No. 18-7179

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

Trevelle J. Taylor — PETITIONER
(Your Name)

vs.

State of Nebraska — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Nebraska Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Trevelle Taylor
(Your Name)

P.O. Box 2500
(Address)

Lincoln, NE 68542
(City, State, Zip Code)

(402) 471-3161
(Phone Number)

## QUESTION(S) PRESENTED

Whether a persons mere proximity to others independently suspected of criminal activity, withoutmore, give rise to probable cause to search that person.

Whether a persons unprovoked flight upon seeing officers down a residential street give rise, without more, related to facts of criminal activity provocation to arrest that person.

Whether an arresting officers actions are still deemed legal in light of the only witness to the crime testifying under oath he never witnessed the crime and never told arresting officers a crime did infact occur by the individual being arrested.

Whether in a criminal case the accused has the right to confront and cross-examine the witnesses against him.

Whether the State was alterted sufficiently to a confrontation clause issue by introducing hearsay statements of Joseph Copelands son whom neither testified nor appeared at trial and relied upon those statements as evidence of the petitioners guilt.

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[X] reported at State v. Taylor 300 Neb. 629, 915 N.W. (2018); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Douglas County, District court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was July 27, 2018. A copy of that decision appears at Appendix B.

[X] A timely petition for rehearing was thereafter denied on the following date: Sept 6, 2018, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Amendments to the United States Constitution, which provides:

IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and paticularly describing the place to be searched, and the persons or things to be seized.

VI: In all criminal prosecutions, the accused shall enjoy the right, to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defence.

XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On the sunny afternoon of Sept. 19, 2009 1:45 P:M Omaha Police officers responded to a shots fired call in the area of 44th and Curtis (612:4-613 :2). In reponse to the intial broadcast radio advised that a possible suspect vehicle was a white four-door with no hubcaps. Officers proceeded to the area in which officer Strominger came to about 41st and Redick and observed a white chevy vehicle with no hubcaps. He also observed an individual standing near the vehicle (613:18-615:21). He described this individual as wearing a white T-shirt and black shorts with a brown item in his hand, possibly a T-shirt walking eastbound on the sidewalk (615:22-616:3).

The driver of the vehicle made a U turn and drove west on redick, Strominger followed the car and after running the license plates was informed the the vehicle was stolen. He then stopped the car which was occupied solely by the driver, Joshua Kercheval (616:6-619:7).

Officer Duncan was on routine patrol when he heard the broadcast of Stromingers description of a black male, 5'7 170 pounds, in a white T-shirt and black shorts (644:5-15). He and his partner drove the area searching for the suspect and came upon an individual, later identified as the "petitioner" Trevelle Taylor running north on 37 street near Reick Avenue. The officers ordered him to stop with weapons drawn and observe him drop something on the ground later identified as a brown shirt (646:5-647:11). The petitioner was then placed under arrest in possesion of a cellphone which was confiscated by Ofc. Duncan. When Taylor asked why he was under arrest he got no answer (51:17 -23). The petitoner was driven back to Stromingers location placed in a different cruiser then to OPD headquarters (668:1-20). It was while under interrogation the petitioners hands and arms were swabbed for gunshot residue,picture

was taken in brown shirt, clothes were confiscated and a DNA sample was administered before being charged with theft by receiving a stolen vehicle (83:14-23).

Oct. 30, 2009 the was then charged in Douglas County district court with count I first degree murder, count II use of a deadly weapon to commit felony along with co-defendant Joshua Nolan for the Sept. 19, 2009 homocide of Justin Gaines. A suppression hearing was held on March 25, 2010 in connection with the homocide to suppress the arrest of the defendant on Sept. 19, 2009 due to lack of probable cause. It was at this hearing where relevant facts became into question regarding the petitioners arrest.

