

 ORIGINAL.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

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**S.C. Supreme Court**

Opinion No. 2013-UP-147 (S.C. Ct. App. filed 4/10/2013)

09-GS-40-6690-91, 6696, 6689.

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THE STATE,

RESPONDENT,

V.

ANTHONY HACKSHAW,

PETITIONER

Appellate Case No. 2013-001372

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 23, 2013. App. 25.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the trial court's erroneous admission of a statement given to police by a witness who refused to testify at Petitioner's trial in violation of Petitioner's right to confront and cross-examine the witnesses against him pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

## STATEMENT OF THE CASE

Petitioner was indicted by the Richland County grand jury for murder, two counts of assault with intent to kill (AWIK), and use of a firearm during commission of a violent crime during its September 2009 term. R. 1663-1670. Petitioner was tried before the Honorable James R. Barber, III, on October 21, 2010, and October 25 - November 1, 2010. He was represented by Tara Dawn Shurling and Jeremy Thompson. The state was represented by Kathryn "Luck" Campbell, Joanna McDuffie, and Nicole Simpson. R. 1. He was convicted of all counts and sentenced to forty-two years' imprisonment for murder; fifteen years' imprisonment on each count of AWIK, and five years' imprisonment for the weapons charge. Judge Barber ordered the sentences to run concurrently. R. 1619, line 7 – 1620, line 11; R. 1645, line 16 – R. 1646, line 10.

Petitioner filed a timely notice of appeal. Elizabeth Franklin-Best represented Petitioner initially by filing a timely initial brief of appellant and designation of matter. Susan Barber Hackett assumed representation of Petitioner when Franklin-Best resigned from the Office of Appellate Defense. Brendan McDonald represented the state. The matter proceeded to oral argument before the Court of Appeals on March 4, 2013. On April 10, 2013, a three-judge panel affirmed Petitioner's convictions. App. 1-3. Petitioner filed a petition for rehearing on April 25, 2013. App. 4-9. Upon request of the Court of Appeals, the state filed a return on April 29, 2013. App. 10-24. On May 23, 2013, the Court of Appeals denied the petition for rehearing. App. 25.

This petition for writ of certiorari follows.

## ARGUMENT

The Court of Appeals erred in affirming the trial court's erroneous admission of a statement given to police by a witness who refused to testify at trial in violation of Petitioner's right to confront and cross-examine the witnesses against him pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

### **Relevant facts**

Law enforcement was dispatched to the home of Ellison Hudson around 1:00 p.m. on May 20, 2009. R. 160, ll. 13-16. When law enforcement arrived, Cleveland Joyner, Ellison Hudson, and the decedent were present. R. 161, ll. 1-4. Officer Brian Carroll of the Columbia Police Department spoke briefly with Hudson and Joyner at the scene. He was informed that the decedent's assailants were two males, one "in black clothing" and "black hat," "5'10," and "190 pounds." R. 167, ll. 3- 23. Officer Carroll also heard there was a second assailant wearing a blue hoodie. R. 168, ll. 5-18. Hudson did not inform the officer that he knew either of the assailants. R. 169, ll. 11-14. A witness who had just returned home from school testified that she heard the gunshots, and observed two guys running. One of them had a gun. R. 181, ll. 2-24. She did not see their faces. R. 182, ll. 10-14.

At the time of these events, Joyner had known Hudson for approximately two years. They would "relax" and "smoke weed" together. R. 225, ll. 2-14. On this date, Joyner dropped his girlfriend off at work, and then headed to Hudson's house to smoke some weed. They were outside in the yard, and smoking their marijuana at a table in the middle of the yard. R. 227, l. 17- R. 230, l. 23. While they were enjoying their pot at the table, Fogle showed up at the house. Hudson was going to wash her car, and so she pulled her car into the backyard. R. 230, l. 24- R. 231, l. 25. Hudson had a gun on the backyard table. R. 232, ll. 5-16.

