STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY

The Honorable J. Michelle Childs, Trial Judge
The Honorable Brooks P. Goldsmith, Post-Conviction Relief Judge

Appellate Case No. 2016-000575

JOEL ANTWAN ROBINSON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE ON APPEAL

Petitioner's Sixth Amendment right to the effective assistance of counsel was violated by trial counsel's failure to properly argue in a suppression motion and that the State did not meet its burden of proving that the initial stop of petitioner was valid because the State did not call the officer who stopped petitioner and relied on inadmissible hearsay that violated the Confrontation Clause to prove the stop's validity.

STATEMENT OF THE CASE

Procedural History

Joel Robinson (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was indicted during the June 2007 term of the Richland County Grand Jury for murder (2007-GS-40-2040), use of a firearm during the commission of a violent crime (2007-GS-40-2038), and assault and battery with intent to kill (2007-GS-40-2039). He was also indicted at the February 2009 term of the Richland County Grand Jury for possession of crack cocaine - second offense (2009-GS-40-1345) and possession of cocaine - second offense (2009-GS-40-1346). On March 3-5, 2009, Petitioner proceeded to a jury trial before the Honorable J. Michelle Childs, where he was convicted as indicted. App. 851, l. 14 - 853, l. Petitioner was represented by Micah Leddy and Jennifer Davis, Esquires at trial. Judge Childs sentenced Petitioner to life imprisonment for murder, twenty years for assault and battery with intent to kill, five years for use of a firearm during the commission of a violent crime, and time served for possession of cocaine - second offense and possession of crack cocaine - second offense. The sentences were to be served concurrently. App. 864, 11. 14-25.

Petitioner filed a notice of appeal and an appeal was perfected on his behalf. Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences by unpublished order filed March 21, 2012. A subsequent petition for rehearing was denied. Applicant then petitioned the South Carolina Supreme Court for certiorari, which was denied by the Court on August 8, 2013. App. 1048. The Remittitur was issued on August 15, 2013.

On October 16, 2013, petitioner filed a PCR application. App. 867. On August 25, 2015, a hearing was held before the Honorable Tanya A. Gee. App. 881. Tara D. Shurling, Esquire represented Petitioner. App. 881. J. Clayton Mitchell, Esquire represented the State. App. 881.

After this hearing, the record was held open to allow Mr. Leddy time to further prepare and review his case file, as well as to receive testimony from Kristy Goldberg, Esquire.[1] Judge Gee reconvened the hearing on October 19, 2015. App. 1017. On January 25, 2016, the court denied Petitioner's application. App. 1047. On March 8, 2016, Judge Gee denied Petitioner's Rule 59(e), SCRCP motion to reconsider in a Form 4 Order. App. 1098. A notice of appeal was filed, and it was perfected by David Alexander, Esquire of the Office of Appellate Defense with the filing of a petition for writ of certiorari on January 13, 2017. This return follows.

Factual History

On Thursday, February 15, 2007, Joel Antawan Robinson ("Robinson") shot Thomas Lee Smith[2] several times. Thomas suffered five gunshot wounds. (App. p. 612). Two were non-lethal; one was to the base of his hand and wrist on his left hand, and the other was to his back. (App. p. 612). Three of the gunshot wounds could have been lethal. (App. p. 612). One was to Thomas's cheek. (App. p. 612). Two were to the shoulder region in his back, both of which pierced coordinates. (App. p. 612). Thomas died from multiple gunshot wounds perforating the mandible, esophagus, lungs, liver, spinal cord, and diaphragm. (App. p. 612). Edwina Evans, who was standing near Thomas when Robinson shot him, was hit in the left hand and in the buttocks. (App. pp. 423, 595). A bullet went through her palm and fractured both her fourth and fifth metacarpal bones. (App. pp. 595-60). One bullet also went through and through one butt cheek, entered the other butt cheek, and was thereafter retained by her body. (App. pp. 602-03).

The Shooting

Jeffrey Smith, one of the victim's cousins, lived in the trailer where the shooting occurred. (App. pp. 234-35). He testified that Robinson came by the trailer three times on the day

[1] Ms. Goldberg was initially appointed by the Richland County Clerk of Court to represent Petitioner, but was relieved because she had represented him earlier during her tenure with the Richland County Public Defender's Office.