At this hearing Ofc. Strominger testifies under oath that he never seen anyone exit the stolen vehicle. He also testified he never told arresting officer Duncan that anyone did infact exit the vehicle and became aware of the false information in their report an hour prior to testifying at this hearing (32:5-22,35:1-13). He further testified he had no knowledge of the number of parties involved in the shooting nor how many was in the suspect vehicle. As well as acknowledging Redick Avenue as a well traveled residential street (40:3-14).

Arresting Ofc. Duncan also testified at this same hearing. Duncan testified officer Strominger told him "thats the guy that ran from the vehicle". He also testified he had no information nor knowledge at the time of arrest tying the defendant to the shooting in question (61:1-18). The hearing concluded denying in part granting in part upholding the fruits of the seizure suppressing only DNA swabs and statements made pre-miranda.

The case proceeded to trial where a jury found the petitioner guilty on both counts in June of 2010 which resulted in reversal on appeal to the Supreme Court for the giving of an errouneous jury instruction. The cause was remanded for retrial. State v. Taylor, 282 Neb. 297, 803 N.W. 2d 746 (2011). A second jury trial was held April of 2012 in which the petitioner was again convicted

on both counts and subsequently received a life sentence.

The petitioner apopealed to the Supreme Court and his convictions were affirmed in part sentence vacated in part and cause was remanded for resentencing , Taylors sentence was deemed unconstitutional under Miller v. Alabama, U.S. 132 S. Ct. 2455, 183 L. Ed. 2d. 407 (2012) and applied to the petitioner under Neb. Rev. Stat. § 28-105, 02 (Supp. 2013) State v. Taylor 287 Neb. 386 N.W.2d Taylor was resentenced Feb. 5, 2016 to imprisonment of 40 to 40 years for first degree murder, with the sentence to run consecutively to his 10 to 10 year sentence for use of a weapon to commit a felony.

Evidence induced at trial is as follows:

On Sept. 19, 2009, Justin Gaines was shot and killed while seated in his automobile which was parked in the driveway of a residence at 4461 Curtis Ave. in Omaha, Nebraska. The cause of death was through and through gunshot wound that entered his right posterior back and fatally penetrated his lungs and heart (809:13-21).

Catrice Bryson testified that on 9-19-09 she was standing outside a friends house on Curtis Ave. when Gaines pulled into the driveway, Bryson and Gaines spoke for about 10 minutes. Bryson went to retrieve a pen from the middle console of her vehicle. When she turned around she seen two men with guns and heard gunshots. She testified the shooter on the drivers side was an African-American with a "low haircut" and wore a brown shirt with orange writing on it. The shooter on the passenger side was "light skinned" African -American with long braids, white basketball jersey and a "do-rag". The shooter on the passenger side ran west the shooter on the driver side ran east along Curtis Ave (451:18-468:16-23).

Kercheval testified for the State that on the morning of 9-19-09 he was at his home at 6738 N. 37th street when Taylor and Joshua Nolan arrived in a white car. Nolan in the driver seat and Taylor was in the passenger seat (680:10-

683:15). After driving around for awhile they wound up on 45th and Curtis streets. The petitioner told Kercheval to slow down so they could buy marijauna. At 44th and Curtis petitioner exited the car and didnt see anyone in the area. Kercheval then pulled over and parked in the area of 45th and Vernon street (6-91:16-695:3). 5 minutes later Nolan exited the vehicle(695:17-697:16). Shortly after, Kercheval heard a series of gunshots. Kercheval then started the car to leave the area when he noticed Nolan running up the street. Nolan got into the vehicle and told him to drive off and proceeded east toward 42nd street. When they reach McMillan Jr. high school, Nolan jumped out of the car. Kercheval then was pulled over by Strominger (698:2-702:18).

Alisha Hobson and Frances Fortenberry testified that right after they heard gunshots, they saw a man matching the driver side description running along Curtis Ave.