While they were in the backyard, they observed a silver Honda drive by. They then noticed the car drive by a second time. Hudson grabbed his gun and walked to the front yard. He walked back, and then started washing the car. They heard a car door close, and then Hudson yelled "Get the gun." R. 232, l. 21- R. 234, l. 17. Fogle was at the table; Hudson ran away. R. 234, ll. 18-25.

Joyner testified that he heard gunshots and then fell down. He saw someone in a blue hoodie run past him, chasing Hudson. He heard screaming and then more shots. He described the person in the blue hoodie as "tall and skinny." Joyner ran behind a shed with the gun in his hand. When he saw the person in the blue hoodie running down the other side of the street, he fired the gun at him. He ran after him, and saw the silver Honda drive down the road. R. 235, l. 7- R. 239, l. 25.

Joyner then took the shells out of the gun, and placed the gun under a couch in the house at the direction of Hudson. R. 241, ll. 12-22. The police arrived shortly thereafter, and Joyner told Hudson to get his (Hudson's) counterfeit money out of the house. R. 242, ll. 6-14. Joyner testified he never saw the shooter's face. R. 244, ll. 2-6. Joyner gave a statement to police recounting these events. R. 244, ll. 10-22. In this statement, he failed to inform the police that he had a gun. R. 253, ll. 3-23.

On June 3, Joyner gave another statement to the police. At that time, he gave them information about a purported "situation" between Hudson and Petitioner that was relayed to him by Hudson. R. 245, ll. 8-19. Joyner testified that he related a message to Hudson from Petitioner that "if he didn't give him his weed or his money that he was coming for his head." R. 246, ll. 17-23.

Ellison Hudson testified that he had the gun on the table because he "had had numerous people" shoot up his house. R. 287, ll. 2-7. He testified that someone had even shot at his house a week before this event, and while his father was standing outside. R. 289, ll. 1-5. During cross-

examination, Hudson admitted that his house had been shot up “maybe twice” before. R. 329, ll. 7-23. He testified that he “saw a tattoo” when the two men approached. R. 294, ll. 5-13. He later characterized this as a “little tattoo.” R. 389, ll. 12-14. After the shooting, he called his father who worked at Best Buy on Two Notch Road. R. 302, ll. 9-18. Hudson testified that he got a good look at one of the shooters. R. 305, ll. 9-15.

Hudson testified that he lied to the police about the identity of the shooter. Asked why, he responded:

A: To be honest, I was scared, nervous at the same time. I wanted revenge, you know, because I just know it wasn't right.

Q: You wanted revenge on who?

A: That guy right there (pointing).

Q: So you blamed someone who had nothing to do with it?

A: Yeah. Yes, ma'am.

Q: And who did you pick to blame? How did you come up with him?

A: Just because previous incidents that I had with plenty of people shooting at my house. You know, once—I guess once people finds out where I stays at, then, you know, he had cahoots—he was a part of what was going on during the time, you know, but I was just mad, you know. Like I say, I just wanted revenge. I---.

R. 305, l. 20- R. 306, l. 14.

In fact, Hudson told the police that he was “positive” that the shooter was Jonathan Bailey. R. 306, ll. 23-25. Hudson even described the tattoos on Bailey's arm to the police. R. 307, ll. 5-6. He testified that he had a “beef” with Bailey's “homie.” “So, you know, there was people shooting at my house, you know, threatening, calling my phone or whatnot, snitch this, snitch that.” R. 330, ll. 10-16. He testified that he told the police that Bailey would be after him because he had snitched

on one of his friends who shot up Hudson's mother's car. R. 331, l. 17- R. 335, l. 4; R. 346, l. 1- R. 347, l. 18.

