

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

**S.C. Supreme Court**

James R. Barber III, Circuit Court Judge

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Opinion No. 2013-UP-147 (S.C. Ct. App. filed April 10, 2013), Appellate Case No. 2013-001372

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THE STATE,

RESPONDENT,

V.

ANTHONY HACKSHAW,

PETITIONER.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

- I. Whether the admission of Torrian Gleaton's prior statement and testimony at trial violated Petitioner's right to confront his accusers as guaranteed by the Sixth and Fourteenth Amendments of the United States when Gleaton was determined to be available as a witness, was subject to cross-examination and was called as a defense witness at trial.

## INTRODUCTION

On May 20, 2009, authorities were dispatched to Ellison Hudson's home after neighbors reported a shooting. (R. p. 171). The ensuing investigation culminated in the trial and conviction of petitioner, Anthony "Bump" Hackshaw ("Petitioner"). (R. pp. 1619-20).

## STATEMENT OF THE CASE

Petitioner was indicted during the September term of the Richland County grand jury for murder (#2009-GS-40-6689), use of a firearm during the commission of violent crime (#2009-GS-40-6696) and two counts of assault with intent to kill ("AWIK") (#2009-GS-40-6690, #2009-GS-40-6691). (R. pp. 1663-70). Following his indictment, Petitioner was tried before the Honorable James R. Barber, III and a jury on October 25, through November 1, 2010 in Columbia.<sup>1</sup> At the conclusion of trial, the jury convicted Petitioner on all charges, and on November 3, 2010, the trial court sentenced Petitioner to 42 years on the murder charge, ten (10) years on each AWIK charge, and five (5) years on the weapons charge, all to be served concurrently. (R. pp. 1619-20); (R. pp. 1645-46). Petitioner was represented by Tara D. Shurling and Jeremy Thompson, while the State was represented by Joanna McDuffie, Kathryn "Luck" Campbell and Nicole Simpson. (R. p. 1).

On appeal, Petitioner, represented by Susan B. Hackett<sup>2</sup> of the South Carolina Commission on Indigent Defense, filed a brief in the Court of Appeals alleging seven separate claims of trial court error. Br. of App. at 1-2. In particular, Petitioner argued *inter alia*, that the trial court erred when it "allowed the state to admit a prior statement made by Torrian Gleaton when admission of the statement violated Hackshaw's right to confront the witnesses against him

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<sup>1</sup> Pre-trial motions were conducted on October 21, 2010. (R. p. 1).

<sup>2</sup> The Initial Brief of Appellant was authored by Elizabeth Franklin-Best, who subsequently left the Commission. As reflected in both the Final Brief of Appellant and in the record on appeal, Ms. Hackett assumed representation of Petitioner following Ms. Franklin-Best's departure.

in violation of the Sixth and Fourteenth Amendments.” Br. of App. at 1. In response, the State filed a brief denying Petitioner’s claims of trial court error and with respect to Petitioner’s Confrontation Clause argument, maintained “[t]he trial court correctly concluded Appellant’s Confrontation Clause Rights were not violated by the admission of extrinsic evidence of Gleaton’s prior statement because the trial court correctly concluded Gleaton was available for cross-examination.” Br. of Resp. at ii.

After conducting oral arguments in the case, the Court of Appeals issued an unpublished, *per curiam* opinion affirming Petitioner’s conviction and sentence. (App. 1-3). In addressing Petitioner’s Confrontation Clause argument the Court cited to State v. Nance, 393 S.C. 289, 294, 712 S.E.2d 446, 449 (2011) and State v. Stokes, 381 S.C. 390, 401-02, 673 S.E.2d 434, 439 (2009) correctly explaining the Confrontation Clause only guarantees an opportunity for cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish. (App. 2). Petitioner subsequently sought rehearing on this ground<sup>3</sup> rehashing his previous argument that his confrontation rights were violated when Gleaton’s statement was admitted into evidence and the State filed a return. (App. 4-9, 10-24). The appellate panel denied rehearing. (App. 25).

## STATEMENT OF THE FACTS

### A. The Underlying Crimes

On the afternoon of May 20<sup>th</sup> 2009, Ellison Hudson and Cleveland Joyner were in Hudson’s backyard in Columbia’s Greenview neighborhood, smoking marijuana, when Hudson’s friend, Ebony Fogle, an 18-year-old female arrived and pulled her car into Hudson’s backyard so Hudson could wash it. (R. pp. 228, 231, 282, 283). As Hudson was preparing to

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<sup>3</sup> The State notes Petitioner did not seek rehearing on any of the other claims advanced in his brief. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

wash Fogle's car, both he and Joyner, who was rolling a second blunt of marijuana on a nearby table, observed a two-door silver Honda slowly pass by Hudson's house, which Joyner would later explain, made him nervous. (R. pp. 232-33, 274-75, 286-87, 326, 328, 233, 287). At the time the silver Honda passed by, a .38 caliber revolver registered to Hudson's mother had been placed on the table with the marijuana, because, according to Hudson, numerous people had previously shot at his house. (R. pp. 232, 286-87).