Trisha Lade testified she was driving home at about 1:45 P:M and observed a white car at the corner of 42nd and Vernon streets with two occupants in the front seat headed south on 42nd (592:5-594:10). As she proceeded home going west on Vernon she observed a black male running east on the sidewalk(604:3-21). She I'd the petitioner from a photo taken after the 9-19-09 arrest as the man she saw in a brown shirt and blue shorts(595:13-1). She observed him holding a cell phone and overheard him telling someone to "come and get him" and that he is on 42nd Street. She did not observe anything else in his hands (596:4-598:2). He then ran north and she lost sight of him (608:8-10).

Joe Copeland testified that on Nov. 27, 2009 2 months after the homocide his 13yr. old son was playing near his home with a neighboor in the area of 40th and Mary streets and located a 9mm hanbgun on the ground under some bushes. His son showed him the gun. Police were called at which time the gun was handed over to them. Copeland recalled that on the day of the shooting he was outside his residence and after hearing the gunshots, he observed a black male

in his late teens or early twenties run through the general area where the gun was found (770:3-77:4-12).

Dan Bredow testified on Sept. 27, 2009 Nolans car was impounded and searched by police. Located inside were 4 spent shell casings (783:6-790:17-24). After examining the casings Dan Bredow determined that 2 of them were also fired fr-om the handgun found by the Copelands (1012:23-1019:4). He also determined 14 of 16 casings found at the scene came from same handgun.

Jennifer Newbold testified that based on cellphone records of the phone take -n from the petitioner by police 9-19-09 and the one found in Nolans car, there were a number of phone contacts between those 2 cellphones on Sept. 19, 2009 between 11 A:M and 2 P:M (964:12-975:24).

Allison Murtha an employee of R.J. Lee Group testified she examined all of the GSR swabs that were taken from Taylor the day of Sept. 19, 2009 and came back inconclusive (880:2-16).

On March 30, 2016 petitioner filed a timely pro se Motion for post-convictio -n relief in which the district court denied and overruled in a written order Aug. 31, 2017; See Appendix. The petitioner prose then appealed the decision to the Nebraska Supreme Court who upheld the findings of the district court; see State v. Taylor 300 Neb. 629 915 N.W. 2d 568 (2018). Motion for rehearing was then timely filed and overruled Sept. 6, 2018.

## REASONS FOR GRANTING THE PETITION

A. Conflicts with Decisions of Other Courts

I. The holding of the Courts below that the detention and arrest of the petitioner did not violate the 4th amendment is directly contrary to the holdings of this Court and several federal courts and circuits. See Ybarra v. Illinois, 444, U.S. 85 (1979); Beck v. Ohio, 379 U.S. 89, 91 (1964); Terry v. Ohio 392 U.S. 1,24 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); U.S. v. Navedo, 694 F. 3d 463 (3rd cir).

II. Importance of the Questions Presented

This case presents fundamental questions of the interpretations of this Courts decisions in Ybarra v.Illinois, Beck v. Ohio, and Terry v. Ohio. The questions presented is of great public importance because its entire foundation is rooted alone in subjective good faith and as qouted by Mr. Justice Stewart in the opinion given in Beck " If subjective good faith alone were the test the protections of the 4th amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects only in the discretion of the police". The police is no magistrate and in view of the large amount of litigation regarding the 4th amendment surrounding technology with the ever evolving questions in this digital era and privacy conclusions we must adhere and stand firm to the Nations basics and simplicity of the 4th amendment. This case entails a 17yr. old on a Saturday afternoon walking down a residential street with no criminal record, had no prior arrest prior to standing near this stolen vehicle, which led to the Petitioner being convicted of first degree murder. Guidance on these questions are also of great importance because this affects everyones liberties, property and life who live, walk, and run down residential streets everyday all across America who can now substantially be arrested for being in an area where a crime was committed and remain incar-

cerated even after witness testimony under oath that no crime respect to that citizen was committed.