[2] Mr. Smith was also known as "Short Dog." (App. pp. 233, 271).

of the shooting. (App. pp. 238-41). Jeffrey noted that Robinson[3] indicated he was looking for the victim when he stopped by at 9 a.m. and 1 p.m. (App. pp. 237-41). Jeffrey testified that Robinson came back to his trailer around 9 p.m. (App. p. 241). He noted that Thomas had arrived at approximately 8:45 p.m. (App. p. 241). Jeffrey testified that Robinson pushed through two people and came into the trailer. (App. p. 246). Then, "Short jumped up after he came in. Short seen him, and they started tussling and going on, and then when Short bend down, he [Robinson] shot Short in the back two times." (App. p. 246;19-21). Jeffrey indicated that no words were exchanged between the two men during the tussling. Jeffrey also intimated that he saw the gun for the first time when Robinson had it in the air. (App. pp. 246-47). That was after Robinson and the victim started their tussling. (App. pp. 247, 268-69).

Jeffrey later testified that he saw Robinson with the gun in the air before Robinson and Thomas started tussling. (App. p. 248). He saw Robinson raise the hand with the gun, point the gun down at Thomas, and shoot Thomas twice in the back. (App. p. 249). Thomas fell down, and Robinson started shooting at Thomas again while Thomas was on the floor. (App. p. 249). Jeffrey noted that he did not see Thomas with a weapon. (App. pp. 249-50). He also indicated that he did not see any of the others who were in the trailer in possession of a weapon, other than Robinson. (App. pp. 249-50). Jeffrey stated that Edwina Evans, another resident of the trailer, was shot in the hip and hand. (App. p. 250). According to Jeffrey, Robinson walked outside, but then he walked back in and he shot Thomas in the top of his head two more times. (App. p. 250).

Levern Smith[4], who also resided in the trailer, testified that he was sitting on the couch when Robinson entered the trailer that night. (App. p. 272). According to Levern, Robinson

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[3] Jeffrey identified Robinson in the courtroom as the one who shot Thomas.
[4] Levern is Jeffrey's first or second cousin, and he was Thomas's second cousin. (App. p. 271).

came through the front door and walked to the kitchen. Levern noted that he did not see Robinson's gun until he reached the kitchen and started pulling it out to shoot Thomas. (App. p. 273). Levern indicated Thomas did not have a weapon. (App. p. 274). Levern initially testified that he did not remember seeing the gun. (App. p. 274). Then he testified that the first time he noticed the gun was when Robinson and Thomas were tussling in the kitchen, when Robinson was shooting Thomas. (App. pp. 274-75). Levern was not sure where Robinson shot Thomas. (App. p. 275). He thought it might have been in the stomach and the side. (App. p. 275). Levern heard several shots, and he recalled that Edwina was hurt afterwards. (App. p. 275). After Robinson shot Thomas, he walked back towards the door to leave the trailer. (App. p. 275). As he was about to walk out, he turned around and shot Thomas a couple more times. (App. p. 275, 276). During cross-examination, Levern indicated he did not see Robinson when he first entered the trailer. (App. p. 288). The first time he saw the gun was when Robinson was shooting Thomas. (App. p. 288). He saw Robinson and Thomas tussling over the gun. (App. p. 288). He saw the gun when Robinson was shooting Thomas. (App. p. 288). He also indicated that Thomas was tussling for the gun to prevent being shot and killed. (App. p. 289).

Edwina Evans, another resident of the trailer where Robinson shot Thomas, testified that they heard a knock on the door at the trailer that evening. (App. p. 366). She indicated that she and the others inside the trailer told the person who knocked to come in. (App. p. 366). Robinson opened the door and pushed someone out of the way. Edwina saw that Robinson had a gun in his hand, and she testified that after he entered, he just charged Thomas. (App. p. 366-67, 396-97, 399-400). According to Evans, Robinson charged at Thomas.

> And they tussled for a minute, and he finally got loose from him and pushed him, and he shot. And when he shot, I put my hand up because I seen him shooting - - getting ready to shoot the gun, and I got shot in my hand. And Short fell on top of me, and then I was

> trying to get away and I crawled to the living room and he was still - - 1 don't know. He was backing up. He was still shooting when he was backing out of the kitchen.

(App. p 368). Shortly thereafter, Robinson walked back into the trailer and shot at Thomas two more times. (App. p. 368). Edwina was shot once in the hand and three times in the buttocks. (App. p. 369). She indicated that Thomas was dead when he fell on her. (App. p. 370). Edwina also noted that no one talked prior to or during the shooting. (App. p. 373).

