THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Robert E. Hood., Circuit Court Judge

Trial Court Case No.: 2014-GS-40-0752
2014-GS-40-0754
2014-GS-40-0755
2014-GS-40-0756

Appellate Case No.: 2014-002771

Trenton Barnes, ... Appellant

v.

The State, ...Respondent

INITIAL BRIEF OF APPELLANT

BY: _____

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ii. Did the Trial Court err in admitting testimony from Alfred Wright and Michael Schaefer pursuant to South Carolina Rule of Evidence 804(b)(3), when such testimony included non-testimonial confessions of Co-Defendant Young that also inculpated Appellant Barnes?

iii. Under the law set forth in *Bruton v. United States* and *Crawford v. Washington,* are state courts provided flexibility in determining whether Confrontation Clause rights are triggered by nontestimonial confessions of unavailable declarants?

iv. Pursuant to SCRE 613, did the Trial Court err in admitting audio evidence of an inconsistent prior statement denied by Latoya Barnes two days after she was excused, and without offering remedy to recall her for the opportunity of explanation and cross-examination?

STATEMENT OF THE CASE

In the matter of The State of South Carolina vs. Lorenzo Young and Trenton Barnes, the named Defendants were jointly tried and convicted of murder, kidnapping, burglary, and attempted armed robbery, the respective indictment numbers for Appellant Trenton Barnes being 2014-GS-40-752, 754, 755, and 756. (Transcript, pg 62). These charges were made in relation to the incidents occurring on July 1, 2013, wherein a Ms. Kelly Lynn Hunnewell died from a single gunshot wound. A Mr. Troy Stevenson was also charged with these crimes, but was not jointly tried with Mr. Young and Appellant Barnes.

Pretrial hearings were held on October 30, 2013, November 3, 2013, and on the day of trial, before opening statements began. Appellant's trial began on November 10, 2014 and concluded on November 19th, 2014. Trenton Barnes was represented at trial by Mark Schnee, and Defendant Young was separately represented by Tracy Pinnock, Stephen Krzyston, and Jacqueline Bambach. Representing the State were Assistant Solicitors Dolly Garfield, Kathryn Luck Campbell, and Nicole Simpson. Presiding over the trial was the Honorable Judge Robert Hood.

Having timely filed a Notice of Appeal on December 22, 2014, Appellant now seeks reversal and remand of all of the above mentioned November 19th convictions.

STATEMENT OF FACTS

On a rainy July 1, 2013, at approximately 3:41am, three individuals were present at an attempted robbery of the Carolina Cafe Bakery located at 93 Tommy Circle, Columbia. (Transcript, pg 297, 1193; State's Exhibit 323, 324). Video surveillance evidence admitted at trial showed that two of the individuals, armed with guns, went into the bakery. (State's Exhibit 323, 324). The third individual was filmed approaching the open door a few moments after the other two entered. (State's Exhibit 323). During the robbery attempt, six rounds of ammunition were

fired, and as a result thirty-three year old Kelly Lynn Hunnewell was shot once in the upper chest and died from her wound. (Transcript, pg 1055). On July 5, 2013, Appellant Trenton Barnes and Defendant Lorenzo Young were arrested separately and charged with the murder of Kelly Lynn Hunnewell, along with kidnapping, burglary, and attempted armed robbery.

At trial, a total of 381 exhibits were entered into evidence by the State against Defendant Young and Appellant Barnes. These exhibits covered a gamut of circumstantial evidence and direct evidence, including but not limited to: video surveillance, ammunition, fired projectiles, photographs, DNA swabs, personal correspondence, handwriting samples, cell phones, cell phone records and video, written confessions, clothing, latent prints, audio recordings . of physical evidence were admitted by the State. There was also a substantial amount of witness testimony put forth by the State. The witnesses included family members, informants, law enforcement officers, police investigators, jailhouse snitches, and experts in the fields of ballistics, DNA, and handwriting analysis. Both Defendant Young and Appellant exercised their right not to testify on their own behalf at trial. (Transcript, pg 1459-1464).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (S.C. 2006). A motion for severance is addressed to the sound discretion of the trial court. *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260, 263 (S.C. 1996). The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. *Id.* at 269. An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *State v. Lopez*, 352 S.C. 373, 378, 574 S.E.2d 210 (Ct.App.2002). An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial. *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315 (2001).

