STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARIAN K. ROBINSON,

PETITIONER

APPELLATE CASE NO. 2010-172947

BRIEF OF PETITIONER

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INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

ISSUE PRESENTED

The Court of Appeals erred by ruling petitioner was not denied his right to confrontation where the trial court ruled evidence relevant to his defense was not a legitimate area of cross-examination until there was previously entered evidence establishing all four elements of self-defense. This ruling was burden shifting and petitioner had the right to confront and cross-examine the state's witnesses during the state's case-in-chief.

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Greenville County grand jury for the offenses of murder and possession of a firearm during a violent crime. R. 762 - 765. His case came on for trial on July 16, 2007 before the Honorable John C. Few and a jury. Christopher D. Scalzo and Nihar Manhar Patel represented petitioner. Leigh Booth Paoletti was the Assistant Solicitor. R. 1.

At the conclusion of the trial on July 19, 2007 the jury found petitioner guilty on both counts. R. 756, l. 19 – 757, l. 5. The judge sentenced petitioner to life imprisonment without parole based on his prior record. R. 760, l. 23 – 761, l. 1.

The Court of Appeals affirmed in State v. Darian K. Robinson, 2010-UP-356 (July 12, 2010). App. 1-15. Petitioner sought rehearing. App. 16-23. The Court of Appeals denied rehearing. App. 24.

A petition for a writ of certiorari was filed on December 6, 2010. All five Justices of this Court voted to grant certiorari in this Court's order dated October 18, 2013. This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred by ruling petitioner was not denied his right to confrontation where the trial court ruled evidence relevant to his defense was not a legitimate area of cross-examination until there was previously entered evidence establishing all four elements of self-defense. This ruling was burden shifting and petitioner had the right to confront and cross-examine the state's witnesses during the state's case-in-chief.

Relevant Facts

This case involves the January 26, 2005 shooting at a housing project. Samuel Groves lived near petitioner and his girlfriend, Latrice, at the time. R. 86, l. 4 – 88, l. 2. Latrice's cousin, William Godwin, was the decedent. R. 88, ll. 1 – 15.

As will be seen infra, petitioner had hit Latrice the night before his fatal encounter with Godwin. Petitioner wanted to the jury to be aware that it was known that Godwin was a convicted murderer, and that Godwin reacted physically and violently when he thought a relative had been harmed by a boyfriend. Petitioner also wanted to show that guns were commonplace in the unsafe neighborhood. All of this went to petitioner's reasonable apprehension of harm at the time of his fatal altercation with Godwin, and therefore his defense of self-defense.

Samuel Groves told the police that petitioner admitted to him that he "smacked Trice [Latrice, the girlfriend] and the cousin [the decedent] came and confronted him. R. 90, ll. 11 -15.

Groves acknowledged that petitioner asked him for advice about what he should do, since the decedent was threatening him because he hit Latrice. Groves told petitioner that he should stand up for himself. "I told him to fight [the decedent]." "He told me that he had a gun." R. 90, l. 11 – 92, l. 14.

Groves said that when petitioner's girlfriend came back to the apartment they shared the following evening, petitioner told her "to stop sending her family at me or your peoples at me or something of that nature right there. Stop sending people at me." R. 92, ll. 19 – 23.

Groves claimed -- and petitioner would deny -- that petitioner told a group of men standing outside an apartment where his girlfriend was with her mother and the decedent: "Ain't no use in ya'll catching a misdemeanor." Groves maintained that petitioner ultimately entered the apartment, and that he heard gunshots shortly thereafter. R. 96, ll. 4 – 16. He saw petitioner come out of the apartment with "a gun down to his side." R. 97, l. 15 – 98, l. 8. As stated, petitioner denied making the "misdemeanor" statement.