The issues importance is enhanced by the fact that the lower courts in this case have seriously misinterpreted Illinois v. Wardlow and U.S. v. Jones. The lower courts in its most recent opinion denying post-conviction relief stated "Based on the evidence presented by the State at the hearing on Taylor's motion to suppress, we agree with the district courts conclusion that the detention and arrest of Taylor did not violate the 4th amendment"- see State v. Taylor (2018). The only evidence presented by the State were those two cases, Illinois v. Wardlow 528 U.S. 119, (2000) and U.S. v. Jones 535 F.3d, 886 (2008 ). These cases both deal in reasonable suspicion and probaable cause of facts related to criminal activity at the time of arrest. Wardlow fled upon seeing officers and was found in possesion of a handgun. In Jones, a bank robbery commenced, a witness to the robbery described the individual. A person matching the description within minutes was found with bank papers, cash, and other items supporting facts of criminal activity. Similar circumstances, but clearly distinguishable from the present. Both cases acknowledge criminal activity at the time of arrest. This case is clearly in violation of due process of law where the arresting officers cant even come to an agreement of why the petitioner is in custody at the time of arrest. These officers in this case did not clearly communicate nor investigate before placing Taylor in a different cruiser and transport him to OPD headquarters (668:19-20).

The suppression hearing enduced the following testimony from Officer Strominger: Q."The only information that you had at the time you stopped the vehicle was what you just stated, possible suspect vehicle in shooting white four door with no hubcaps? A. Thats correct" (26:2-6). Q. And you indicate that shortly after receiving that call you observe a vehicle that is a white vehicle with four doors and no hubcaps? A. Thats correct. Q. And where did you

observe it? A. Just east of my location about 41st and Redick parked at an angle in the street (26:10-19). A. I observed an individual that was standing in close proximity to the vehicle. Q. Ok. was he having any interaction with the people in the vehicle? A. Not to my knowledge. Q. And you specifically candidly state in your report that the individual was not seen by reporting officer exiting the vehicle; correct? A. That's correct. Q. And then go on to say, But it was in close proximity; correct? saying that you thought maybe he was a passenger? A. Thats correct. Q. How many people were supposedly in this white vehicle with no hubcaps and four doors? A. That information was not broadcast. Q. And how many people when you first observed it did you see inside the vehicle? A. Just the driver(27:1-22). A. As I saw the individual standing near the car, I was gathering intelligence. At that point in time the suspect started to walk eastbound. The car made a U-turn in the street. Q. The pedestrian suspect was walking eastbound? A. Thats correct(28:3-12). Q. Yes, thats all. Im interested in what you broadcast as a description. A. RO noticed a black male about 5'7, 170 pounds, dark shorts, ?, black, and a white T-shirt walking eastbound on the south sidewalk. This black male I will call Suspect 2 appeared to be in his late teens and is carrying something brown in his right hand. Q. All right. After you stopped the white car, you said it was about ten minutes thereafter that an individual was brought to you in handcuffs and disp-layed to you? A. That was an approximation, yes. Q. And when the individual was returned to you, what is it about the individualthat you recognize as being the same person? A. His description, his build, his clothing, and his age( 30:4-13,18-25,31:-4). Q. Ok. Did you identify him as the pary who exited the stolen vehicle? A. I did not tell them that he had exited the vehicle. Q. Ok and have you becomne aware of their report that claims you did say that? A. I am aware of their report. Q. And your telling us that's incorrect in that respect? A. Yes. Q. You testified here under oath that you did not see any-

one exit the vehicle? A. Thats correct. Q. And you testified that you never told Duncan or Finch that this person exited the vehicle? A. Thats correct. Q. And you testified that you are aware that they in their report claim that you did say he exited the vehicle; right? A. Thats what they wrote(32:5-25). Q. So at the time of your stopping the vehicle, you had no information about the number of parties involved in the shooting; correct? A. Thats correct. Q. And you stopped it before you found the information out about it being stolen; correct; while you were following it? A. Thats correct(35:7-,36:1). Q. The street that the car was parked on when you observed it, what street was that? A. Redick Avenue. Q. Its residential, but its also more traveld than the other streets in that area; correct? A. I would probably say so, yes (40:3-14).