Within a five-minute span, the silver Honda passed by again, which prompted Hudson to grab the gun and proceed to the front yard to investigate. (R. pp. 233-34, 289). However, upon walking out to the front yard, Hudson saw only his neighbors and therefore returned to the backyard where he placed the gun on the table and resumed washing Fogle's car. (R. pp. 233-34, 289-90). Shortly thereafter, Hudson saw two men, one wearing a hooded sweatshirt and the other wearing a black hat, black shirt and black pants, approaching his backyard. (R. pp. 290-91, 293-94). One of the men was armed with a pistol. (R. p. 293).

Seeing the gun, Hudson yelled at Joyner, who was sitting at the table with Fogle, instructing him to grab the revolver. (R. p. 293). He then began running, at which point the men opened fire and one of the two men started chasing Hudson. (R. p. 294). As he was running away, Hudson, who explained he heard shots "whistling past" his head, pushed Fogle out of the way. (R. pp. 295, 296). He then jumped a fence running into his next-door neighbor's yard before jumping a second fence in order to escape the man who was pursuing him. (R. pp. 295-97). While he was running, Hudson heard shots coming from the direction of his house. (R. pp. 296-97).

Meanwhile, back at Hudson's house, Joyner, who had fallen to the ground after hearing the gunshots, got up and after observing one of the men run past him, grabbed the revolver

before quickly retreating behind a nearby shed. (R. p. 237). Joyner later explained that as was on the ground he observed one of the attackers, describing him as being “tall and skinny,” about “5’9” or 5’10” with a slim build and wearing a dark blue hooded sweatshirt. (R. p. 234-35, 236). While he was hiding behind the shed, Joyner heard Fogle scream and then heard rapid gunfire coming from the backyard. (R. 237-38). After approximately three minutes, Joyner emerged from behind the shed, saw the man in the dark blue hooded sweatshirt running down the other side of the street and fired the revolver at him. (R. pp. 238-39). Joyner then hopped the fence when he saw the silver Honda drive back down the road. (R. p. 239).

After hopping the fence, Joyner eventually returned to Hudson’s backyard where he saw Fogle lying on the ground, face down. (R. pp. 240-41). After seeing Fogle, Joyner ran to Hudson’s front yard where he encountered two of Hudson’s neighbors who had already called police. (R. p. 241). Joyner then walked into Hudson’s house, took the shells out of the revolver and hid the gun under the couch in the bedroom. (R. p. 241).

In the aftermath of the event, Hudson returned to his backyard, saw Fogle on the ground and rolled her over. (R. p. 299). Fogle was unresponsive. (R. p. 299). He then ran into his house, took the discarded revolver shells from Joyner, moved the gun from the couch to behind the headboard in his mother’s bedroom and put the shells in the living room couch. (R. pp. 300-01). After this, both Hudson and Joyner returned to the backyard and tried to revive Fogle. (R. pp. 241-42). Police and EMS arrived shortly thereafter, but Fogle was already dead. (R. pp. 160-61).

#### B. The Investigation and the State’s Case

Upon arriving on the scene, police performed gunshot residue (“GSR”) tests on Hudson, Joyner and Fogle. (R. pp. 1016-17). Additionally, police took statements from both Hudson and

Joyner and also interviewed Hudson's neighbors to determine if they had witnessed the incident. (R. pp. 303, 236, 1020, 173, 183). Later that day, Hudson led investigators to the revolver and revolver shells he had previously hidden. (R. pp. 304, 1015).

In his initial statement, Hudson described his attackers and later that evening, lied to police telling them one of his attackers was Jonathan Bailey. (R. pp. 305-06). Specifically, Hudson explained Bailey was looking for him because a friend of Bailey's had gotten locked up for a previous shooting involving Hudson's mother's car. (R. pp. 331-32). Hudson would later explain he lied in his initial statement to police because he was scared and wanted revenge against Petitioner who he knew was the actual perpetrator of the crime. (R. pp. 305-06, 321-22, 336-37, 349). Hudson would later acknowledge he only revealed Petitioner's information to police once he had learned Petitioner was in jail and he "wasn't going to be able to touch him." (R. p. 349).

