

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Mabior Mabior — PETITIONER
(Your Name)

vs.

State of Nebraska — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- 1) Is a defendant's right to confrontation under the Sixth Amendment violated when testimonial statements are admitted for the truth of the matters asserted and made by declarants the defendant was unable to cross examine when an appellate court, for the first time determines the statements are not hearsay?
- 2) Is a defendant's right to confrontation under the Sixth Amendment violated when a testimonial statement that the defendant committed the crime charged is admitted into evidence for the truth of the matter asserted, and made by a declarant that the defendant was unable to cross examine, and if so can this Court determine that the State appellate court erred by describing the statement as cumulative and thus harmless error?
- 3) Is a defendant's Sixth Amendment right to effective assistance of counsel violated when his trial counsel failed to object on hearsay and Confrontation Clause grounds to testimonial statements made by declarants the defendant was unable to cross examine when the State appellate court determines for the first time on appeal, that the statement was admitted for the effect on the listener even though no such limitation was provided by the trial court?

PARTIES TO THE PROCEEDING

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

DIRECTLY RELATED PROCEEDINGS

Proceedings at issue in this matter began with the filing of the Information in the District Court of Douglas County Nebraska, State of Nebraska v. Mabior Mabior, CR21-1706. Judgment was rendered on May 6, 2022. An appeal was filed on April 26, 2022. The Nebraska Supreme Court filed the opinion on August 25, 2023, under the case number S-22-574 affirming Petitioners convictions. On September 5, 2023 the Petitioner filed a Motion for Rehearing with the Nebraska Supreme court. On October 16, 2023 the Nebraska Supreme Court overruled Petitioner's Motion for Rehearing. The Nebraska Supreme Court's opinion can be found at *State v. Mabior*, 314 Neb. 932, 989 N.W.2d 378 (2023) (No. S-22-574).

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OPINION BELOW

The opinion of the Nebraska Supreme Court is reported at 314 Neb. 932, 994 N.W.2d 65 (2023) (No. S-22-308) and is attached at App. A, p. la-43a.

STATEMENT OF JURISDICTION

The Nebraska Supreme Court delivered its opinion on August 25, 2023 and overruled the Petitioner's Motion for Rehearing on October 16, 2023. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

I. The Confrontation Clause of the Sixth Amendment which guarantees, "In all prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. Amend. VI.

STATEMENT OF THE CASE

The State of Nebraska filed an Information charging the Petitioner, Mabior Mabior with two counts of Murder in the First Degree and two counts of Use of a Firearm in the Commission of a Felony. The charges were based on the shooting deaths of Loklok Thok and Doup Deng.

Thok and Deng were shot and killed in the early morning hours of March 27, 2021. Just prior to the shootings, Thok and Deng had attended a gathering of people at the residence of Kim Doluony at 2405 Emmet St. in Omaha Nebraska. Mabior was also in attendance at that gathering. The shooting took place outside the residence on the corner of 24th and Emmet Streets.

Responding police officers observed two black males on the ground suffering from obvious gunshot wounds. Thok was declared dead at the scene. Deng was transported by ambulance to the hospital and was pronounced dead shortly after his arrival.

Investigators at the scene located eight 9mm spent casings head stamped "Blazer" and one spent .45 casing stamped "Sig 45 Auto". A deformed spent .45 caliber projectile was located in the hooded sweater of Thok.

Angie Harder, who is employed in the Omaha police forensic unit, testified that she examined the 9mm cartridge casings found at the shooting scene and determined that they were all fired from the same weapon. However, since no weapon was retrieved she was unable to compare the casings to a particular weapon. She also testified that one .45 caliber casing was located at the scene, therefore deducing that two weapons were fired in this incident.

Police obtained surveillance video from nearby Lothrop elementary school. The video is motion activated and is very choppy. It fails to depict an uninterrupted flow of events or the activity of individuals as the shootings took place. This video depicts multiple individuals on the corner of 24th and Emmet where the shooting took place. The video also shows an individual in a red or orange outer garment standing over a person on the ground and several flashes. Several individuals can be seen running to and entering a vehicle. The vehicle then departs the scene of the shooting. The individuals running to the car are only identifiable by color of their outer clothing. Several appear to be red or orange tops. The video is of insufficient quality to identify any of the parties.

Police identified Nyamal Both as being the driver of the Honda Civic that the individuals entered, and which vehicle drove away from the scene of the shooting. She is acquainted with Mabior but does not know Thok or Deng. At the time of the trial, she was charged as an Accessory in this case.

She testified at trial that she and her boyfriend, Dilang Dat attended the gathering at 2405 Emmet St. on the night of the shooting. Nyamal Both stated that she and Dilang Dat were only inside the residence for a few minutes. The two exited the residence and went to her car but did not immediately leave the area. Nyamal Both got into the driver's seat and Dilang Dat told her to wait for him and he left. Nyamal Both did not see where Dilang Dat went. A few minutes later she heard gunshots and Dilang Dat and two others ran to her car and she drove away. She identified the two others as Mabior and Dilang Dat's brother Goa Dat. At trial she testified that she could not recall what Mabior was wearing that evening.