Officer Duncan testifies at this same suppression hearing: Q. As I understood your testimony, the reason that you responded to the area in question is to assist in this stop of this stolen vehicle? A. Yes. (53:10-13). Q. All right. Did he say he saw him exit the vehicle? A. He said the guy that ran from the vehicle. Q. Your report says that he was positively IDed by Officer Strominger as being the party who exited the stolen vehicle in the area of 42nd and Redick; right? A. Thats what it says, yes. Q. Ok. Well is that what he told you? A. I believe he said that was the guy that ran from the vehicle. Q. Well, then why did you put in that that was the party who exited the vehicle? You know thats important now dont you? A. I believe what he said is thats the guy that ran from the vehicle referring to the guy that exited and ran from the vehicle. Q. Ok. Well, what information did you have that this person was ever inside this vehicle? Where did that come from? A. Like I said, radio northeast and northwest were simulcasting information regarding a vehicle possibly involved in the shooting at 44th. Once we got to the area to assist with the stolen vehicle, Officer Strominger gave us a

description of the party who ran from the vehicle (57:3,-58:2). Q. Do you recall learning any other information regarding the shooting besides a possible suspect vehicle? A. There was a second suspect that they were looking for that had ran westbound on Curtis. Q. Anything else that you remember regarding the shooting? A. NO (61:11-18).

The lower courts speak on the totality of the circumstances, but disregard these facts and cite no other cases to support there erroneous findings. This court in Terry v. Ohio, held that a police officer may stop an individual reasonably suspected of criminal activity, question him briefly, and peform a limited search for weapons. The district courts finding on this matter specifically stated was that "based on the totality of the circumstances available to Ofc. Duncan, Defendants presence near the scene and his flight upon seeing the patrol car would create reasonable suspicion of criminal activity to justify stop". The petitioner does not argue about suspicion based upon the flight and general description given by Ofc. Strominger, however finding no weapons and learning no additional facts regarding the shooting, stolen vehicle or incriminating there of, the officers authority to detain the petitioner under Terry stop terminated. Instead officer Duncan placed handcuffs on the 17yr. old petitioner, placed him in the back of his cruiser transported him to a different location and when Taylor asked why he was being arrested he got no answer (51:17-23).

The lower courts reasnoning that defendants presence near the scene is also highly contrary to this courts opinion in Ybarra v. Illinois,444 U.S. 85 (1979) which clearly held that "a persons mere proximity to others independent-ly suspected of criminal activity does not, without more, give rise to probable cause to search that person." It also stated "where the standard is probable cause, a search or seizure of a person must be supported by probable cause with respect to that person. This requirement

cannot be undercut or avoided by simply pointing to the fact that coincidently there exist probable cause to search or seize another or to search the premises where the person may happen to be". Each individual who walks down a residential street is clothed with constitutional protection against unreasonable search and seizures. See U.S. v. Di Re, 332 U.S. 589, 583-587, 68 S. Ct. 222,223. This court in Di Re held it was not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled. In this case the petitioner was not only outside the car, but was not seen by officer Strominger having any interaction with the vehicle or its occupants. Officer Stominger is the only witness to support the arrest of Taylor Sept. 19, 2009 who testifies under oath he never seen a crime take place or anything incriminating thereof.

The present case is closely aligned with the findings held in U.S. v. Navedo, 694 F. 3d 463 (3rd Cir. 2012). In Navedo the court held police lacked reasonable suspicion to detain suspect in connection with their investigation of shooting in neighborhood based on their observation of suspect looking at gun that another individual was showing him and engaging in breif conversation with the other individual and his companion where the officers had no prior information about suspect. Specifically stating in Navedo for vacating and remanding officers lacked reasonable suspicion to detain suspect based on their observation of suspect looking at gun that another person was showing him and the officers lacked probable cause to arrest suspect based on his flight after officers I'd themselves.