Similar to Hudson, Joyner gave police a statement in which he described the shooter's height, build and clothing. (R. pp. 244-45). He further described the silver Honda, explaining it had tinted windows. (R. p. 244). Joyner did not implicate Bailey.

Police also spoke with Hudson's 75-year-old neighbor, Ruth Gold, who later testified that she was sitting in her home when she heard gunshots, causing her to look out of the peephole in her door. (R. p. 171). When she did, Gold explained she saw a man running up the street, and called 9-1-1. (R. p. 171). She estimated hearing between eight and nine shots, then hearing a brief break in between with the majority of the shots coming before the break. (R. pp. 174-75). The individual she saw running was wearing all black, and it looked "like a black sweat hoodie sweat shirt." (R. p. 176). She did not see a hat on his head, nor did she see a silver Honda. (R. pp. 176-77).

Another neighbor, Zionde Harper, was interviewed by police. (R. p. 183, 1020). As Harper would later explain at trial, she was just arriving home from school when she heard gunshots from her bathroom which led her to look out of the window. (R. p. 181). Looking out the window, Harper observed two men running in the backyard. (R. p. 181). Harper stated the second man, who was pursuing the first, had a gun and described him as a black male with a black hat, wearing dark clothing and maybe “a normal black tee.” (R. pp. 181-82, 187). She believes she heard one shot at first, saw the men running and then heard more shots. (R. p. 183).

After taking Hudson’s statement, police secured an arrest warrant for Jonathan Bailey but continued to interview others. (R. p. 1022). Upon hearing he was wanted in connection with a murder, Bailey turned himself into police. (R. pp. 557, 558-59). Bailey was adamant about speaking to the police and provided an alibi for the time of the shooting. (R. p. 560, 552-56).

Specifically, Bailey explained he had been dropped off by his girlfriend, Whitney Caruth, at Kavae Dolphin’s house between 11:00 AM and 12:00 PM on the day of the incident. (R. pp. 552-56). While he was there, Bailey was with his friend Stephanie McGowan until either 3:00 PM or 4:00 PM. (R. pp. 421, 482, 496, 554). This was corroborated by both Dolphin and McGowan who added that Bailey was picked up by a friend. (R. pp. 422, 483, 554, 428, 497).

Additionally, testimony from Bailey’s mother, Mali Allen, Sgt. Norman Jenkins, an officer with the Richland County Fugitive Task Force, and Bailey revealed Bailey was on a three-way phone call discussing an outstanding warrant in the time leading up to the incident. (R. pp. 504, 513, 555). In fact, this testimony was later corroborated by telephone records which documented there was a call between the parties, beginning at 12:21 PM and ending at 12:34 PM—just 18 minutes before the shooting was reported. (R. pp. 504-05, 653). The crime scene was located 6.4 to 6.9 miles away from Dolphin’s house. (R. p. 1091).

After speaking with Bailey, Dolphin and others, police turned their investigation back to Hudson. (R. pp. 1023-28). In fact, Investigator Kevin Reese, the chief investigator in the case, obtained an arrest warrant against Hudson for obstruction of justice. (R. p. 1029).

On May 23rd, three days after the shooting, police re-interviewed Hudson. (R. p. 1030). During the interview, Hudson named “Bump” as the shooter, prompting authorities to ascertain “Bump’s” identity. (R. pp. 308, 1030). They also arrested Hudson for obstruction of justice. (R. pp. 1030-31). Thereafter, on June 1st, Hudson advised police that “Bump” had previously shot at him at an apartment complex on Brighton Hill Road in Columbia and after speaking with management at the complex, learned about the previous shootout and that “Bump” was Petitioner. (R. pp. 1031-32).

Two days later, police re-interviewed Joyner who gave them additional information about the relationship between Hudson and Petitioner. (R. pp. 245, 1034-35). Specifically, Joyner related that Hudson had robbed Petitioner on April 23rd and further explained Petitioner had told him to tell Hudson “that if he didn’t give him his weed or his money . . . he was coming for his head.” (R. p. 246).

Upon learning of the relationship between Hudson and Petitioner, police confronted Hudson for a third time on June 4th. (R. p. 1035). At that time, Hudson elaborated on his relationship with Petitioner explaining that he and his friend Sheldon McDowell, known as “Hot Boy,” had gone to Petitioner’s apartment complex in order to buy marijuana when he noticed that one of Petitioner’s associates was armed, which in turn prompted him to pull a gun on Petitioner. (R. pp. 310-15). When he did, Petitioner immediately retreated, throwing a backpack full of marijuana into the air and running up the stairs of the apartment complex. (R. pp. 315-17). Petitioner emerged from his apartment armed with a gun, came out to the breezeway of the

apartment complex and began firing at Hudson and McDowell, who were now running away from the complex toward their car which was parked in the parking lot. (R. pp. 317-19). Hudson stated the backpack contained approximately eight ounces of marijuana, worth about three-thousand dollars. (R. pp. 318-20).

