

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Richland County  
Honorable DeAndrea G. Benjamin, Circuit Court Judge  
2012-GS-40-101889  
Appellate Case No. 2012-213457

**RECEIVED**

AUG 27 2013

**S.C. Supreme Court**

THE STATE,

Respondent,

vs.

ANTHONY TREMAINE McWILSON,

Appellant.

**MOTION TO DISMISS APPEAL PURSUANT TO STATE V. ISAAC**

Respondent ("the State"), through its undersigned counsel, would respectfully move to dismiss the appeal from as an improper interlocutory appeal from an order denying immunity under the Protection of Person's and Property Act pursuant to State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) (Shearouse Adv. Sh. No. 37 at 15, 17). Respondent would show this Court the following:

**I.**

This case involves an appeal by Anthony Tremaine McWilson from a November 2, 2012 Order of the Honorable DeAndrea G. Benjamin denying a motion to dismiss the Richland County indictment for murder and award immunity from prosecution pursuant to the Protection of Person's and Property Act, S.C. Code Ann. 16-11-410, et seq. McWilson was indicted by the Richland County Court of General Sessions for the September 11, 2001 murder of Michael Smith.

The motion to assert statutory immunity was made by counsel for the Appellant, Brian Shealy, on August 22, 2012. The State responded in opposition to the motion on August 30, 2012. The order denying defendant's motion to assert statutory immunity from prosecution was from a hearing held on September 4, 2012. The Appellant was represented by Brian Shealey and Luke Shealey. The State was represented by Assistant Solicitors April W. Sampson and Raia Hirsch of the Fifth Circuit Solicitor's Office. Judge Benjamin entered her order denying the motion seeking immunity dated November 2, 2012.

The Appellant, through counsel Brian R. Shealey of the Richland County Public Defender's Office filed a notice of appeal in the Supreme Court of South Carolina on November 8, 2012.

According to the records of the Respondent, the matter is before this Court awaiting the filing of the Initial Brief of Appellant which is due on September 11, 2013, pursuant to an Order of this Court entered on August 13, 2013. The Appellant is presently represented by Susan B. Hackett of the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

## II.

In South Carolina, the right to appeal is conferred by S.C. Code Ann. § 14-3-330. State v. Miller, 289 S.C. 426, 426, 346 S.E.2d 705, 705 (1986). Ordinarily, an appeal may only be pursued after a party has obtained a final judgment or has otherwise satisfied the terms of Section 14-3-330. State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010); see Miller, 289 S.C. at 426, 346 S.E.2d at 705 ("In order to exercise his statutory right to appeal, a defendant must come within the terms of the applicable statute."). In criminal cases, judgment for a criminal defendant is not final until a sentence is imposed. State v. Robinson, 287 S.C. 173, 174, 337 S.E.2d 204, 204 (1985); see Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment

in a criminal case means sentence. The sentence is the judgment.”). Thus, a criminal defendant may **not** appeal until **after** a sentence has been imposed. Parsons v. State, 289 S.C. 542, 542, 347 S.E.2d 504, 504 (1986).

### III.

On August 21, 2013, in State v. Isaac, the South Carolina Supreme Court instructed that an order denying a request for immunity from prosecution under the South Carolina Protection of Persons and Property Act does not fall within any category of orders that are immediately appealable under Section 14-3-330. State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) (Shearouse Adv. Sh. No. 37 at 15, 17). In reaching that conclusion, the Supreme Court explained that an order denying a request for immunity was not a final order and was not an interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver. Id., (Shearouse Adv. Sh. No. 37 at 18-19). As a result, the Supreme Court held that “the denial of a request for immunity under the Act is not immediately appealable.” Id., (Shearouse Adv. Sh. No. 37 at 21).

### IV.

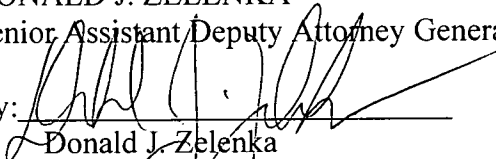
In this case, Appellant McWilson is appealing from Judge Benjamin’s order denying his motion to dismiss the murder indictment based upon request for immunity from prosecution. However, Appellant’s case has not yet gone to trial, and Appellant has not yet been convicted or sentenced. See State v. Hughes, 56 S.C. 540, 35 S.E. 214, 215 (1900) (recognizing that the general rule is that a criminal defendant cannot appeal until he has been convicted and sentenced), cited in State v. Isaac, infra.

Accordingly, Appellant's appeal is an improper interlocutory appeal from an order that is not immediately appealable and should be dismissed, and Appellant's case should be remanded for trial. See Isaac, (Shearouse Adv. Sh. No. 37 at 23) (instructing that the denial of a defendant's request for immunity pursuant to the South Carolina Protection of Persons and Property Act is not subject to immediate appeal, dismissing Isaac's appeal, and remanding for trial); see also State v. Hubbard, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) ("The appellants have not yet gone to trial. An appeal in a criminal case must attend the final judgment rendered on the indictment. No final judgment has occurred in this case and the order appealed from is interlocutory. Therefore, we dismiss the appeal and remand the case for trial." (citations omitted)).

**WHEREFORE**, Respondent moves this Court to dismiss Appellant's notice of appeal and appeal as an improper interlocutory appeal from an order that is not immediately appealable; remand the case to the circuit court for trial; hold this appeal in abeyance pending a ruling on Respondent's motion; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,  
ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Senior Assistant Deputy Attorney General

By:   
Donald J. Zelenka

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
S.C. Bar Number 5758  
(803) 734-3601

August 27, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

AUG 27 2013

Appeal from Richland County  
Honorable DeAndrea G. Benjamin, Circuit Court Judge  
2012-GS-40-101889  
Appellate Case No. 2012-213457

**S.C. Supreme Court**

THE STATE,

Respondent,

vs.

ANTHONY TREMAINE McWILSON,

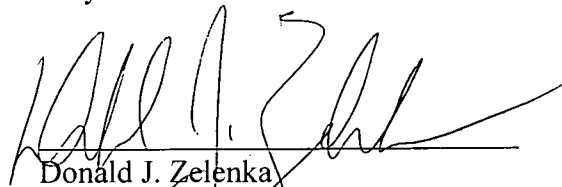
Appellant.

**PROOF OF SERVICE**

I, Donald J. Zelenka, certify that I have served the within Motion to Dismiss Appeal on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire  
S. C. Commission on Indigent Defense  
1330 Lady Street, Suite 401  
Columbia, S.C. 29201

I further certify that all parties required by Rule to be served have been served.  
This 27<sup>th</sup> day of August, 2013.



Donald J. Zelenka

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
S.C. Bar # 5758  
(803) 734-3601

August 27, 2013