Officer Strominger in this case put out a description of the petitioner before he knew the car was stolen, model or make of the suspected vehicle or how many suspects were supposedly involved with this shooting. In the end as in Navedo both officers conceded they had no information about the petitoner

at the time of arrest. See Beck v. Ohio, 379 U.S. 89, 91 (1964); this court held probable cause pursuant to an arrest warrant or a warrantless arrest exist where police have, at the moment of arrest, knowledge of facts and circumstances grounded in reasonably trustworthy information sufficient to warrant a reasonable belief that an offense is or has been committed by the person to be arrested. This case is a clear cut example of this courts reasoni -ng in Wong Sun v. United States, 371 U.S. 471 (1963); which held that an arrest without a warrant bypasses the safegaurds provided by objective pre-determination of probable cause and substitutes the far less reliable pro-cedure of an after the event justification for arrest and search, too likely to be subtly influenced by familiar shortcomings of hindsight judgement. This case is the epitome of an after the event justification in light of Kerchevals testimony who also testified to dropping Nolan off in the area of Redick Avenue not Taylor contradicting Strominger's testimony further.

The question presented now is does the evidence, viewed most favorably to the Govt. require a decision,,as a matter of law, that the search and seizure was illegal and therefore a violation of the petitioner's consti-tuional rights under the 4th and 14th amendment. Under the totality of the circumstances yes, yes it does. The after-the-event justification for the arrest was justified by cumlative prejudicial evidence which was heavily relied upon to support petitioner's first degree murder conviction.

Thus the court below seriously misinterpreted Wardlow and Jones by failing to distinguish reasonable suspicion from probable cause of facts related to criminal activity with regards to the person being arrested at that moment in time. This court should correct that misinterpretation and make it clear that probable cause is based on more than mere suspicion,hunches, and maybe's of an officer. It is well established that a reasonable suspicion to make an investigatory stop cannot be found when there is no factual foundation ex-

plaining the source of information being relayed between officers.

B. Conflicts with Decisions of Other Courts

I. The holding of the courts below that the inaddmissible hearsay testimony of Joseph Copelqadd about where the firearm used in the homocide was located as harmless error is directly contrary to the holdings of this court and two federal circuits. See Howard v. Gavin, 810 F. Supp. 1269; Hutchins v. Wainwrig -ht, 715 F. 2d 512, 519 (11th cir. 1983); Douglas v. Alabama, 380 U.S. 415, 13 L. Ed 2d 934, 85 S. Ct. 1074 (1965); Crawford v. Washington, 541 U.S. 36; Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. (1986); Pointer v. Texas, 380 U.S. at 404. In addition, under the U.S., Nebraska Constitution article I,§ 11 §§ 27-802 and 27-804 In all criminal prosecutions, the accused shall enjoy the right....to be confronted with the witnesses against him.

II. Importance of the Questions Presented

This case presents fundamental questions of the interpretation of this Courts decision in Pointer v. Texas, Crawford v. Washington, Brecht v. Abrahamson, and Douglas v. Alabama. The questions presented is of great public importance because the confrontation clause is not a mere technicality. It is a right of citizens which provides a protection that responds to something deep in human nature that regards face-to-face confrontation between the accused and accuser as essential to a fair trial in a criminal prosecution. The right to confron- tation is one of the fundamental gaurntee's of life and liberty. It's lineage traces back to the beginning's of Western legal culture that is gaurded agains -t legislative and judicial action by provisions in the Constitution of the United States. There are criminal prosecutions proceeding in all 50 states 365, Monday through Friday in hundreds of courts in each city each day. Guidance on these questions is also of great importance because

the fact that this right appears in the 6th amendment of our Bill of Rights reflects the belief of the framers of those liberties and safegaurds that confrontation was a fundamental right essential to a fair trial in a criminal prosecution and their ability to find truth in the proceedings that may result in life or death finalized under incarceration and harsh punitive confinement.