After Hudson admitted his involvement in the April 23rd incident, William Gonzalez, the officer assigned to investigate the April 23rd incident, sought a search warrant for Petitioner's residence. (R. pp. 683-84). In the search warrant, which was secured and executed on June 5th,<sup>4</sup> Gonzalez explained the purpose of the search was to locate "any firearms, firearm parts or pieces, ammunition or paperwork associated with the sales, ownership or transfer of firearms and any other devices that is (sic) associated with the commission of the offense." (Search Warrant Number I-918149). As the search warrant was being executed, police found a print out of Hudson's jail photograph in Petitioner's apartment. (R. pp. 684-85).

Following the execution of the search warrant, police began speaking to Petitioner's friends and neighbors. (R. pp. 1037-38). In particular, police determined Petitioner and his wife, Rosa Grenald, had recently been driving a two-door silver Honda with tinted windows. (R. pp. 597-98, 544, 456, 701). Police also learned Petitioner had asked his neighbor, Joseph Smith, about buying nine-millimeter bullets for him. (R. p. 700). Smith later testified that in addition to seeking bullets from him, Petitioner had talked to him about the April 23rd incident with Hudson telling Smith he was going to handle the situation. (R. p. 700).

Police also learned from Petitioner's neighbor, Nina Gordon, that on the day of the murder she observed Petitioner leaving his apartment in a hooded sweatshirt with a hat on. (R. pp. 455, 465-66). Gordon added Petitioner usually wore dark scrubs to work with a hooded

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<sup>4</sup> There appears to be a difference in opinion as to when the search warrant was executed as both the State and defense counsel believed the warrant was executed on June 5th (R. pp. 52-53), while Gonzalez believed the warrant was executed on June 8th. (R. pp. 683-84).

sweatshirt and hat. (R. pp. 455, 465-66). Continuing, Gordon stated she actually visited with Petitioner's wife on the afternoon of the murder and was present when Petitioner called and told Petitioner's wife not to go home until he said so. (R. p. 457).

In addition, police obtained a statement from Petitioner's friend, Torrian Gleaton, who was also a friend of Hudson's. (R. pp. 960-62). In his statement, which was introduced through investigator Walter Mahoney when Gleaton denied making the statement to police at the Columbia Police Department on June 3rd, 2010,<sup>5</sup> Gleaton informed police that Petitioner called him after the murder telling him he "sprayed the yard." (R. p. 980). The statement further revealed Petitioner had asked Gleaton about Hudson's welfare and whether anyone suspected him of being behind the incident. (R. pp. 973-77, 999-1001).

After speaking with Petitioner's neighbors, police attempted to contact Petitioner and his wife regarding the silver Honda, but were unable to do so until the end of July. (R. p. 1048). However, police were able to contact Petitioner's wife's friend, Shanelle Latimer, who informed them that during the course of Memorial Day weekend, Petitioner's wife came to Latimer with the silver Honda and left the keys in her possession, telling her to drive it only in an emergency. (R. p. 522). Police also contacted Shaquenda Evans, Petitioner's wife's supervisor, who later testified Petitioner's wife had asked to switch cars with her. (R. pp. 528-30). Evans explained she kept the silver Honda for around two weeks until Petitioner's wife eventually retrieved the car. (R. pp. 528-30).

Police also contacted the Department of Mental Health, where Petitioner was employed. (R. p. 1037). There they learned that while Petitioner's work hours indicated he was at work all day, William Littlejohn, a security officer who locked down the facility on the afternoon of May

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<sup>5</sup> At trial Gleaton, after consulting with his attorneys and being advised of his rights and the penalties for contempt, denied making the June 3, 2010 statement to police (R. p. 846), and added he would not cooperate since he and his families lives were threatened. (R. pp. 848-49).

20th due to a disturbance in the Greenview neighborhood, did not recall seeing Petitioner when they performed the lockdown. (R. pp. 537, 544, 546). Indeed, records obtained from Petitioner's physical therapist revealed he had an appointment that afternoon at 1:30 PM. (R. pp. 1046-47). While Petitioner wrote on the physical therapist's sign-in sheet that he signed in at 1:00 PM, the person on the sign-in sheet immediately before him signed in at 1:09 PM.<sup>6</sup> (R. pp. 1046-47). In addition, police discovered Petitioner was separated from his employment in the aftermath of the shooting due to three or more days of consecutive absences dating back to June 9th, 2009 when Petitioner and his wife fled South Carolina after learning their apartment had been searched by police. (R. pp. 1213-14, 1157-58; 1404).