When petitioner attempted to cross-examine Groves about the fact this neighborhood was not a safe place to live and that was why many people carried guns, the judge sustained the solicitor's relevance objection. The court rejected defense counsel's argument that this testimony was relevant to rebut the state's claim that petitioner armed himself solely to shoot the decedent. R. 102, l. 22 – 105, l. 14.

Groves testified that petitioner told him that both the decedent and Keith Williams, the father of Latrice's children, had confronted him earlier in the day. R. 109, ll. 4 – 19. Petitioner asked to use his cell phone before the shooting occurred. Groves described petitioner's call as "a distress call." There would later be testimony from petitioner that he was attempting to get out of the housing project because of the threats being made against him because he had hit Latrice. R. 110, l. 7 – 114, l. 7.

Defense counsel also asked Sammy Groves if it was common for other people in the area to have guns. The solicitor again objected to the relevance of this testimony. The judge again sustained the relevance objection. R. 118, l. 19 – 120, l. 20.

Natasha Latrice Atkinson was petitioner's girlfriend at the time of the shooting. Petitioner shared an apartment with her, and her two children. R. 130, l. 5- 132, l. 17.

Latrice testified on the night before the shooting she argued with petitioner, and that petitioner hit her in the face in front of her children. R. 133, l. 14 – 136, l. 10. This angered her because she never even argued with the father of her children, Keith, in front of them. R. 136, l. 11 – 139, l. 21.

Petitioner confronted her when she returned home the following evening about "telling these lies. Your people ain't going to be rolling up on me, sitting in the parking lot like they're going to do something to me." R 143, l. 11 – 144, l.23.

She added that petitioner used the number "187" when referring to himself. R. 145, ll. 1 – 8. There would later be state's evidence this was a gang code for murder that originated from §187 of the California Penal Code, the murder statute. R. 145, ll. 1 – 8. Defense counsel attempts to keep this prejudicial evidence from coming before the jury were unsuccessful, but petitioner denied he ever said this number or made such a reference. R. 145, l. 2 – 150, l. 3.

The fatal encounter

Latrice remembered she was drinking coffee with her mother when the decedent came to her apartment. R. 152, l. 22 – 153, l. 5. Petitioner later came to the door as the three of them were talking. Latrice let petitioner inside where the decedent was sitting with her mother. R. 157, l. 5 – 160, l. 8.

Petitioner continued to complain to Latrice about her family threatening him. Latrice recalled at this point the decedent got out of his chair, and asked petitioner: "What do you mean by family?" Latrice testified that petitioner then pulled the gun out of his pocket, and "you heard two loud firecrackers sounds at first." R. 160, l. 3 – 161, l. 23. Petitioner would later testify that the

decedent, who was a large man, had 'rushed" him immediately before the frightened petitioner shot him. R. 165, l. 16 – 167, l. 17.

Dr. Michael Ward, the pathologist, testified the decedent was shot once in the head, once in the chest, and once in the abdomen. R. 320, l. 7 – 331, l. 12. Importantly, Dr. Ward testified the decedent fell forward which indicated "there was some momentum," which was corroborating expert evidence that the decedent *was moving towards petitioner* when he was shot. R. 336, l. 12 – 337, l. 14.

The judge's continued ruling on self-defense

Out of the presence of the jury, Latrice acknowledged she knew the decedent had been in prison, and that the decedent had been in prison for "some sort of murder charge." R. 179, l. 16 – 181, l. 22. Latrice also remembered *petitioner and the decedent had talked and they both referred to "the smell of blood" and "hurting somebody or killing somebody* that I guess it leaves you with the memory of blood or something you don't forget." (emphasis added). Latrice said she remembered the conversation about smelling the presence of blood vividly because petitioner and the decedent were both talking about it and how it affected them once they had been exposed to it. R. 181, l. 13 – 183, l. 21.

The judge ruled that there was not any evidence *yet* in the case that petitioner knew the decedent had committed a murder, and that the prior murder evidence could not be heard by the jury. R. 184, l. 24 – 185, l. 15.