The issues importance is enhanced by the fact that the lower courts in this case did not address the merits of the 6th amendment right to confrontation. Stating only in its conclusion "we determine that because there was sufficient other evidence of Taylor's guilt, the admission of Copeland's unchallenged testimony regarding the location of the gun does not undermine confidence in the outcome of the trial and there was not a reasonable probability that the result of the trial would have been different if the testimony had been excluded".-See State v. Taylor 300 Neb. 629 915 N.W. 2d 568 (2018). However, the same court in State v. Taylor, 287 Neb. 386, 842 N.W. 2d 771 (2014); stated "the fact the gun was located precisely at 40th and Mary streets was not vital to the states case. The important fact is that the gun was found near the Copeland's home, in the area where Copeland had seen someone running the day of the shooting" which is completely contradictory to their most recent opinion.

The Federal court in Howard v. Gavin, 810 F. Supp. 1269; held that the state court is sufficiently alerted to the confrontation clause issue when substance of claim before the State court was that prosecution obtained unfair advantage by introducing hearsay hearsay statements of person whom neither testified nor appeared

at trial and by relying upon those statements as evidence of defendants guilt. Gavin also held that constitutional right to confrontation does not exclude all hearsay evidence; confrontation clause is satisfied where proffered hearsay has sufficient gaurntees tee's of reliablity to come within firmly rooted exception to hearsay rule, but in other cases evidence must be excluded, at least absent showing of paticularized gaurntee's of trustworthiness.

In this case the lower courts conceded that this hearsay testimony does not fall within exception to the rule specifically stating "Under Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008), hearsay is not admissible unless a specific exception to the hearsay rule applies. The State does not argue that Copeland's statement fell within many of these exceptions".-See State v. Taylor (2014). The petitioner asserts that as a result of the introduction into evidence of the substance of those statements and findings attributed to the unidentified undisclosed 13yr. old boy, and the reliance upon those statements as evidence of the petitioners guilt, violated petitioners right to confrontation under the 6th amendment to the U.S. Constitution.

"To establish that admission of the hearsay statements did not violate confrontation clause, prosecution must show that out-of-court declarnt is unavailable for trial and that the statements bear sufficient indica of reliability to provide jury with adequate basis for evaluating their truth".-See Hutchins v. Wainwright, 715 F. 2d 512, 519 (11th cir 1983). In this case neither of the above requirements were established. The prosecution made no showing of Copelands son ever being deemed unavailable for either trial, gave no prior opportunities for cross-examination, and provided no basis for evaluating the credibility of the witness. Accordingly having not met either requirement under Ohio v. Roberts, 448 U.S. 56, 62-

66, 100 S. Ct. 2531, 2537 39, 65 L. Ed 2d 597; the admission of the these statements violated the confrontation clause.

This court in Crawford v. Washington, 541 U.S. 36 (2004); held that "out of court statements by witnesses that are testimonial are barred under the confrontation clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whethers such statements are deemed reliable by court; abrogating Roberts". "Where testimonial statements are at issue, only indicum of reliability sufficient to satisfy constitutional demands is the one the constitution actually prescribes, i.e. confrontation".

Because confrontation clause violations are subject to harmless error analysis the next step is to decide whether the 6th amendment violation was harmless under Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Brecht requires a confrontation clause violation to have a "substantial and injurious effect or influence in determining the jury's verdict" before it merits reversal on collateral review. This court outlined a number of factors to conclude whether the asserted error was harmless or not in Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. (1986); those factor -s include "the importance of the witness testimony in the prosecutions case, whether the testimony was cumlative, 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 prosecutions case". The present case clearly meets the harmless error analysis under Brecht and violated the petitioners right to confrontation.

Witness testimony regarding location where his son found the gun was inaddmissible hearsay, in trial for first degree murder and use of a weapon

to commit felony, where witness testimony was based entirely on what his son had told him. The prosecutors reliance on the hearsay testimony in closing arguments was such that a reasonable juror could have only concluded that the witness Joe Copeland, identified Taylor as the person who ditched the gun and was infact in possesion of the murder weapon.