Eventually, Petitioner and his wife turned themselves in to authorities. (R. p. 1048). Subsequently, Petitioner's previous attorney arranged for an interview between Petitioner and police. (R. p. 1052). During the interview, Petitioner denied that he and his wife had access to a silver Honda, a statement which was subsequently rebutted by the testimony of Petitioner's wife and her sister, Rotania Grenald ("Rotania") who both admitted the car, which was Rotania's, was in Petitioner's wife's care during the time in which the crimes were committed. (R. pp. 1152, 1028). Finally, investigators spoke with two inmates, Terran Hughey and Travis Golson, both of whom shared the "Hotel Unit" in the Alvin S. Glenn Detention Center with Petitioner. (R. pp. 789, 861). Each relayed the details Petitioner had told them about how he discovered where Hudson lived. (R. pp. 793-99, 864-65). In fact, both Hughey and Golson later testified Petitioner revealed to them that he had a female take him to the Best Buy where Hudson's father, who lived with Hudson, worked. (R. pp. 793-99, 864-65). While in the Best Buy parking lot, she also identified Hudson's father's truck. (R. pp. 793, 864-65). Petitioner then had the female

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<sup>6</sup> However, cell phone tower records which were retrieved and plotted on a map, demonstrated Petitioner was not at physical therapy at the time he had written on the sheet. (R. p. 773).

take him to Hudson's home where they saw the same truck again. (R. pp. 793-99, 867). Each separately testified to several details about the incident and how Petitioner believed he was going to get away with it. (R. pp. 864-66). Petitioner

C. Petitioner Testifies

At trial, Petitioner denied ever speaking to Hughey or Golson about his case in jail, denied speaking to Gleaton and denied asking Smith about bullets or speaking to him about the April 23rd incident. (R. pp. 1409, 1413, 1443). He also stated the value of the marijuana taken during the April 23rd incident was only two or three hundred dollars, adding he held no ill will towards Hudson. (R. pp. 1396, 1437).

**ARGUMENT**

- I. Both the Court of Appeals and the Trial Court Correctly Concluded Petitioner's Confrontation Rights were not Violated by the Admission of Extrinsic Evidence of Gleaton's Prior Statement since Gleaton was Determined to be Available for Cross-Examination, was Subject to Cross-Examination on two Occasions and was Called as a Defense Witness Meaning Petitioner, consistent with both *Nance* and *Stokes*, had an Opportunity to Confront Gleaton

As detailed above, Petitioner, via his brief, maintained he was denied his Sixth and Fourteenth Amendment Rights to confront the witnesses against him when Gleaton, during direct examination, stopped cooperating, which Petitioner contends rendered him unavailable for cross-examination. Specifically, Petitioner seeks to distinguish this case from State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009) on the basis that Gleaton, unlike the witness from Stokes, was unavailable for cross-examination which he believes, results in a violation of his Confrontation Clause rights. The State disagrees because, as noted by the Court of Appeals, Gleaton was available to testify, was called as a witness, was twice subject to cross-examination and was even called as a defense witness. Accordingly, as demonstrated below, Petitioner's Confrontation

Rights were not violated since the record clearly reflects Petitioner was available for cross-examination.

A. Presentation of the Issue

Torrian Gleaton was primarily called to the stand to testify regarding his conversations with Petitioner after the shooting at Hudson's residence when, after acknowledging his past criminal record, pending charges and potential for receiving a downward departure, he elected to stop cooperating. (R. pp. 758-61). Specifically, Gleaton refused to cooperate because, "he fears for his safety and the safety of his family." (R. pp. 814-15). Gleaton's attorney later engaged in a more robust discussion of Gleaton's refusal to testify stating:

[H]e has told me that he does not want to cooperate and I think it would be inappropriate to say it in front of a jury, but he feels like it will endanger his life and the life of his or the welfare of his family. He has actually discussed this with members of his family, and there are members of his family that even afraid if he were to come in here today and testify against this particular man. *Even though this particular person could not harm him, he believes that this person could direct others to harm him, and he refuses to do anything to assist in the prosecution of him.*

(R. p. 849). (emphasis added).

After it became evident Gleaton would refuse to testify, defense counsel objected to the admission of extrinsic evidence of Gleaton's statement on Confrontation Clause grounds. (R. pp. 849-50). Arguing for the admission of the statement, the State likened the situation to a similar situation in Stokes stating:

[The State] called the defendant's uncle to the stand to testify. They questioned—the State asked him whether or not he made a statement to the police on November 26th of 2003 after he was taken to the hospital. He denied making the statement.