ARGUMENT

I. The Trial Court abused its discretion in denying Defendant Barnes' motion for severance.

The trial rights of Appellant Barnes were compromised by the Court failure to grant Defendant Barnes' motion for severance. As such, the Court abused its discretion in the matter and Appellant is entitled to reversal and remand for new trial

Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63, 73 (S.C. 1998); However, severance should be granted "when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." *State v. Walker*, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (S.C.Ct.App.2005). Additionally, the compromised trial right or unreliable judgment by the jury must constitute prejudice against the Defendant before the Appellate Court will reverse a conviction. *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315 (S.C. 2001). Finally, "a motion for severance is addressed to the sound discretion of the trial court." *Tucker*, at 263. An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *Lopez*, at 378. Finally, "there can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case." *State v. Walker*, 623 S.E.2d 122, 129 366 S.C. 643 (S.C.Ct.App. 2005). Nevertheless, if the Court is presented with information that would demonstrate a *serious risk* of compromised trial rights or interference with the jury judging the guilt of a defendant, severance should be granted to preserve the rights of the accused.

In the case at hand, numerous motions to sever were requested of the Trial Court. Mr. Schnee, serving as trial counsel for Trenton Barnes, moved for severance on the basis that the anticipated evidence and trial rights of Barnes and Young are antagonistic to each other, and that evidence, which would only be admissible against Defendant Young, was allowed to inculpate Mr. Barnes. (Transcript, pg 236-237; 279-283, 1455, and 1647.) These motions were all denied and the Defendants were required to proceed jointly despite the substantial risk and ultimate compromise of their trial rights.

The first anticipated risk and compromise of trial rights occurred during the testimony of Rolanda Coleman. Trial counsel for Defendant Barnes, moved for severance on the basis that he would be limited in his cross-examination of Rolanda Coleman. She shared criminal charges with Codefendant Young which cannot be discussed without violating Young's rights against evidence of prior bad acts.(Transcript, pg 279-280). This is important to the impeachment of Ms. Coleman because she potentially harbors extreme bias in her testimony, as she is also the girlfriend of Young, and the mother of their two infant children. Her inclination to protect her children's' father would otherwise be impeachable if not for his presence as a Codefendant. S.C. R. Evid. 404(b). The Court explicitly forbid trial counsel from delving into the shared burglary charge, any details thereto, or any motivation she may have to lie as a result. (Transcript, pg 279-283). According to Schnee, by the Court's own recognition, such information would likely be admissible if not for Young being tried jointly. (Transcript, pg 283). The Court did not contest that recollection of in-chambers discussion. This is a prime example of how Mr. Barnes trial rights were compromised at the expense of protecting the trial rights of a codefendant.

This is precisely the type of compromised trial rights that the standard set forth in *Walker* contemplates as necessary to warrant a motion for severance. *State v. Walker*, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (S.C.Ct.App.2005) Appellant should have his full opportunity to impeach

the credibility of a witness that speaks against him, demonstrate the bias that witness may hold, and thereby defend against the evidence the witness may have levied against him. Ms. Coleman is the only witness who claims to have seen Trenton with a gun, and is one of the few sources of identification testimony against Mr. Barnes, as she was somehow able to recognize Appellant in the brief video footage based on his stature and "gray hoodie". (Transcript, pg 534-536). It bares mentioning that she could not recognize her own boyfriend using the same criteria. (Transcript, pg 545). Lastly, and in further error, the Trial Court allowed Ms. Coleman, on multiple occasions, to provide hearsay testimony of information provided to her from Codefendant Young. (Transcript, pg 525-526, 531-532). As Codefendant Young never testified, Appellant was denied an opportunity to cross-examine a witness against him. These numerous aspects of Ms. Coleman's testimony cast doubt upon the jury's ability to make a reliable judgment as to Trenton Barnes' guilt; this prejudiced Mr. Barnes, both in hindering his ability to cross-examine witnesses, as well as by providing tainted evidence to the jury.