When police spoke to Hudson again, on May 23, he told them that Petitioner was the shooter. R. 308, ll. 1-14. However, even before he named Petitioner as one of the shooters who killed Ebony Fogel, the police were asking Hudson about Petitioner. R. 338, l. 24- R. 339, l. 12. Hudson admitted he had "no problem lying to the police and blaming an innocent man." R. 336, ll. 3-5. He claimed that he "told the truth" because he was locked up at the detention center, and knew he would not be able to exact his revenge on Petitioner. He also claimed that a discussion with his grandfather inspired him to tell the truth. R. 348, l. 6- R. 350, l. 22. Hudson described an incident that happened earlier to the police. He told the police that he had stolen drugs from Petitioner approximately two or three weeks earlier, with a friend named "Hot Boy." He told them that they went to Petitioner's apartment to buy marijuana from him. Instead, Hudson pulled a gun on him and stole the marijuana. R. 310, l. 24- R. 318, l. 4. He claimed that he and Petitioner fired at one another at the apartment complex. R. 318, ll. 17-24. Then, on June 4, Hudson gave an additional statement to police in which he informed them that he was "90 to 95 percent" sure that Petitioner was the shooter. R. 412, l. 13- R. 413, l. 17.

At trial, the state called Torrian Gleaton to the stand. R. 757, l. 21. He was a critical witness for the state because according to a statement he gave to police, Petitioner made highly incriminating statements to him about the shooting. When he first took the stand, the state elicited from him that he had recently pled guilty in federal court to possession of a firearm by a felon, and that he had an outstanding warrant in Sumter County for unlawful possession of a weapon. He also had a conviction for possession of Ecstasy. R. 758, l. 17- R. 760, l. 9.

After he answered these preliminary questions about his record, the state then asked him whether he knew Ellison Hudson. At that point, he testified that he did not want to cooperate. R. 760, ll. 11-14. At least seven times, he stated that he did not want to cooperate. R. 760; ll. 15-18; R. 761, ll. 22-24; R. 762, ll. 3-4; ll. 9-11. The trial court judge then addressed Gleaton and informed him that he could be held in contempt. He asked if he wanted to consult with his lawyer, and he replied that he did. R. 763, ll. 5-16.

Gleaton's counsel arrived at the courthouse and spoke to him. Counsel informed the court:

MR. KIRKLAND: He maintains that the reason that he is not cooperating—unfortunately, he's not able to plead under—to say that it's a fifth amendment privilege against incriminating himself. He's only able to say that he fears for his safety and the safety of his family.

R. 814, l. 23- R. 815, l. 2. Counsel again reiterated that Gleaton was not going to cooperate at all. R. 836, ll. 11-22; R. 838, ll. 5-12. Throughout the discussion of whether Gleaton's statement to police would be admitted, Gleaton's counsel again reiterated that Gleaton claimed he did not wish to cooperate because it would endanger his life and the life of his family. R. 848, l. 23- R. 849, l. 9. Even when the judge ordered Gleaton to answer the questions posed, Gleaton's counsel informed that court "he does intend to defy your order." R. 835, line 22 – R. 836, line 10. Gleaton's counsel and Gleaton made clear that Gleaton was refusing to answer questions at all. R. 836, lines 14-22.

During the discussion of Gleaton's refusing to answer questions and the state's motion to admit his statement to police, the judge correctly noted "if he's refusing to answer, I don't know how that's subject to being cross-examined." R. 838, lines 21-23. The state argued it should be allowed to admit the statement, and that it was entitled to do so under State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009). R. 841, l. 6- R. 842, l. 14. Petitioner objected. R. 842, l. 16- R. 845, l. 7; R.

853, l. 19-25. The trial court judge ruled that the statement was admissible. R. 854, l. 1- 24. The court ruled that Stokes was controlling. R. 885, ll. 14-24.

When Gleaton was called to the stand again, and he refused to answer questions, the judge found Gleaton in direct contempt of his order for Gleaton to answer the questions asked of him. R. 848, ll. 12-20. Judge Barber sentenced Gleaton to six months' imprisonment, which he ordered to be served consecutive to Gleaton's federal sentence. R. 849, l. 21 – R. 850, l. 3.