Defense counsel would later argue that for a long period of time "that the judge ruled that self-defense had to be established prior to being relevant." R. 728, ll. 4 – 8. The judge acknowledged he ruled there had to be evidence to support "*all the elements [of self-defense]* before

something that was unrelated to the case *other than to prove self-defense* became relevant and therefore became admissible." R. 728, ll. 9 – 13. (emphasis added).

Defense counsel argued the judge's ruling violated petitioner's right to confrontation. "You can't let them go backwards and then cross-examine the state's witnesses in a defense case. Those witnesses have already testified. The opportunity for cross-examination is gone at that point." Counsel argued this was burden-shifting because the defense had to present evidence of each element of self-defense during the state's case-in-chief which was not practicable. R. 728, l. 4 – 729, l. 20.

For example, defense counsel noted the evidence that Latrice was aware that her cousin, the decedent, had been convicted of murder. R. 728, ll. 4 – 17. The judge responded that petitioner could have recalled Latrice as a witness during his case. Defense counsel told the judge that was not an acceptable solution given his right to cross-examine and confront the state's witnesses. R. 732, l. 22 – 733, l. 11. Defense counsel argued he had been denied the right to cross-examine the state's witnesses "*from day one*." R. 733, l. 13 – 734, l. 1. (emphasis added).

The judge then said that the defense was not entitled to attack the character of the victim. The judge once again stated that until there was evidence of each element of self-defense, that the defense **could not attack the character** of the victim. R. 735, l. 1 – 736, l. 3.

Hannah Paulette Edens, Latrice's mother and the aunt of the testified after Latrice. R. 228, l. 23 – 231, l. 8. Edens testified when she returned with Latrice from their janitorial job that evening petitioner was "outside my daughter's door talking to Sammy." R. 231, ll. 11 -16.

Other testimony

Edens recalled at the time of the fatal incident that the decedent was seated at her dining room table. She remembered petitioner knocked on the door at that time. R. 236, l. 4 – 237, l. 25.

Once inside, petitioner and Latrice were "bickering" back and forth. R. 238, ll. 2 – 4. Edens remembered petitioner stating that he was tired of being threatened by their family. Edens recalled at this point the decedent got out of his chair, and Edens said petitioner shot him. She offered that petitioner then turned around, and "walked out of the door as if he hadn't did a thing," R. 239, l. 15 – 241, l. 7. Defense counsel objected to Edens' characterization of petitioner as he was leaving the apartment. That objection was overruled. R. 241, ll. 8 – 16.

Other self-defense evidence during the state's case-in-chief

When petitioner attempted to get before the jury testimony from Latrice about a confrontation between the decedent and her sister's boyfriend, the solicitor again objected on relevance grounds. R. 215, l. 1 – 217, l. 4. Latrice ultimately denied that she remembered that she and petitioner were told that the decedent had confronted her sister's boyfriend, and the decedent "put his hands on him about Rocko" about hitting his sister. R. 223, l. 23 – 224, l. 11.

The judge ruled this incident was not relevant. Defense counsel countered that the confrontation was relevant in this case. Defense counsel noted the fact that the decedent had attacked Rocko as a result of *what Rocko did to Latrice's sister was connected* what happened in this case and relevant. Defense counsel argued he should be allowed to pursue this line of questioning. R. 225, l. 1 – 228, l. 6.

Defense case and the continued fight over "establishing self-defense"

During the defense case Alicia Robinson testified, out of the presence of the jury, that *petitioner was aware that the decedent had killed his stepfather*. R. 409, l. 6 – 411, l. 20. The judge then asked if there was any evidence that petitioner did not know the decedent was inside the apartment where the decedent was sitting at the time petitioner entered. Defense counsel argued that the answer to that question did not change the relevance of this evidence that petitioner knew of

the decedent's prior murder conviction. A long colloquy followed in which the judge questioned defense counsel about the fact petitioner was apparently illegally armed. R. 412, l. 4 – 421, l. 8.