In addition to the prejudice caused by Ms. Coleman's testimony, the testimony of Alfred Wright and Michael Schaefer also infringed upon the trial rights of Mr. Barnes. Both witnesses were allowed to inculpate Appellant via the retelling of Codefendant Young's jailhouse confessions. Given that Codefendant Young did not testify, Appellant was left without a means of cross-examining the testimony against him. This is the manner of compromised trial right and tainting of the judgment of the jury which is discussed by the Supreme Court in *Bruton v. United States*. *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Counsel argues, in opposition to current court interpretations, that *Bruton* and *Crawford* leave room for nontestamonial Confrontation Clause rights. (infra, Argument III). However, the presence of a "*Bruton* issue" is not *necessary* in order to meet the standard for granting a motion for severance. It bears repeating that the standard for granting severance is that only a "serious

risk" be posed to a defendant's trial rights or the jury's ability to judge guilt. *Walker*, at 129. The Trial Court should have granted severance after being informed of the testimonial dangers of Ms. Coleman, Mr. Wright, and Mr. Schaefer. In consideration of the substantial prejudices that resulted against Trenton Barnes, the Trial Court abused its discretion in denying counsel's motions for severance.

II. Codefendant Young's jailhouse confessions to Wright and Schaefer, which inculpated Appellant Barnes, were improperly admitted under Rule 804(b)(3).

The Court erred in allowing hearsay testimony from Alfred Wright and Michael Schaefer which inculpated Appellant Barnes. This error of law rose well above harmless error and warrants a new trial.

South Carolina Rule of Evidence 804(b)(3) provides admissibility for "a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." S.C. R. Evid. 804(b)(3). This rule was in dispute multiple times during the course of Appellant Barnes' trial. The Trial Court permitted Alfred Wright and Michael Schaefer to testify pursuant to this exception over the repeated objections of counsel as being hearsay not covered by exception. (Transcript, pg 740, 745, 920).

There is no dispute that this evidence would have been admissible against Codefendant Young in a separate trial. However, there are no grounds for admissibility against Appellant Barnes, and consequently the testimony, as offered, is inadmissible. Three major cases provide the basis for this argument. If *Bruton* and *Crawford* do in fact restrict Sixth Amendment rights to testimonial confessions only, which Appellant argues is improper (infra), then the holdings of

Lilly v. Virginia, Williamson v. United States, and State v. Fuller provide a collective reasoning for finding the 804(b)(3) evidence against Appellant Barnes inadmissible.

In *Lilly*, a family member of the defendant named Mark made statements to police that inculpated the defendant. *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). Mark was called as a witness, but plead the Fifth when questioned. The prosecution sought to inter his statements to police on the basis that they were admissible as declarations of an unavailable witness against penal interest. The Court in *Lilly* ruled that even when a statement against interest is made that inculpates a criminal defendant, it cannot be introduced against the defendant without an opportunity for cross examination. *Id.* The Court states that "In the years since *Bruton* was decided, we have reviewed a number of cases in which one defendant's confession has been introduced in evidence in a joint trial pursuant to instructions that it could be used against him but not against his codefendant." *Id.* "[W]e have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person." *Id.* (citing *Gray v. Maryland*, 523 U.S. 185, 194, 195 (1998)). As a result, we see that the application of 804(b)(3) carries with it the same concerns demonstrated in *Bruton*, and that such hearsay cannot be applied against a codefendant.

Williamson, provided a similar circumstance of confession to law enforcement. However, in *Williamson*, the Court ruled strictly on the application of 804(b)(3), without reaching the question of Sixth Amendment rights. *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994); *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). The Court found that:

> "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is

> making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994).

As it pertains to the circumstances of Appellant Barnes, it is reasonable to trust the portions of Wright and Schaefer's testimony that inculpate Young, as he is the declarant. It is not however, reasonable to trust the portions that inculpate Trenton Barnes, as such utterances do not make the confession more credible based on theory of the 804(b)(3) exception. It is this decision that marks the Court's acknowledgment that 804(b)(3) admissibility is limited to the declarant codefendant, based solely on the Rules of Evidence.

The Supreme Court of South Carolina, in *State v. Fuller*, handled a very similar circumstance to the disputed testimony that inculpated Appellant Barnes. In *Fuller*, a potential co-conspirator to a murder, named McKinney, took the stand and initially made an inculpatory statement against his own interest. Following that statement, he gave hearsay testimony allegedly confessed by a participant in the murder who was deceased at the time of trial. *State v. Fuller,* 523 S.E.2d 168, 337 S.C. 236, 240 (S.C. 1999). According to McKinney, The deceased participant confessed that the defendant, the deceased, and one other individual had committed the murder for which the defendant was being tried. *Id.* at 242. The Supreme Court of South Carolina deemed the testimony of McKinney to be a non-self-inculpatory (albeit collateral to a self-inculpatory statement) reiteration of a statement by an unavailable declarant that was against the declarant's penal interest. "The hearsay statements recounted by McKinney essentially amounted to statements by a deceased third-party that inculpated Defendant." *Id.* at 243. As such, the Court ruled that such a statement is inherently unreliable, and *inadmissible* under 804(b)(3), or any other exception. This ruling was significant because it demonstrates that "non-testimonial" type confessions are irrelevant to an 804(b)(3) analysis.