Shonda Moffett testified that on the night of the shooting, she and her boyfriend caught a ride with Robinson to the Hole.[5] (App. p 302), She was friends with Freddie Smith, who lived across from Jeff and Levern. She testified that she saw Robinson go over to the trailer. She did not see him carrying anything, but she observed him enter Jeff and Levern's trailer. (App. pp. 79-308-09). Within three to four minutes, she heard gunshots. (App. p. 309). When they went to the door to see who was shot, she saw Robinson was rushing. (App. p. 310).

Robinson's Statements to Police

Robinson gave two statements to police. One was written, and the other was oral. In his handwritten statement, Robinson stated as follows:

> I went to the trailer off ames to buy drugs and got in a confortaion[sic] with Short Dawg and I left. The next time I went in the hole Short Dawg was in the parking lot with a gun and we had more words. And I left the Hole. The next morning people were comeing[sic] through telling me to be careful because Short Dawg was looking for me and was telling people that he was going to kill me. That night I went to the trailer to try to discuss the situation when I drew down on Short Dawg and he charged me and tried to grab the gun I had I took the safty[sic] off and shot him. . .

(App. p. 690-91). Further in the written statement, Robinson noted that he did not know if the victim had a gun. (App. p. 694). He also indicated there were at least four people in the trailer

[5] The neighborhood where the shooting occurred was nicknamed "the Hole." (App. pp. 258, 326, 412).

when he arrived, and none of them either had weapons or attacked Robinson. (App. p. 695) According to Robinson, he and Thomas did not have a conversation before the shooting. (App. pp. 695). Robinson later admitted that Thomas did not have a weapon on him. (App. p.695). In response to the question of what happened the moment Robinson got inside the trailer, Robinson stated

> I walked in behind two people and pushed them out of the way. I pointed the gun at Short Dog. He grabbed the gun. I snatched it away from him and wrapped my hands up in his clothes because I was trying to push him off of me. He was pushing me back towards the wall. I got the gun up in the air but pointed down at him. I have him off at arms length [sic]. I fired some shots. I saw that the bullets was [sic] hitting him but the bullets were not affecting him. He was hit several time but we was still tussling. He fell but he wasn't dead. He was still breathing. Blood bubbles was [sic] coming out of his mouth. He was twitching. I walked on pass him and shot him two more times. This time I shot him in the head. I think the gun was empty then because it was empty when I got back in the car.

(App. pp.696-697).

In his oral statement, Robinson indicated that he first met Thomas on Friday when he went to the Hole to buy drugs. Robinson indicated that Thomas was giving him trouble that afternoon, and that Thomas was apparently trying to start a fight. Robinson told officers that others intervened, and he successfully purchased drugs that day. Robinson returned to the Hole on Saturday night. Robinson indicated that he had another confrontation with Thomas that night. Robinson told police that Thomas had a pistol out when Robinson arrived. Robinson further noted that he and Thomas had words. Robinson informed police that Thomas drew his gun on Robinson. Others intervened and prevented a physical confrontation that Saturday. Robinson then indicated that the next morning, someone told him he needed to be careful because Thomas had told others he would do something to Robinson the next time he saw him. State's 85.

In the oral statement, Robinson indicated that on the night of the shooting, he went to the trailer to see Thomas. Robinson asserted that he wanted to talk with Thomas about their confrontations and the threats that Thomas allegedly made against Robinson's life. According to Robinson, he had a 9 mm handgun when he entered the trailer. He noted that when people in the trailer opened the door to let two others in, he went in behind them. Robinson stated that once he went inside, he drew down on Thomas. At the time, Thomas was standing in a corner in the kitchen. After Robinson drew down on Thomas, Thomas charged Robinson and grabbed him. Then, Robinson took the safety off. Robinson noted that he had the gun out when he walked into the trailer. He also indicated that he did not see Thomas with a gun, and he did not know if Thomas had a weapon at the time. Robinson also intimated that Thomas charged after he saw the gun. Robinson held the gun back. They tussled, Robinson knocked the safety off, and he shot Thomas. He could not recall how many times he shot Thomas, but he told police that he had ten rounds in his gun and he shot all ten rounds. State's 85.