Defense counsel argued that petitioner's awareness of the decedent's prior murder conviction was relevant to the issue of petitioner's "reasonable apprehension" of the decedent. R. 421, l. 9. The judge ruled that the evidence of the decedent's North Carolina murder conviction could not be admitted through Robinson. R. 423, ll. 9 – 11.

When defense counsel asked Robinson about her conversation regarding whether or not Keith Williams, the father of Latrice's children owned or possessed a weapon the solicitor objected. Defense counsel noted that Williams had contact with petitioner on the night of the shooting. The judge sustained the objection. R. 434, l. 4 – 435, l. 9.

Petitioner testifies

Petitioner testified that on the day of the shooting the decedent was continuously threatening him. The decedent told petitioner at one point that if he was not gone when he returned that he would kill him. R. 466, l. 1 – 471, l. 9. Petitioner's said he tried to convey to the decedent that he did not want any trouble. R. 471, ll. 10 – 15. Petitioner testified that he was scared because Keith, the mother of Latrice's children, and the decedent were both threatening him that day. R. 476, l. 13 – 478, l. 21.

Petitioner acknowledged he confronted Latrice about "sending your family around" to threaten him after he had hit Latrice. R. 479, ll. 14 – 23. He remembered that he had called his friend Travis for a ride so that he could get away from the apartment complex before there was any trouble. R. 478, ll. 2 – 4.

At the time of the fatal incident, which occurred inside the apartment, he again told Latrice that her family had been threatening him all day. R. 490, l. 16 – 491, l. 5. At this point the decedent

got of his chair, and "he walks at me . . . [more] like a rush . . . he had his hand balled up and ran towards me . . . now I'm thinking that I am going to get hurt and I'm scared." R. 491, ll. 15 – 24.

Inexplicably, the solicitor objected that this line of testimony was not relevant. The judge this time stated he was going to overrule the objection, but he wanted further clarification about the testimony. R. 492, l. 2 – 494, l. 11.

Petitioner could not safely retreat from the situation, and that is the reason he shot the decedent when he rushed him. R. 498, l. 2 – 503, l. 4. Petitioner said he left with Travis following the shooting. He admitted he hid at a local motel because he was scared. Petitioner saw himself displayed on television as a fugitive and possibly armed. Petitioner was afraid that the police would shoot him. R. 508, l. 7 – 509, l. 16. Petitioner denied using term "187" to refer to himself. R. 509, l. 17 – 510, l. 9.

The judge finally revealed that he would charge self-defense based on petitioner's testimony. The judge said he was still concerned that petitioner had not established the element that "he was without fault in bringing on the difficulty." However, the judge said "*so I'm gonna change my mind and I think self-defense is going to be charged.*" R. 537, l. 9 – 538, l. 5. (emphasis added). The judge then agreed the jury could hear that the decedent had a prior conviction for murder. R. 648, l. 15.

The judge told the jurors immediately before closing arguments that he was taking judicial notice "of the fact that the victim in this case was or had been convicted of second degree murder in North Carolina in 1989." R. 676, ll. 16 – 19.

As seen above, defense complained that the judge's prohibiting cross-examination of state's witnesses until such time as he deemed all four elements of self-defense were established denied petitioner his right to confront and cross-examine the state's witnesses. Counsel also argued that the

judge's ruling was impermissibly burden shifting. Counsel finally argued that recalling witnesses after the judge deemed self-defense was established was not an acceptable alternative for the right of cross-examination during the state's case-in-chief.

Court of Appeals

Petitioner argued to the Court of Appeals that he had the right to cross-examine the state's witnesses during the state's case-in-chief where they had evidence that was relevant and corroborative of petitioner's self-defense claim. Petitioner noted that the trial judge's reasoning that petitioner had to establish evidence of all four elements of self-defense before he could cross-examine the state's witnesses about evidence relevant to it was burden shifting, and it denied petitioner his right to confrontation, and effective cross-examination. Brief of Appellant at 13.

