." State v. Holder, 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009) (citing State v. Vincent, 120 P.3d 120, 124 (Wash. Ct. App. 2005)).

Here, the State presented six other witnesses who testified they saw Petitioner shoot the victim. Each witness testified they did not see the victim with a gun and that he approached Petitioner's car in a non-threatening manner. Thus, the co-defendant's

statement was not important to establish Petitioner as the shooter. Rather, it was cumulative to the other eye-witness testimony of the shooting.

Furthermore, the co-defendant's statement established Petitioner shot victim, but made no mention of whether victim was also armed. (App. p. 363). In effect, the statement did not provide any information regarding Petitioner's self-defense claim. Petitioner's assertion that cross-examination of the co-defendant would have revealed something new regarding the self-defense claim is without support in the record. Regarding this claim, trial counsel thoroughly cross-examined each of the eye-witnesses and Petitioner had the opportunity to testify to his version of the shooting. If these efforts were insufficient to convince the jury to acquit Petitioner, cross-examination of the co-defendant would not have affected the outcome. The evidence against Petitioner was overwhelming, and he was not prejudiced by the use of the co-defendant's statement.

In light of all of this evidence, the PCR judge properly found Petitioner was not prejudiced by any alleged deficiency of trial counsel. Because the record contains significant probative evidence that trial counsel acted reasonably and within professional norms when implementing Petitioner's trial strategy and that no prejudice resulted from trial counsel's actions, the PCR judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests this Court deny the  
Petition for Writ of Certiorari.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

October 30, 2013

STATE OF SOUTH CAROLINA  
In the Supreme Court

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Appeal from Marlboro County  
Court of Common Pleas  
Honorable J. Michael Baxley, Circuit Court Judge

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Case No.: 2010-CP-34-0303  
Appellate Case No.: 2013-000588

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BRANDON LAQUAN RAY,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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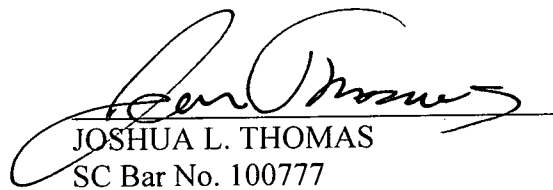
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the **Return to Petition for a Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

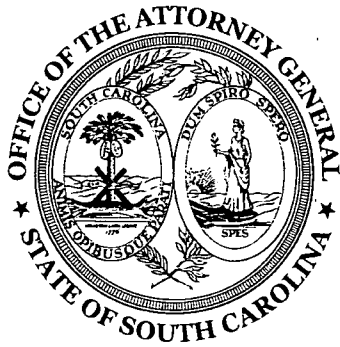
**Carmen V. Ganjehsani, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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This 30<sup>th</sup> day of October, 2013

  
JOSHUA L. THOMAS  
SC Bar No. 100777  
ATTORNEY FOR RESPONDENT

SWORN to before me this 30<sup>th</sup> day of October, 2013.

  
Notary Public for South Carolina.  
My Commission Expires: May 11, 2014



ALAN WILSON  
ATTORNEY GENERAL

October 30, 2013

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
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**RECEIVED**

OCT 30 2013

**Re: Brandon Laquan Ray v. State of South Carolina**  
**Appellate Case No: 2013-000588**  
**Lower Court Case No. 2010-CP-34-0303**

**S.C. Supreme Court**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies each of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Joshua L. Thomas  
Assistant Attorney General  
S.C. Bar # 100777

JLT/jacc  
Enclosures

cc: Carmen V. Ganjehsani, Esquire  
Trisha Allen, Victim Services