Each of the above three rulings from the Supreme Court of South Carolina provided a piece to the puzzle that is the inadmissibility of Young's jailhouse confession. *Lilly* recognizes that a statement against penal interest, admissible against one defendant, "does not justify its use against a codefendant" in the absence of a valid hearsay exception. *Williamson*, most importantly, rendered such hearsay inadmissible without needing to reach the issue of whether Confrontation Clause rights were denied. It also adds to that foundation the fact that "the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statement, even if they are made within the broader narrative that is generally self-inculpatory." *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). More simply, each individual statement must be evaluated for admissibility, not the collective statement as a whole. Lastly, *Fuller* demonstrates that a statement against penal interest, even one that is nontestimonial, is inadmissible without a separate applicable hearsay exception. The combination of the rulings between *Lilly*, *Williamson*, and *Fuller* demonstrate that non-self-inculpatory, nontestimonial statements from an unavailable declarant cannot be admissible against a codefendant under Rule 804(b)(3). Here, Wright and Schaefer have provided only a non-self-inculpatory statement that reiterates the statements against penal interest made by an unavailable declarant, Co-Defendant Young. The application of 804(b)(3) in light of these three cases: the testimony inculpating Barnes was inadmissible hearsay.

At the very least, two actions could have been taken. First, a limiting instruction should have been given to the jury after it occurred to try and "unring the bell." Such a remedy would likely be woefully insufficient, and regardless, the Judge failed to provide such instruction. Second, in line with *Richardson*, the testimony should have been proffered and redacted to protect Appellant's rights. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Thus, the full consequence of the legal error was allowed to endure and the jury was irreparably tainted by

hearing the multiple confessions of Co-Defendant Young via jailhouse witnesses that provided repeated and detailed inculpation of Appellant Barnes.

The error of the Trial Court in permitting both of these witnesses to testify via hearsay is substantial. As with any hearsay, the danger is that such testimony is inherently unreliable. These statements from Wright and Schaefer spoke directly to Appellant Barnes' participation in the crime, detracted from Appellant's argument that the confession letter was an effort to protect his older brother who has yet to be tried, and softened any concern the jury may have had in finding proof of identity. As such, the error of law was not harmless, and reversal and remand is warranted in this circumstance.

III. The *Bruton* rule was triggered by limiting the cross examination of Rolanda Coleman, and by the inculpating Appellant through nontestimonial confessions of an unavailable codefendant absent proper grounds for hearsay exception.

Pursuant to the rule set forth in *Bruton v. United States* and its progeny, Counsel for Appellant Barnes made numerous motions for severance during the course of the trial on the grounds that the antagonistic evidentiary positions of Co-Defendant Young and Appellant Barnes created substantial risk that Barnes' constitutional rights and trial rights would be infringed upon, and the jury would be unable to make a reliable determination as to Trenton Barnes' guilt or innocence. These concerns were echoed and supported by counsel for Co-Defendant Young. (Transcript, pg 236). However, despite being alerted to the risks of certain evidence hindering or denying trial rights of Appellant Barnes, the Court abused its discretion in denying Appellant's motions for severance, and tainted the jury with unreliable evidence of guilt against Appellant Barnes. Reversal and remand is warranted for this reason.

"A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." *State v. Walker*, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App.2005) (emphasis added). "An example of a specific trial right that may be prejudiced from a joint trial is the constitutional right to cross-examination when one codefendant's confession expressly implicates another codefendant but the confessor does not take the witness stand." *Bruton v. United States*, 391 U.S. 123, 135–37, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The *Bruton* Court acknowledged the human limitation of a jury and the substantial prejudice that can result from joint trials when a defendant is denied the right to confront the witness against him. Justice Brennan writes,

> "In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' * * * It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." *Id.* at 131.

Justice Brennan goes on to say that "A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand." *Id.* at 132. When such circumstances arise, a motion for severance is warranted in order to protect the trial rights of the prejudiced defendant. or the questionable evidence must be deemed inadmissible. If a court fails to sever, and admits the testimony, a codefendant has been denied one of the most basic trial rights of the American legal system. *Id.* at 132.