Petitioner strongly argued that he had the right to develop his self-defense claim where the state's witnesses had evidence relevant to it. Petitioner noted that the state's right to present its case-in-chief did not entitle it to have only testimony with inferences favorable to its case, and against any defense or lesser-included defense the defendant may later seek. See State v. Gourdine, 322 S.C. 296, 472 S.E.2d 241 (1996). He further argued that the scope of cross-examination in South Carolina is broad, and legitimate cross-examination cannot be limited. State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976); State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). Brief of Appellant at 13.

Petitioner advised the Court that what happened in this case was similar to what happened in State v. Washington, 67 S.C. 76, 623 S.E.2d 836 (Ct. App. 2006), where the judge similarly refused to allow defense counsel to cross-examine the state's witnesses about evidence relevant to self-defense until such time as petitioner took the stand and established self-defense. See, also, State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008)(affirmed in result). The problem in Washington

was that once the judge deemed self-defense had been established because of the defendant's testimony, the defense had been robbed of corroborating evidence of its self-defense claim that state's witnesses would have been forced to acknowledge was present had cross-examination not been limited. For example, the state's main witness, Cropper, Washington's former girlfriend and the present girlfriend of the decedent in that case, acknowledged in camera that she made the decedent put his gun in the trunk when she was with him. The jury never heard this corroborating evidence, and Washington's testimony that the decedent was looking for the gun inside his car at the time of the fatal encounter stood without corroboration. Brief of Appellant at 13-14.

Further, in his reply brief Petitioner directly informed the Court that this appeared to be a concerted planned effort by some solicitors to

> "[D]eny defendants their right to a fair trial during a murder-self-defense case under the guise of protecting the decedent's character from attack. Appellant respectfully submits this Court should strongly hold that not allowing relevant cross-examination about self-defense during the state's case-in-chief is a violation of the defendant's right to confrontation and reversible error.
>
> The state argues that the judge ultimately admitted "virtually all of the evidence in question," and that appellant did not recall the key prosecution witness and cross-examine her on matters pertaining to self-defense. . . " Respondent's brief at 2. That is a clear admission that the trial judge was altering the natural course of the trial to appellant's disadvantage. Appellant had the *Constitutional right* to confront and cross-examine the witnesses against him as they testified. He was not obligated to establish the four elements of self-defense, and then have the burden of recalling prosecution witnesses if he desired a fair trial.

Reply brief of appellant at 3-4.

Petitioner again cited in his reply brief to the fact that what occurred in this case was virtually identical to what occurred in State v. Washington, 67 S.C. 76, 623 S.E.2d 836 (Ct. App.

2006). *affirmed in result in* State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008). Petitioner pointed out that Washington was a Charleston case where a different judge refused to allow relevant cross-examination until such time as all four elements of self-defense were established. Petitioner argued that this showed an apparent concerted effort by some solicitors to deny defendants their right to a fair trial during a murder-self-defense case under the guise of protecting the decedent's character from attack. Reply brief of appellant at 3.

The Court of Appeals did not hold an oral argument in this case and, respectfully, virtually ignored petitioner's straight forward argument that petitioner was denied his right to confrontation where the trial court ruled evidence relevant to his defense were not legitimate areas of cross-examination until there was evidence establishing all four elements of self-defense since this ruling was burden shifting and petitioner had the right to confront the state's witnesses during the state's case-in-chief. App. 1-15. The opinion of the Court of Appeals was instead a mind spinning application of procedural default devices to a straight forward proposition: That is unfair and a denial of the right to confrontation for the trial court to deny cross-examination until he had established all four elements of self-defense to the trial court's satisfaction, under the guise of protecting the decedent's character. App. 1-15.