Your Honor, the State was then allowed to introduce extrinsic evidence of the prior inconsistent statement. Defense counsel argued under Crawford [v. Washington], 541 U.S. 36 (2004)] that they were denied effective cross-examination of him. However, the South Carolina Supreme Court held, based on

Crawford, that they were not denied the protections that Crawford affords the defendant. Because the declarant was therefore cross-examin[ed] at trial, the confrontation clause places no constraints at all on the use of prior testimonial statements. And they further went on to say that the confrontation clause does not bar admission of the statement so long as the declarant is present at trial to defend or to explain it.

Your Honor, the Court went on to emphasize that it's the opportunity to cross-examine that is constitutionally protected and that in the incident case, Your Honor, we would argue the defense will have that opportunity to cross-examine the witness. He is here. He is on the stand available for cross-examination, Your Honor, and it is the opportunity to cross-examine, not the effectiveness or the—or any other thing that Crawford protects.

Therefore, Your Honor, the statement would—our position is that the prior inconsistent statement would not be hearsay as defined under—I think it's 801(d)(1), Your Honor.

(R. p. 842). The trial court acknowledged that it was familiar with Stokes.

Defense counsel then responded to the State's argument, first citing to State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008) before explaining the present situation was more like Crawford with the exception that the marital privilege did not render Gleaton unavailable as the witness was in Crawford. (R. pp. 843-44). Nevertheless, defense counsel continued to argue Crawford prohibited the admission of Gleaton's previous statement. (R. p. 844).

The trial court reviewed Crawford before ruling, stating “I'm going to allow you to proceed and we'll see what he does, and we'll see if you can lay a foundation. And if you do that, the way I read this case, they can offer extrinsic evidence at some point in time in the future.” (R. p. 844). Defense counsel reiterated her objection. (R. p. 844). The trial court then explained his understanding of Stokes stating, “[t]he way I read that case is if this fellow is available—and in reading other cases if, in fact, he says ‘I don't remember,’ I think the law is the Court can interpret whether he is—even if he doesn't answer is that amounts to a denial.” (R. p. 845).

After further discussion on the matter, defense counsel renewed her Confrontation Clause objection once again. (R. p. 853). The trial court, relying on Stokes, then ruled that Gleaton denied the statement, was available for cross-examination and noted the statement could be admitted through extrinsic evidence. (R. p. 854). Defense counsel then asked the trial court to review Mitchell before making a final ruling on its Confrontation Clause objection. (R. pp. 854-55). The trial court agreed to review Mitchell and in the meantime, the State presented another witness. (R. p. 855).

At the conclusion of the next witness, the trial court issued its ruling regarding Gleaton's prior statement finding, "[o]kay[,] I have read Mitchell and I have not changed my opinion after reading Mitchell." (R. p. 885). The trial court then distinguished Mitchell from Petitioner's case stating:

Mitchell—clearly there was a difference in the facts, the availability of that witness. They were removed from the courthouse. Nobody had an opportunity to talk to that witness, question him. You know, we gave you as much opportunity as we could under the facts and circumstances in this case, so I don't believe based on Stokes that—I believe Stokes is controlling in this instance, and I'm going to allow the extrinsic evidence to come in if that's what the State intends to do at some point in time.

(R. p. 885). The parties further agreed to make arrangements for additional cross-examination of Gleaton. (R. pp. 885-86). After testimony was presented from other witnesses, defense counsel attempted to "re-address" the ruling. (R. p. 938). The trial court informed defense counsel the ruling was final prompting defense counsel to pass up a memorandum of law, which the trial court subsequently reviewed and again, denied. (R. pp. 939, 943-44). Defense counsel then noted unavailability was never argued in Stokes. (R. p. 944).

B. Law Regarding one's Right to Confrontation

The Sixth Amendment to the United States Constitution provides 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. Accordingly, the Supreme Court of the United States has generally determined the introduction of testimonial hearsay violates the Confrontation Clause if: (1) the witness is unavailable, and (2) the defendant has not had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 68 (2004). Yet where the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints on the use of his prior testimonial statements. Id. at 59 n. 9. Indeed, “[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.” Id. “[W]here the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem.” California v. Green, 399 U.S. 149, 162 (1970).

With respect to cross-examination specifically, 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.” U.S. v. Owens, 484 U.S. 554, 559 (1988) (internal quotation marks and citations omitted). Indeed, an opponent’s opportunity for cross-examination can be considered the “main and essential purpose of confrontation.” Delaware v. Fensterer, 474 U.S. 15, 19–20 (1985) (internal quotation marks and citation omitted); see also Kentucky v. Stincer, 482 U.S. 730, 739 (1987) (explaining the Confrontation Clause’s “functional purpose” as “ensuring a defendant an opportunity for cross-examination”). Thus, it is the opportunity to cross-examine, rather than effective cross-examination that is constitutionally protected by the Confrontation Clause. Stokes, 381 S.C. at 402, 673 S.E.2d at 440 (2009); State v. Nance, 393 S.C. 289, 294, 712 S.E.2d 446, 449 (2011).