The *Bruton* decision was not exclusive to *testimonial* admissions. The Court was dealing with a testimonial issue at the time, but frequently characterized their concern for admissions

from an unavailable witness as simply "inadmissible hearsay," "a statement," "a confession," and "inadmissible statements." The terms "testimonial" and "nontestimonial" are never mentioned in the entirety of the opinion.

Thirty-six years later, the Supreme Court in *Crawford v. Washington* was asked to evaluate the application of the Confrontation Clause as it pertains to testimonial admissions and nontestimonial admissions. *Crawford v. Washington,* 124 S.Ct. 1354, 158 L.Ed.2d 177, 541 U.S. 36, 42 (2004). In short, the *Crawford* Court was asked to reconsider the *Roberts* test of whether "an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability -- i.e., falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness' in light of its apparent conflict with Confrontation Clause guarantees." *Id.*

The court's conclusion was that "where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law - as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68.

This ruling requires some very focused parsing. First, *Crawford* deals with a far narrower question than *Bruton*, as *Bruton* was a recognition of the practical limitations of juries, the shortcomings of limiting instruction, and the general risk of allowing improper evidence of guilt in circumstances that cannot be cross-examined. Nevertheless, the *Crawford* ruling does not blatantly demand that Confrontation Clause scrutiny can *only* be applied to matters of testimonial hearsay, thereby leaving nontestimonial hearsay as irrelevant to confrontation clause rights. *cf. United States v. Smalls*, 605 F.3d 53, 65 (1st Cir.2010); *State v. Ladner,* 373 S.C. 103, 111, 644

S.E.2d 684, 688 (2007); Instead, it simply demonstrates that testimonial statements of an unavailable witness are guaranteed to trigger Confrontation Clause rights. The ruling is inclusive, not exclusive. The *Crawford* Court leaves States the *flexibility* to decide on their own whether the Confrontation Clause should be triggered by nontestimonial hearsay. *Crawford*, at 68.

In addressing nontestimonial hearsay, while not automatically excluded from Confrontation Clause analysis, the *Crawford* court was clear that mechanisms such as hearsay law are not to be ignored in determining whether nontestimonial hearsay can be admitted. To that extent, it left the *Roberts* test intact, if states chose to use it as opposed to confrontation clause scrutiny. *Id. Crawford*, while related *Bruton*, was not a "*Bruton*" issue, and was not drafted as a narrowing of *Bruton rule*. It was merely a clarification of the Confrontation Clause and how states may proceed in handling nontestimonial admissions. The distinctions to take from the *Crawford* decision are three fold: 1) it does not prevent state courts from applying Confrontation Clause scrutiny to nontestimonial admissions, it merely says that such is not demanded; 2) other mechanisms such as the *Roberts* test or hearsay law are sufficient to determine admissibility of nontestimonial admissions; and 3) it does not preclude *Bruton* issues from arising out of nontestimonial hearsay circumstances. See *Id.*

There is a glimpse of discontinuity in interpreting *Crawford* as an express limitation upon when *Bruton* issues may arise, as many courts have currently hold. The logic behind *Bruton* was that a jury cannot accept a statement of a co-defendant as showing guilt against himself, and then deny that same evidence as guilt of some other inculpated co-defendant when the declarant is not available to be cross-examined. *Id.* 131. Thus arose a confrontation clause concern that the Supreme Court could not ignore. *Id.* In *Crawford,* that concern was expounded upon to hold that all testimonial statements by unavailable declarants incur Confrontation Clause guarantees. In

interpretation of *Crawford*, subsequent courts have understood the ruling in *Crawford* to be that *only* testimonial statements trigger Confrontation Clause concerns.

It nevertheless leads to a strange disconnect and the question of why jurisprudent would be willing to protect a confrontation clause issue when the statement is testimonial and being introduced via reliable sources, but not protect a confrontation clause right when the statement is non-testimonial and is being introduced via potentially unreliable sources. Such an approach seems counterintuitive. Rhetorically, why would that same logic purposefully leave the same defendant at the mercy of a non-testimonial out-of-court statement, without a means of cross-examination, when such statements could be introduced from incredibly unreliable sources such as jailhouse snitches?