It was almost as if the decedent's character had to be treated as if the criminal trial were instead the penalty phase of a capital trial where only good memories of the decedent could be placed before the jury as victim impact evidence.

Rehearing

On rehearing petitioner argued, inter alia, that the Court of Appeals:

> [M]ay have overlooked two central facts when finding "no reversible error." in this case. The first is this Court must have overlooked *the fundamental trial error* in not allowing cross-

> examination of the state's witnesses about facts relevant to self-defense until the judge was satisfied there was evidence of all four elements of self-defense. That causes problems as it did here where the defense *is expected to recall state's witnesses* that should have been cross-examined as the trial naturally progressed.
>
> Here, the state successfully argued petitioner should be blamed for not recalling a hostile witness, his former girlfriend who was in the center of this dispute, to cross-examine her. This was after she in so many words on direct insinuated petitioner shot the decedent in cold blood where the decedent did not pose a threat to petitioner. What occurred in this case was so extraordinarily unusual on rulings denying cross-examination about matters of self-defense, and expecting petitioner to recall a hostile witness and blaming him for not doing so that cites to similar self-defense cases in which this occurred should not be expected.

Petition for rehearing at 1-2. App. 16-17.

Discussion

Petitioner had the right to cross-examine the state's witnesses during the state's case-in-chief where they had evidence that was relevant and corroborative of petitioner's self-defense claim. Petitioner had the right to develop his self-defense claim where the state's witnesses had evidence relevant to it. The state's right to present its case-in-chief did not entitle it to have only testimony with inferences favorable to its case, and against any defense or lesser-included defense the defendant may later seek. See State v. Gourdine, 322 S.C. 296, 472 S.E.2d 241 (1996). Further, the scope of cross-examination in South Carolina is broad, and legitimate cross-examination cannot be limited. State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976); State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001).

As petitioner argued to the Court of Appeals, and as seen supra, what happened in this case was very similar to what happened in State v. Washington, 67 S.C. 76, 623 S.E.2d 836 (Ct. App. 2006), wherein the judge similarly refused to allow defense counsel to cross-examine the state's

witnesses about evidence relevant to self-defense until such time as petitioner took the stand and established self-defense. See State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008)(affirmed in result). In Washington, the state's main witness, Cropper, Washington's former girlfriend and the present girlfriend of the decedent in that case, acknowledged in camera that she made the decedent put his gun in the trunk when she was with him. The jury never heard this corroborating evidence, and Washington's testimony that the decedent was looking for the gun inside his car at the time of the fatal encounter stood without corroboration.

Here the Court of Appeals found fault with petitioner for not citing authority for the proposition that it was unfair to expect petitioner to recall his hostile girlfriend at the end of the defense case to place evidence before the jury that petitioner knew the decedent was a violent and dangerous and man. It respectfully was unreasonable to expect for trial counsel to call a hostile witness as the last witness the jury would hear from where he had the right to place that evidence before the jury during normal cross-examination of Latrice. The solicitor would have had an unwarranted field day when he same to "cross-examine" this favorable witness. Petitioner cited State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976) and State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) for the proposition that the scope of cross-examination in South Carolina is broad, and legitimate cross-examination cannot be limited. That is exactly what occurred in this case, and the trial judge's reasoning that until there was evidence presented establishing all four elements of self-defense, cross-examination about facts relevant to self-defense could not be elicited during cross-examination of the state's witnesses was fundamentally unfair, and erroneous.

One of the primary purposes of cross-examination is having the jury hear concessions of facts unfavorable to its case, and favorable to the defense. Defense counsel correctly argued here the judge's ruling violated petitioner's right to confront the witnesses against him. See State v.

Mitchell, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008). That right to confrontation is based in the Sixth Amendment to the United States Constitution. See State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007).