Additionally, despite the general rule from Crawford prohibiting the introduction of unfronted testimonial hearsay, the Crawford Court simultaneously recognized a limited exception to this rule writing that “a defendant, by his own ‘wrongdoing,’ can forfeit ‘on essentially equitable grounds’ his Confrontation Clause right.” Id., at 62. This proposition, known as the “forfeiture by wrongdoing exception,” was reiterated in Davis v. Washington, 547 U.S. 813 (2006), where the Court again recognized that “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” Id., at 833.

Most recently, this common law-based Confrontation Clause exception was acknowledged in Giles v. California, 554 U.S. 353 (2008) where the Supreme Court of the United States gave a detailed historical account of the “forfeiture by wrongdoing” exception and its common law origins. Id. at 358-59. Specifically, the Giles Court, reaching back to the Confrontation Clauses’ common law underpinnings, explained forfeiture by wrongdoing permitted the introduction of unfronted testimonial statements of a witness who was “detained” or “kept away” by the “means or procurement” of the defendant or his associates. Id. at 359. Summarizing the meaning of the “forfeiture by wrongdoing” exception, the Giles Court stated, “the scope of the forfeiture rule suggest[s] that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying” or where the defendant “uses an intermediary for the purpose of making a witness absent.” Id. at 360.

In addition to the Supreme Court of the United States recognition that, as a matter of equity, one’s intentional wrongdoing may result in the relinquishment of a constitutional right, the Federal Rules of Evidence, in 1997, adopted this limitation as it related to findings of unavailability. Davis, 547 U.S. at 833. Specifically, Federal Rules of Evidence Rule 804(b)(6), “codifies the forfeiture doctrine” from these cases. Id. South Carolina also recognizes the

“forfeiture by wrongdoing” rule in South Carolina Rules of Evidence, Rule 804(a). Specifically, the rule states:

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Rule 804(a), SCRE.

C. There is No Confrontation Clause Violation

Petitioner appears to agree the Confrontation Clause allows for only the opportunity to cross-examine, but argues that because Gleaton refused to cooperate, he was unavailable, and therefore Petitioner did not have the opportunity to cross-examine the witness thereby violating his Right to Confrontation under Crawford. Quite simply, this is incorrect.

First, Petitioner’s contention that Gleaton was unavailable for cross-examination is simply wrong. In fact, defense counsel never formally requested the trial court make a finding of unavailability under any of the provisions of Rule 804(a), SCRE. See Rule 804(a), SCRE (explaining the ways in which one may found to be unavailable under the Rule). Instead, defense counsel, in arguing that Stokes did not apply, generally stated that Gleaton’s refusal to further cooperate rendered him unavailable without any supporting authority—an argument which the trial court overruled multiple times. (R.pp. 854, 885, 939, 943-44, 1479-1480).

Moreover, the trial court’s factual determination that Gleaton was available for cross-examination was correct since Gleaton was called as a witness; was cross-examined; was subsequently recalled for additional cross-examination and was then called as a defense witness. Thus, since the trial court, after reviewing Stokes, determined that Gleaton, like the witness in Stokes, was in fact available for cross-examination and therefore, consistent with Stokes, admitted Gleaton’s testimony, the trial court did not abuse its discretion. Rather, the trial court

correctly applied the Stokes Court's reasoning that where the witness testifies at trial, the Confrontation Clause only protects "the opportunity to cross-examine, rather than effective cross-examination." Stokes, 381 S.C. at 402, 673 S.E.2d at 440; Nance, 393 S.C. at 294, 712 S.E.2d at 449. In light of these facts, the State submits Petitioner's argument lacks merit.

Furthermore, even if defense counsel had asked the trial court to make a formal determination of unavailability under the provisions of Rule 804(a), SCRE, the trial court, consistent with Rule 804(a), SCRE's prohibition on the use of wrongdoing to support a finding of unavailability, would have denied such a request. See Rule 804(a), SCRE ("A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."). Indeed, Petitioner's misconduct in intimidating Gleaton off the witness stand and into a six-month contempt sentence bars a finding of unavailability under Rule 804(a), SCRE. (R. pp. 844-45, 849). Therefore, Petitioner's Confrontation Rights were not violated, since the trial court, consistent with Rule 804(a), SCRE's prohibition on unavailability by wrongdoing, correctly determined Gleaton was available for cross-examination. See Crawford, 541 U.S. at 68 ("The [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.").