For the sake of arguendo, it could be said that defendants should have some means of confronting trustworthy witnesses against them because a jury is likely to believe a trustworthy witness, as opposed to an untrustworthy witness. However, from the perspective of a juror, *any* witness who is unassociated with the crime being tried could be believable when testifying as to the self-inculpatory statements of a defendant. The Rules of Evidence support this proposition, as that is the exact logic behind the "statement against interest" hearsay exception provided in Rule 804(b)(3). It is trustworthy because a declarant would not make such a self-incriminating remark unless it were true, therefore curing the potentially unreliable hearsay source. S.C. R. Evid. 804(b)(3). But, this trustworthiness does not extend to *other* individuals inculpated by a codefendant's statement. Statements of the guilt of others does not carry the inherent trust contemplated by the Rule. It is, instead, a shifting or sharing of guilt, making it inherently unreliable. This concern was the precise reason for the protections afforded by *Bruton,* and absent an opportunity to cross-examine the declarant, such testimony is inadmissible. This was the crux of the arguments made by trial counsel. (Transcript, pg 238) See *Lilly v. Virginia,* 527

U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). Regardless, the distinction between testimonial and nontestimonial hearsay is often simply the occupation of the witness who hears the confession. Awarding Constitutional rights on the assumption that jurors would not find a non-law enforcement witness believable, is at the very least questionable. Especially considering the Bruton court deemed the right a fundamental principle of constitutional liberty. *Bruton*, at 135.

Therefore, Appellant argues against the current interpretation of *Crawford*, and contends that the Trial Court erred in its analysis and rulings on Mr. Schnee's motions for severance. The Trial Court held that since the admissions at play during the trial are nontestimonial, no *Bruton* issues arise. (Transcript, pg 671-672). It followed that ruling with the analysis that if no *Bruton* issues arise, hearsay testimony can be admitted against one defendant, pursuant to Rule 804(b)(3), without improper prejudice against a codefendant. This was clearly in error. Consequently, numerous *Bruton* violations occurred during trial from the inclusion of Mr. Wright's and Mr. Schaefer's testimony.

The Court had two different chances to potentially preserve the propriety of this trial. The first was to simply grant the motions for severance that he received multiple times, from both defendants, for numerous different evidentiary issues. The Trial Court declined to do so, despite such a solution being completely within its discretion and by far the safest and easiest approach to some very complicated circumstances. The second, having denied severance, the Court could have ruled the jailhouse witness testimony of Co-Defendant Young's statements inadmissible, thereby preventing any prejudice against Appellant Barnes. The Court failed to take this route either, and consequently reversible error resulted.

The Court improperly allowed hearsay testimony from Alfred Wright and Michael Schaefer which inculpated Appellant Barnes, in violation of *Bruton.*

IV. The Trial Court allowed the solicitor to improperly impeach Latoya Barnes by admitting extrinsic evidence of a prior inconsistent statement two days after the witness was excused and could not provide an explanation or context to the newly admitted evidence.

The Trial Court improperly admitted State's Exhibit 440, an audio recording as extrinsic evidence of a prior inconsistent statement of Latoya Barnes after she had already been excused as a witness. (State's Exhibit 440). Such evidence should have been admitted during Ms. Barnes' testimony. This would have allowed her to respond with an explanation and the context in which it was given, and allowed counsel the opportunity to cross-examine her as to the recording.

Latoya Barnes was called as a witness by the State on November 13, 2014. During her testimony she was asked about a statement she made during a phone call with Investigator McCoy. (Transcript, pg 660). She was asked if she recalled identifying Trenton to be in the individual in the gray sweatshirt to Investigator McCoy during a phone conversation "in August 2013". (Transcript, pg 661). Ms. Barnes denied the statement, and Ms. Campbell proceeded to read Ms. Barnes' prior inconsistent statement from an unofficial transcript. (Transcript, pg 661-662). Mr. Schnee objected on behalf of Defendant Barnes arguing that that was not an official transcript. (Transcript, pg 662). The Trial Court overruled the objection, the statement was read, and Ms. Barnes responded by saying "I never stated that's Trenton, never. I said I know my kid's body build, yes, I did." (Transcript, pg 662).