The court's ruling that petitioner had to attempt to establish all four elements of self-defense before he could cross-examine state's witnesses about evidence relevant to self-defense was fundamentally unfair, and burden shifting. See State v. Fuller, 297 S.C. 440, 442-443, 377 S.E.2d 328, 330 (1989); McAninch, Fairey, Coggiola, The Criminal Law of South Carolina (5th ed. 2007) at pp. 542-550. Defense counsel correctly argued it was impracticable to establish self-defense prior to the defense testimony. In essence, a criminal defendant pursuing a self-defense claim is denied the same procedural cross-examination as any other defendant under the trial court's reasoning and ruling here. That ruling is arbitrary and unreasonable, and petitioner respectfully suggests guidance from this Court is needed for the benefit of the bench and bar.

Petitioner had the right to present evidence regarding the confrontation between the decedent and Rocko over Rocko hitting the decedent's relative – Latrice's sister. This was another violent intervention by the decedent, and it was relevant to show how the decedent reacted violently and threatened people when he thought that they had hurt a member of his family. See State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). Petitioner reasonably thought a similar violent reaction was likely to follow the decedent's threats where petitioner hit Latrice.

Similarly, Latrice's testimony that she was aware of the decedent's prior murder charge was relevant. It was evidence from which the jury could conclude petitioner had further reason to fear the decedent who was threatening him. The definition of relevant evidence is broad. It is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Rule 401,

SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986); Collins, South Carolina Evidence, §9.1 at pp. 241-247 (2000 ed).

Defense counsel correctly argued at trial that recalling Latrice at the conclusion of his case was not an acceptable alternative to his right to confront and cross-examine the state's witnesses as the state's case was be presented. The state, in essence, under the trial court's ruling affirmed by the Court of Appeals, was allowed to put forth its theory of the case without any inconvenient truths being elicited on cross-examination. The judge reasoned petitioner could pursue the "unforgettable smell of blood" testimony because it was a "double edged sword" which cut against petitioner also.

The only certain thing in this case is that this Court does not have to draw inferences from the record. The procedural default devices employed by the Court of Appeals, and applying the almost impossible to meet mistrial standard to petitioner's assignment of error ignores the fact that the judge announced that there would be no evidence of self-defense allowed *until he determined the record had established all four elements of self-defense.*

The judge was true to his word on the unsafe neighborhood evidence, the evidence of people carrying guns to protect themselves in the neighborhood and the refusal to allow petitioner to elicit that Latrice was aware of the decedent's prior murder, and the refusal to allow petitioner to pursue Latrice's alleged lack of memory about what the decedent did to Rocko. See State v. Green, 318 S.C. 426, 458 S.E.2d 73 (1995)(evidence of strong drug activity in the area should not have been excluded where it was relevant to show *why* the police were stopping people).[1] Petitioner was denied his right to meaningful cross-examination, and the ruling was burden shifting.

[1] The evidence was relevant here to show *why* petitioner was carrying a gun in this self-defense case.

In Brooks v. Tennessee, 408 U.S. 604 (1974), the Court held that a Tennessee statute that mandated that a defendant in criminal proceeding who desired to testify had to do so before any other testimony for the defense was heard by the court violated the defendant's privilege against self-incrimination and also constituted denial of due process in that it infringed the defendant's constitutional rights by depriving him of the guiding hand of counsel in deciding not only whether the defendant would testify but, if so, at what stage of the trial.

The procedure the judge demanded employed here denied petitioner his right to confrontation, and it was impermissibly burden shifting. It, most respectfully, is time that this Court spoke on this tactic of denying the defense the right of meaningful cross-examination about self-defense until the defense first *carries its burden* and establishes all four elements of self-defense to whomever the trial judge happens to be in the case.

CONCLUSION

Based on the foregoing arguments, petitioner's conviction should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 25th day of February, 2014

STATE OF SOUTH CAROLINA

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John C. Few, Circuit Court Judge

THE STATE,

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CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner in this case has been served on William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of February, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of February, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 10 - 24 - 2021