Aftermath of the Shooting

After leaving the trailer, Robinson returned to his car. According to Moffett, Robinson asked Moffett and her boyfriend if they were ready to go. (App. p. 310). Robinson pulled a gun from under his car seat and started shooting at Freddie Mae Smith's home when she and her boyfriend refused to leave with him.[6] (App. pp. 311-12). Robinson indicated in his oral statement that someone in Freddie Mae Smith's home shot at him first. State's 85. Shortly thereafter, Robinson fled the scene. Police later apprehended him as he was walking down a street.[7] (App. p. 667, see App. pp. 253-54, 443-46). When Robinson was arrested, police recovered a 9mm handgun, a small amount of crack cocaine (.29 grams), a small amount of marijuana, and a small

[6] Robinson was not charged with this second shooting.

[7] Robinson told one of the officers who initially arrested him that "I shot him. He's dead." (App. p. 162).

amount of powder cocaine (.25 grams) from his person. (App. pp. 446-48, 488-493, 523, 551-52). Jeffrey identified Robinson as the person who shot Thomas at the scene of Thomas' arrest.[8] (App. pp. 444-46, 521). Edwina and Levern also later selected Robinson from photo lineups.[9] (App. pp. 280-83; 434-35). Shonda Moffitt also identified Robinson in a photo lineup. (App. pp. 321-22, 428, 429).

Nine 9mm shell casings were recovered from inside the trailer near Thomas' body. (App. p. 410, 473). One projectile was also recovered from the trailer.[10] (App. p. 473). Three projectiles were removed from Thomas' body during the autopsy. (App. pp. 451, 532). All of the shell casings matched the gun that was recovered from Robinson. (App. p. 575). The three projectiles recovered from Thomas were also fired by Robinson's 9 mm handgun. (App. p. 575).

[8] Jeffrey also identified Robinson as the shooter at trial. (App. p. 260).
[9] They both also identified Robinson as the shooter at trial. (App. pp. 282, 367).
[10] The projectile was recovered after someone from the coroner's office moved Thomas' body. (App. pp. 479, 498-99, 510-11).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "**any** evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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 (1984); Butler, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief.

Strickland, at 687. First, an 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." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

There is probative evidence to support the PCR Court's finding that trial counsel was <u>not</u> ineffective for an alleged failure to argue during a pretrial suppression motion that the State did not meet its burden of proving that the initial stop of the Petitioner was valid, as well as that overwhelming evidence existed to support the conviction.

Petitioner argues trial counsel was ineffective for failing to properly argue in a suppression motion that the State did not meet its burden of proving the initial stop of the petitioner was valid because the State did not call the officer who initially stopped Petitioner, and also relied on inadmissible hearsay that violated the Confrontation Clause to prove the stop's validity.

Petitioner wrongly argues the testimony of the officer who initially stopped him is essential for the State to have met its burden of showing that the stop was valid and, therefore, trial counsel was ineffective for failing to object. This is inaccurate, primarily, because nothing this officer did affected the outcome of the stop. Judge Gee's order from the PCR refers to testimony from trial counsel that this began as "a suspicion stop, not a probable cause stop." App. 1052, citing Trial Tr. p. 210, lines 19-23. Officer Dutton's statement, which was read into the record, shows that she had not even run Petitioner's identification before being met by backup.[11] App. p. 81;14 – 82;9.

Trial counsel defense strategy was that Officer Dutton's testimony was necessary for the State to establish the stop was valid. As part of this strategy, they argued that Officer Dutton's stop led to the detention out of which all other evidence arose and, therefore, it would be fruit of the poisonous tree if the stop was invalid. App. p. 145. As part of the exercise of this strategy, trial counsel repeatedly objected to the continuation of the pre-trial hearings without Officer

[11] Trial counsel timely and properly objected to the Solicitor's reading of this statement into the record during the pre-trial hearing.

Dutton's testimony. This eventually led to a discussion between trial counsel and the trial judge regarding confrontation clause issues and Crawford v. Washington, 542 U.S. 36 (2004) regarding Dutton's statement. App. p. 199;25-203;18. Petitioner is correct in its assertion that a specific ruling was never obtained regarding the confrontation clause issues; however, such a ruling was unnecessary. The facts of this case do not warrant consideration of this issue. Regarding the validity of the initial stop, it is uncontroverted by the record trial counsel made every necessary objection to preserve the issue for the record.

Regarding the State's burden to prove validity, Dutton's statement is not testimonial and, therefore, does not fall under the constraints of Crawford. Rather, it is offered to show the initial actions she took in her stop in a very objective manner.[12] "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987) (citing California v. Green, 399 U.S. 149 (1970); State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)).