Finally, even if this court were to find that Gleaton was unavailable, Gleaton's attorney's statement that both Gleaton and members of his family believed Petitioner could order others to harm them is susceptible to an inference which would take this case out of the general rule of Crawford and into the forfeiture by wrongdoing exception. As discussed above, the Supreme Court of the United States, in Giles, elaborated on the requirements of the forfeiture by

wrongdoing exception, overruling a California version of the exception which allowed for the admission of an unfronted testimonial statement where the defendant committed wrongdoing in generally rendering the victim unavailable. Giles, 554 U.S. at 365. The Giles Court did so on the basis that the California version of the exception was not an established exception under common law at the time the Sixth Amendment was written. Giles, 554 U.S. at 365. In so finding, the Giles Court wrote that the common law wrongful forfeiture exception applied only where there was “a showing<sup>7</sup> that the defendant intended to prevent a witness from testifying.” Id. at 361.

In the present case, while the trial court never made a factual finding regarding forfeiture by wrongdoing—likely because the witness was available and defense counsel never provided a legal basis for declaring the witness unavailable—the State submits the evidence contained within the record could support an inference that Petitioner threatened or otherwise influenced Gleaton not to testify. In particular, one could infer that Gleaton and his family’s fear of implicating Petitioner was produced as a result of Petitioner, either by himself or by “procurement” of others, informing Gleaton or members of his family that Petitioner had the power and the people to harm them. In support of this inference, the State notes Gleaton’s interview revealed that after the shooting he and Petitioner spoke nearly every day (R. p. 971), but by the time of trial, he was under the belief that Petitioner “could direct others to harm him[.]” (R. p. 949). This fact suggests that Petitioner or his associates conveyed this information to Gleaton or his family in an attempt to discourage him from testifying. Indeed,

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<sup>7</sup> In the wake of Giles, state courts have characterized this “showing” differently. See e.g. In re: Roland G., 232 Ill. 13, 902 N.E.2d 600, 616, 327 Ill. Dec. 479, 495 (2008) (“The doctrine of forfeiture by wrongdoing may not be employed to deny an accused his confrontation right absent evidence that, when committing the crime or other wrongdoing, the accused was motivated by the desire to prevent the witness from testifying against him at trial.”); State v. Dobbs, 167 Wash. App. 905, 913, 276 P.3d 324, 328 (Ct. App., Div. 2, May 1, 2012) (explaining the State must prove that the defendant’s conduct is the reason for the witness’s absence and must do so by “clear, cogent, and convincing evidence.”).

Gleaton's attorney's statement to the Court regarding Gleaton's discussions with his family members further demonstrates these facts. In particular, Gleaton's attorney said:

[Gleaton] has told me that he does not want to cooperate and I think it would be inappropriate to say it in front of a jury, but he feels like it will endanger his life and the life of his or the welfare of his family. He has actually discussed this with members of his family, and there are members of his family that even afraid if he were to come in here today and testify against this particular man. Even though this particular person could not harm him, he believes that this person could direct others to harm him, and he refuses to do anything to assist in the prosecution of him.

(R. p. 849). Therefore, the State submits there is a suggestion Petitioner waived his Right to Confrontation under the forfeiture by wrongdoing exception and as a result, no violation exists. See Davis, 547 U.S. at 833 (“[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”); Giles, 554 U.S. at 360 (explaining the forfeiture by wrongdoing exception applies where the defendant or “an intermediary” engages in conduct designed to prevent the witness from testifying).

### CONCLUSION

For the aforementioned reasons, the State submits certiorari must be denied and respectfully asks that this Court to stand on the Court of Appeals' judgment affirming Petitioner's conviction and sentence.

Respectfully Submitted,

ALAN WILSON  
Attorney General

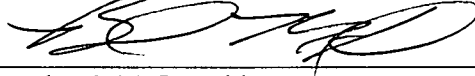
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September 9, 2013

**STATE OF SOUTH CAROLINA  
In the Court of Appeals**

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Appeal from Richland County

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No.: 2013-001372

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THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANTHONY HACKSHAW,

APPELLANT.

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**PROOF OF SERVICE**

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I, Brendan J. McDonald, certify that I have served Respondent's Return to Petition for Writ of Certiorari on counsel for Petitioner, by depositing two (2) copies of same in the United States mail, first class postage prepaid, to counsel for appellant, addressed as follows:

Susan B. Hackett, Esq.  
SCCID/Division of Appellate Defense  
1330 Lady Street, Ste. #401  
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This 9<sup>th</sup> day of September, 2013.



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