Counsel again objected when the state called Investigator Walter Mahoney, of the CPD's Major Crimes Unit to read Gleaton's statement to the jury. R. 960, ll. 9-10; R. 963, ll. 12-14. The state elicited the following relevant testimony:

Q: "Torrian was saying that the next day Bump says to Torri that E. shot somebody in Greenview. Bump said they went to get E. and started spraying. And Torri—and Bump asked Torri did E. get shot, and Bump said that they shot somebody. They sprayed someone. They didn't know who they hit."

R. 966, ll. 21-25 ("Bump" is, supposedly, Petitioner's nickname).

The officers, according to Mahoney's reading of Gleaton's interview, asked for more detail about the shooting that Hudson's house. R. 968, ll. 2-4.

A: "That they sprayed somebody. They were going to look for E. and they were looking for E. and they sprayed."

Q: "That means they were looking for E. before they started shooting?"

A: "Oh, yeah."

Q: "And sprayed means shooting?"

A: "They were looking for E. the day he robbed him. All tell they were going to—all tell they were going to catch up with him."

Q: "All right."

A: "Every day."

Q: "So Bump has told you that they were looking for E. since E. robbed him?"

A: "In one of them phone calls he's asking me have I seen E-Dog."

Q: "Those—the phone calls that you're talking about, are they before Ebony Fogle was killed in E's back yard or after? Because it sounds like you're telling me two different things here."

A: "Before and after."

R. 968, ll. 5-25.

According to Mahoney's reading of Gleaton's interview, Gleaton told the police that Bump was going to "retaliate from the robbery." R. 969, ll. 10-25. He told them that Bump was out looking for him at night clubs. R. 972, ll. 12-24. After the shooting occurred, according to Mahoney's recitation of the interview, Bump then called Gleaton and asked if E. had been killed. R. 975, ll. 18- R. 976, l. 7.

The final interview lasted approximately thirty-six minutes, although the interrogation prior to the taking of the statement lasted over two hours. R. 1002, ll. 6-15. In fact, Investigator Reese of the CPD testified that it lasted more than 3 hours. R. 1106, ll. 10-11. During the interrogation, Investigator Reese used profanity, yelled, and slammed his fist down on the table. R. 1003, ll. 7-12. Gleaton told the officers that he was confusing what E. had told him, and what Bump had said to him about the incident. R. 1002, ll. 16-23; R. 1003, l. 13- 1004, l. 4. During the interrogation, Investigator Reese threatened to prosecute him:

Q: Let me rephrase the question. What he actually says is, "You realize you're making yourself an accessory to a murder." That's what he said, isn't it?

A: Yes, ma'am.

R. 1004, ll. 12-15. Reese also stated that he had no qualms putting Gleaton in jail if he did not keep talking to them. R. 1006, ll. 16-19.

Later, defense counsel attempted to call Torrian Gleaton to the stand. He testified that he was still unwilling to answer any of her questions. R. 1291, l. 17- R. 1292, l. 12.

### **Discussion**

The trial court judge erred by admitting Gleaton's statement because doing so violated Petitioner's right to confront and cross-examine the witnesses against him. Gleaton was not available for cross-examination because of his repeated refusals to cooperate with either the prosecution or defense.

The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This 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). The Confrontation Clause guarantees the opportunity for cross-examination. United States v. Owens, 484 U.S. 554 (1988). The opportunity for cross-examination has been deemed the "main and essential purpose of confrontation." Delaware v. Fensterer, 474 U.S. 15, 19-20 (1985). And see Crawford v. Washington, 541 U.S. 36 (2004). Cross-examination allows the accused the opportunity:

[N]ot only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Douglas v. Alabama, 380 U.S. 415 (1965) (quoting Mattox v. United States, 156 U.S. 237, 242 (1895)).