The United States Supreme Court (USSC) explained the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" Crawford v. Washington, 541 U.S. 36, 51 (2004).The Court then defined testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id.

Crawford prohibits the admission of testimonial, out-of-court statements unless two conditions are met: the witness is unavailable at trial and the defendant had a prior opportunity to

[12] Petitioner notes that trial counsel conceded that the statement was hearsay, though admissible under the rules due to the nature of the pre-trial hearing. App. p. 85; 10-13; p. 200;19-21.

cross-examine the witness. Crawford, 541 U.S. at 68. The USSC further articulated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." As a result, the Court "exempted [nontestimonial] statements from Confrontation Clause scrutiny altogether." Id. Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." Davis v. Washington, 547 U.S. 813, 821 (2006) (citing Crawford, 541 U.S. at 51). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Id.

In Davis, 547 U.S. 813 (2006), the USSC announced the "primary purpose" test for determining whether an out-of-court statement is testimonial in nature. The Court explained statements are testimonial where their primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." Id., at 822. This is an objective consideration and not based on the subjective intents involved. Id. at 826. In Michigan v. Bryant, 562 U.S. 344 (2011), the USSC further expounded on the primary purpose test, indicating the Court must consider "all of the relevant circumstances." Id. at 369. The Court found where an out-of-court statement's primary purpose is "to create a record for trial" or "creating an out-of-court substitute for trial testimony" then the statement is testimonial and falls within the requirements of Crawford and the Confrontation Clause.

Bearing this line of cases in mind, it was not necessary to have Officer Dutton present for cross-examination due to the non-testimonial nature of the information. The portion of her statement before she received backup states that she heard the dispatcher's description, saw someone matching that description in the appropriate vicinity, and made an objective

investigatory stop. "[L]ooking at the totality of the circumstances, reasonable suspicion requires there be an objective, specific basis for suspecting the person stopped of criminal activity." Robinson v. State, 407 S.C. 169, 182, 754 S.E.2d 862, 868 (2014). Specifically, Officer Dutton knew that she was in the vicinity of the suspect, she had a full description of the suspect sent via radio from dispatch, and she had an individual matching the description. This objective, specific basis was corroborated by the other officers who testified that they heard the dispatch calls and found a suspect matching the description when they arrived to assist Officer Dutton. Nothing that was presented in Dutton's statement was testimonial or uncorroborated by the other officers who were available to testify.

As Petitioner notes, trial counsel challenged the stop extensively and, therefore, the issue could have been raised on direct appeal. This was the ruling of the PCR court, with the related finding that trial counsel was not "ineffective in failing to challenge the search and subsequent seizure of Applicant and the recovery of the murder weapon." App. p.1052-3. Petitioner, and PCR counsel before him in her Rule 59(e) motion, specifically took issue with trial counsel's failure to get a ruling on the issue of the State's failure to call Dutton, thus failing to preserve it for appeal pursuant to State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). App. p. 1056-69.

As alluded to above, Respondent argues that the separate issue of whether Officer Dutton's statement was testimonial and therefore inadmissible is irrelevant in this Court's consideration. Trial counsel conceded that the statement was admissible hearsay for the purposes of pre-trial argument and the trial court gave it the proper weight deserved in its consideration of the motions. As trial counsel mentioned in argument, there is no South Carolina law on whether Crawford applies to pretrial hearings but, assuming *arguendo* that it does, this statement does not qualify as a testimonial statement for purposes of that evaluation. Many courts have held that

expanding this right to become a pretrial right would be inappropriate, as the point is to prevent restrictions on defense counsel during cross-examination. See Pennsylvania v. Ritchie, 480 U.S. 39 (1987) ("If we were to accept this broad interpretation of Davis, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."); California v. Green, 399 U.S. 149, 157 (1970) ("[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); Barber v. Page, 390 U.S. 719, 725, (1968) ("The right to confrontation is basically a trial right").

For the above-stated reasons, there is probative evidence in the record to support the PCR court's findings. Petitioner has shown no deficiency on the part of trial counsel, and there is certainly no proof of prejudice for the reasons stated on appeal. Furthermore, the PCR court made a finding of overwhelming evidence that should not be disturbed, as none of this evidence could be classified as fruit of the poisonous tree as alleged by Petitioner. Based on the evidence before this Court, the petition for writ of certiorari should be denied, and the must serve the remainder of his sentence.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
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Columbia, SC 29211

This 29th day of June, 2017

FELICIA V. HAYES
Legal Assistant For Respondent