On November 17, 2014, Investigator McCoy was called as a witness. (Transcript, pg 1025, 1120). During the questioning of Investigator Matthew McCoy, Solicitor Campbell offered a recording of Ms. Barnes' prior inconsistent statement. Counsel for Barnes objected on the grounds that it was improper impeachment, in violation of SCRE 613. In seeking to admit the recording as evidence days after Ms. Barnes had been excused, she would be denied her right to

explain the recording and the context of her statement. It also prevented defense counsel from having an opportunity to cross-examine Ms. Barnes as to the recording.

An similar circumstance arose in *State v. Stokes*. *State v. Stokes*, 673 S.E.2d 434, 381 S.C. 390 (S.C., 2009). However, in *Stokes*, the defense counsel was at least offered the opportunity to cross-examine on the newly admitted statement by recalling the witness. On appeal the South Carolina Supreme Court stated, "it is the opportunity to cross-examine that is constitutionally protected. In the instant case, appellant had that opportunity. It is undisputed Brown appeared at trial, was available for cross-examination, *and could have been recalled after the statement was admitted. Id.* at 440. (emphasis added).

At the very least, the Court should have demanded that Ms. Barnes be recalled to give her such opportunity, and to allow defense counsel the opportunity to cross-examine her as to the recording. No offer was made and the evidence was improperly admitted. As this particular statement goes to the limited evidence of proving the identity of Appellant in the video, it was prejudicial to his defense and reversal and remand is warranted.

CONCLUSION

Much of Appellants argument centers around the 804(b)(3) testimony of Wright and Schaefer. There are three separate and distinct underpinnings for why the jailhouse snitch evidence provides grounds for reversal. The first, is that it clearly compromises Appellants trial rights and ability of the jury to reasonable judge the guilt of Trenton Barnes. Strictly in relation to the standard for granting severance, this evidence greatly prejudiced Appellant and constituted an abuse of discretion by the Trial Court. Secondly, in evaluation of the *Crawford* and *Bruton* rules, counsel argues that Courts of South Carolina are granted "flexibility" as to whether the Confrontation Clause rights can be triggered by nontestimonial confessions of an unavailable declarant. As is argued above, a denial of such a right in such circumstances is counterintuitive.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Robert E. Hood., Circuit Court Judge

Trial Court Case No.: 2014-GS-40-0752
2014-GS-40-0754
2014-GS-40-0755
2014-GS-40-0756

Appellate Case No.: 2014-002771

Trenton Barnes, ... Appellant

v.

The State, ...Respondent

CERTIFICATE OF COUNSEL

I hereby certify that this Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal, to the attorney for the Respondent, by placing it in the U.S. postal mail, postage pre-paid, on February 10, 2016, addressed to his attorney of record, Benjamin Aplin, Esquire, at S.C. Attorney General's Office, P.O. Box 11549, Columbia, SC 29211.

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February 10, 2016

The Honorable Jenny Abbott Kitchings
Clerk for the South Carolina Court of Appeals
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RE: Trenton Barnes v. The State,
Appellate Case No.: 2014-002771

Dear Ms. Kitchings:

Enclosed please find Appellant's Designation of Matter, Initial Brief, Proof of Service, and Certificate of Counsel in regard to the referenced appellate case. Please file and return a clocked copy in the pre-addressed and metered envelope.

Thank you for your time and attention.

Sincerely,

W. Joseph Maye

WJM:jwb
Enclosures

cc: Benjamin Aplin, Esquire
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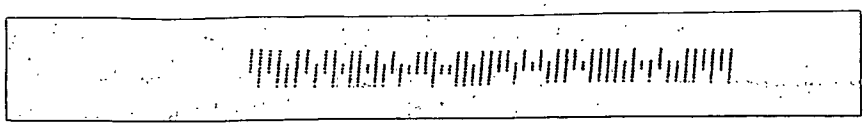

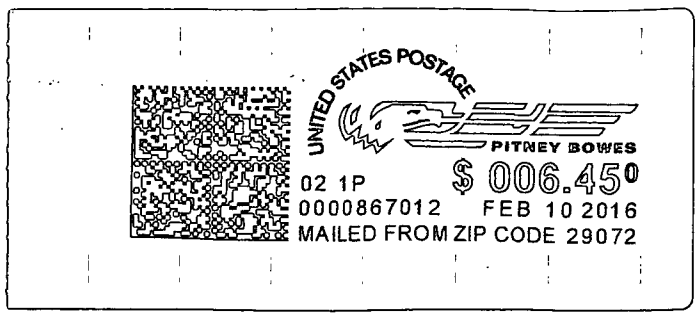

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