On cross-examination, Nyamal Both testified that when Goa Dat got into her car, he was wearing an orange coat. She further admitted that during her earlier pre-trial deposition, she testified that on the night of the shooting, Mabior was wearing black clothing.

Mabior was interviewed by homicide detective Michael Young at police headquarters. The interrogation began at about 6 PM on March 27th 2021. Mabior was released at 3:30 A.M on March 28th. Later on that day, police went to Mabior's place of employment, and brought him back to headquarters. Mabior was again interrogated by Young, who was later joined by Lt. Christensen of the homicide unit. This interrogation went from about 4:30 PM until 10:45 PM, whereupon Mabior was informed that he was being booked on two counts of criminal homicide and two counts of use of a firearm in the commission of a felony.

During the interrogation, Mabior initially admitted to being at the party but claimed to have left before the shooting. Eventually, Mabior admitted to witnessing the shooting and informed police that the shooter was Goa Dat. Mabior acknowledged that after Goa Dat shot Thok and Deng, he briefly searched their bodies for his personal cell phone, but to no avail.

At trial, an individual who also attended the party, Abuk Mathok, was called as a witness by the prosecution. She testified that

she observed Mabior in attendance at the gathering. On direct examination, the State never asked her to describe the clothing Mabior was wearing. Mabior's trial counsel also did not inquire of her if she could describe Mabior's clothing.

However, the State's final witness, Detective Young, testified that Mathok was interviewed by police on March 28th. The following then occurred at trial:

Q: (by prosecutor) Why did you go and make contact with Mabior Mabior after interviewing Abuk Mathok?

A: (by Young) She was able to tell us that he was wearing a red hoodie that night.

Mabior's trial counsel did not object to Young's testimony, failing to raise a hearsay objection or confrontation clause violation.

In further testimony elicited by the prosecution from Detective Young, he related information of his interview with Dilang Dat which occurred on March 29, 2021 at Omaha police headquarters. Without objection from Mabior's trial counsel, Young related that Dilang Dat claimed that his brother Goa Dat was not present at the scene of the shooting. Dilang Dat told Young that he left the scene of the shooting in Nyamal Both's vehicle, but refused to name other individuals that were present in the vehicle. Dilang Dat was asked by Young to describe what happened without naming names. Dilag Dat responded that there was only one shooter and that the shooter went through the pockets of one or both shooting victims.

Dilang Dat never testified at trial, and Mabior's trial counsel failed to raise objections on hearsay and confrontation grounds.

No gun was ever recovered in this investigation. No red or orange clothing similar to that worn by the individuals in the Lothrop school video was ever recovered. No eyewitness ever testified to seeing Mabior with a firearm that evening or actually shoot either of the decedents. The video surveillance tape is not of sufficient quality to identify any of the individuals portrayed in the video. Thus the State had to rely on circumstantial evidence at trial. Of great significance

was which individuals from the scene were wearing red or orange clothing. Also of great significance is whether it was the shooter who went through the clothing of the victims after they had been shot.

The only evidence produced at trial indicating that Mabior was wearing a red hoodie came from Detective Young relating the out of court statement made to him by Mathok. Additionally, the only evidence produced at trial indicating that there was only one shooter and that the shooter searched the victims also came from Detective Young who related the content of Dilang Dat's out of court police interview. Both of these statements should have been excluded from trial because they were testimonial and violated the Confrontation Clause. In spite of the paucity of evidence, the prosecution was able to obtain convictions on all counts, resulting in Mabior being sentenced to life in prison.

Mabior's trial counsel informed the trial court that he would not be handling Mabior's direct appeal to the Nebraska Supreme Court at which time the trial court appointed the undersigned counsel, Thomas C. Riley, Douglas County Public Defender, to handle Mabior's direct appeal.

Under Nebraska law, if appellate counsel is different from trial counsel, appellate counsel must raise all possible issues concerning ineffective assistance of trial counsel on direct appeal. Failure to do so, bars post-conviction remedies involving such issues.

As a result, appellate counsel raised trial counsel's failure to object to Young's testimony about his interviews with Abuk Mathok and Dilang Dat as providing ineffective assistance of counsel because they were hearsay and also violated the Confrontation Clause.

In its brief to the Nebraska Supreme Court, the State asserted, for the first time, that Mathok's statement to Young about Mabior wearing a red hoodie was not a violation of the confrontation clause because it was not offered for the truth of the matter. Rather the State claimed that the statement was offered to show the effect on the listener, Detective Young, and explained why he went and interviewed

Mabior a second time. The State asserted that Mathok's statement was not hearsay, and therefore did not implicate the protections of the Confrontation Clause.

Concerning the out of court statements of Dilang Dat, the State asserted that if their admission into evidence was error, it was harmless because Dilang Dat's statements were cumulative to other admissible testimony.