The prosecution in closing arguments said "This gun, the gun that the defendant ditched later on as he ran away from the murder this gun is tested by crime lab tech Bredow and 14 of these 16 cases are positively identified as being shot from this gun. 2 of those casings come back as having tin in them (1040:14-18). "Joe testified that he saw the defendant out cross here (indicating) towards Mary street where the gun is found a month and-a-half later right here (indicating). This same gun that crime lab tech Bredow tested and those casings matched from the murder of Justin Gaines. Defendant had just run through the neighborhood with that brown shirt holding this gun (indicating) in his shorts. He's got to do something with it. He ditches it" (1045:17-25). "When Strominger see's him, he's no longer holding up his shorts. He just ditched the gun, took that brown shirt off"(1046:8-10). "He wasnt holding up his shorts when Duncan saw him because he didnt have his gun. He already gotten rid of it"(1048:16-18)." Why are you running to this area (indicating) and getting rid of this gun (indicating) the gun that matched 14 of the 16 casings from the murder scene? Because you know youre guilty. The same gun that matched casings that had tin in them that are found on your hand? Because you know you're guilty. (1049:12-18). "Thats the defendant, with the 9, over on the drivers side of the car (1073:21-22).

These closing arguments become cumlatively harmful due to the major fact that not one witness can corroborate seeing the petitioner in possesion of a firearm in broad day light. Furthermore, Joe Copeland never testified to seeing the defendant at all (765:12-25). The prosecution also used inconclusive

GSR testimony in closing arguments to corroborate the error. "You heard from Alison Murtha from RJ Lee Group that the gunshot residue found on the hand had tin in it. She's done thousand's of GSR analysis testing. Very rare that you would find tin. Tin is usually seen in foreign ammunition. The Defendant has tin on his hand. Tin is also found in 2 of the 16 casings. And they didnt test all the casings. They found tin in 2 and stopped there. That's how we know the defendant is on the drivers side of Justins car unloading this 9mm gun on Justin" (1039:25,1040:1-4). "At that time the Defendant , you heard , asked Officer Liebe for some hand sanitizer. He didnt have any dirt on his hands. The defendant knew he had just fired this weapon (indicating) and he wanted to get rid of the evidence. He knew he was guilty" (1048:23-25).

However, conflicting testimony was also given to refute those arguments Joshua Kercheval testifies under oath at several hearings he dropped the other alleged shooter Nolan,off in the area of Mc Millian school where the gun is later found (698:19,701:-6). Testimony was also given of Nolan being arrested 8 days after the homocide in which his car was impounded and searched by police. The search produced 4 spent 9mm shell casings. Dan Bredow examined the casings and determine 2 out of the 4 were consistent with being fired from the 9mm found by the out-of-court declarant Joseph Copeland's son who was never called to testify or questioned by police during the course of the investigation (101 :2-,1018:17).

This case is completely consistent with the findings found in Wainwright which said "The use of this testimony in closing arguments and the easily drawn inferences therefrom namely that informant identified defendant as perpetrator of robbery in question constituted hearsay and violated confrontation clause, thereby denying defendant a fair trial". In ordering reversal this court in Douglas v. Alabama, 380 U.S. 415, 13 L. Ed. 2d. 934, 85 S. Ct. 1074 (1965); noted that the accomplices confession added a crucial link to the Govts case

and that the confession provided "the only direct evidence" to establish that the defendant had fired the weapon used in the crime.

These opinions in these 2 cases can easily be concluded in the present. The prosecution in closing stated Joe Copeland Id'd the defendant as the person in question who ditched the murder weapon, although again Joe never testified to that (765:12-25). This testimony also provides "the only direct evidence" to establish the petitioner fired the weapon used in the homocide which is vital in a first degree murder conviction with use of a deadly weapon to commit a felony.

Thus the court below seriously disregarded the confrontation clause and the factors needed under Brecht to determine this fatal error was harmless to the petitioner. The court should correct that and make it clear that out-of-court statements by witnesses which are testimonial are barred , under the confrontation clause when witnesses are available and the defendant had no prior opportunities to cross-examine the witness espeacially relying on that testimony as evidence of the petitioners guilt..

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Trevelle Taylor

Date: Dec. 1, 2018