The admission of testimonial hearsay statements against an accused violate the Confrontation Clause if the declarant is unavailable to testify at trial, and the accused has had no prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54. “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” Id. at 59 n.9. This Court made clear that the Confrontation Clause “guarantees only an opportunity for effective cross-examination not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Stokes, 381 S.C. 402, 673 S.E.2d at 439 (quoting United States v. Owens, 484 U.S. 554, 559 (1988)).

The trial court’s and the Court of Appeals’ reliance upon Stokes was misplaced, however. The witness against Stokes denied having made the written statement when he testified. In response, the prosecution moved to admit the statement pursuant to Rule 613, SCRE, which the judge allowed. Although the witness denied having made the statement, the witness remained on the witness stand and was subject to cross-examination, including cross-examination regarding the statement, by Stokes. Stokes, 381 S.C. at 399, 673 S.E.2d at 438. This case, then, is distinguishable from Stokes because Stokes had an opportunity to cross-examine the witness, but chose not to.

In this case, Petitioner did not have the opportunity to confront and cross-examine Gleaton as to the statements he made to law enforcement because Gleaton refused to cooperate. He refused to answer any questions about this incident, and was therefore not available for cross-examination. In fact, Gleaton was held in contempt of court for his failure to answer questions. The judge sentenced Gleaton to six months’ imprisonment for his refusal.

Given the dearth of evidence tending to show that Petitioner was guilty of this crime, including Hudson's initially informing law enforcement that someone else did it, the prejudice of allowing this statement into evidence was overwhelming. Additionally, the prosecutor's reliance upon Gleaton's statement as evidence of Petitioner's guilt demonstrated the harmful nature of the evidence. The state argued extensively that Gleaton's testimony proved Petitioner's guilt:

The murder of Ebony Fogle. Remember when he talked to his one friend, Mr. Gleaton, who didn't want to be here, who didn't want to get up in front of his friend and testify? You were allowed to listen to that testimony only because certain circumstances were met and the judge made that call, but what did he tell him? That he sprayed.

R. 1544, ll. 15-20. The state referenced the statement later in the closing argument. R. 1557, l. 23-

R. 1558, l. 9. And, yet again, in closing, the prosecution relied upon Gleaton's statement:

Torrian Gleaton, the defendant's friend. He also knows E. He spoke to both of them. He was up front about that. Bump told him about the robbery, said he was looking for E., even tried to remember getting him to go and find out where E. lived or show him. Told him about the shooting. He sprayed the yard.

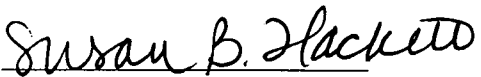
R. 1560, l. 19- R. 1561, l. 11.

In addition to the state's constant reference to the statement and reliance upon the statement as the linchpin of its case, the record demonstrated the prejudice to Petitioner as a result of the admission of Gleaton's statement due to the jury's questions about the statement. The jury was concerned about Gleaton's testimony, as evidenced by the notes they sent to the judge during their deliberations. R. 1602, line 5- R. 1610, line 2. Given the importance of this testimony to the jury during their deliberations, Petitioner was prejudiced by its improper admission. The trial court judge's error overwhelmingly prejudiced Petitioner.

CONCLUSION

The trial court judge erred when he allowed the state to publish Gleaton's statement to law enforcement because doing so violated Petitioner's right to confront the witnesses against him, and he was overwhelmingly prejudiced. Respectfully, Petitioner asks this Court to reverse his convictions and remand his case for a new trial.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 9th day of August, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

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THE STATE,

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ANTHONY HACKSHAW,

PETITIONER

Appellate Case No. 2013-001372

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Anthony Hackshaw, #343463, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, and the S.C. Court of Appeals this 9th day of August, 2013.

Susan B. Hackett  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day  
of August, 2013.

Emily M. (L.S.)  
Notary Public for South Carolina  
My Commission Expires: November 16, 2022.