In its opinion affirming Mabior's convictions, the Nebraska Supreme Court made short shrift of Mabior's arguments and agreed with the assertions of the State that Mathok's out of court statement about the red hoodie was not hearsay, was offered to show the effect on the listener, and therefore not a violation of the confrontation clause.

Concerning the out of court statement of Dilang Dat that there was only one shooter, and the shooter went through the decedent's pockets, the Nebraska Supreme Court again sided with the State's claim of harmless error.

Concerning Dat's out of court statement the Nebraska Supreme Court stated "The State apparently does not dispute that the testimony was hearsay and violated Mabior's rights under the Confrontation Clause, but the State argues that Mabior cannot show he was prejudiced thereby.

We agree with the State. Even assuming trial counsel was deficient in failing to object to the detective's testimony that there was one shooter who went through the victim's pockets, the record establishes that Mabior cannot show that he was prejudiced thereby, because the detective's testimony was cumulative of other testimony" (App A, Pg 38a-39a)

REASONS FOR GRANTING THE WRIT

I. THE CONFRONTATION CLAUSE REQUIRES THAT AN ACCUSED HAVE THE OPPORTUNITY TO CROSS EXAMINE WITNESSES AGAINST THEM WHEN THE STATEMENTS ARE TESTIMONIAL.

The case of *Crawford v. Washington* 541 U.S. 36, 124 S. Ct. 1354 (2006) created a sea change in Confrontation clause jurisprudence. *Crawford* abandoned the approach set out in *Ohio v. Roberts* 448 U.S. 56, 100 S. Ct. 2531 (1980) Under *Ohio v. Roberts*, supra, the Confrontation clause did not prohibit the admission of an out of court statement that has “adequate indicia of reliability”. To satisfy that test the statement had to fall within a “firmly rooted hearsay exception or bear “particularized guarantees of trustworthiness”.

In abrogating *Ohio v. Roberts*, this court in *Crawford*, took a significantly different approach and determined that “testimonial” statements made by witnesses who are unavailable for cross examination are barred by the 6th Amendment confrontation clause regardless of whether such statements are deemed to be reliable by the court.

The Court in *Crawford* declined to spell out a comprehensive definition of “testimonial” but concluded that, “Whatever else the term covers, it applies at a minimum to...police interrogations”. Taking a final broadside to the *Ohio v. Roberts* approach, the Court stated “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation”.

This Court has further elaborated on the question of what is “testimonial” in subsequent cases. In *Davis v. Washington* and *Hammon v. Indiana* 547 U.S. 813, 126 S. Ct. 2266 (2006). In those cases the Court determined that statements are not testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police to meet an ongoing emergency. (See also *Michigan v. Bryant* 562 U.S. 344, 131 S. Ct. 1143 (2011)). Conversely, when circumstances objectively show that there is no ongoing emergency and that the primary purpose of the police interrogation is to establish or prove past events, potentially relevant to a later criminal prosecution,

such statements are testimonial and implicate the protections of the Confrontation Clause.

The State of Nebraska violated Mabior's rights under the Confrontation Clause. During the course of their investigation, Omaha police officers interviewed Abuk Mathok and Dilang Dat concerning their knowledge of the incident. Both interviews took place at police headquarters and no ongoing emergency was occurring. The police interviews of Dilang Dat and Abuk Mathok are clearly testimonial in that the primary purpose of each interview was to establish or prove past events potentially relevant to a later criminal prosecution. Mabior was precluded from cross-examining either declarant on the substantive matters in their statements because Detective Young is the witness who testified to those statements. The substance of their statements were highly significant to the resolution of the contested issue in the case, i.e. was Mabior the shooter.

In *Crawford*, this Court recognized that the Sixth Amendment is not solely concerned with testimonial hearsay. "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence." *Crawford* *supra*, 541 U.S.36, 61, 124 S.Ct. 1354, 1370.

However, that is precisely what the Nebraska Supreme court did when examining Young's testimony that Mathok told police that Mabior was wearing a red hoodie. That Court's determination that Young's testimony was admissible, not for the truth of the matter, i.e. Mabior was wearing a red hoodie but rather for the effect on the listener surely bypasses the protections of the Confrontation Clause by relying on the vagaries of the rules of evidence.

The Nebraska Supreme Court used the same artifice to circumvent a defendant's Confrontation clause protections in *State v. Vaughn* 314 Neb. 167 (2023). In *Vaughn*, the defendant was convicted of possession with intent to distribute marijuana. Vaugh was a passenger on an Amtrak train and police used a drug sniffing dog that detected the odor of marijuana on a piece of luggage that did not

overtly identify the owner of the luggage. Police asked an Amtrak porter who owned the luggage and the porter responded the owner was in cabin 12. Vaughn was in cabin 12. Over Vaughn's objection on hearsay and Confrontation grounds, the Nebraska Supreme Court affirmed the trial court's finding that the statement of ownership of the luggage was not admitted for the truth of the matter, but to show the effect on the listener, the police officer to explain why he went to cabin 12.

Just as in this case, the statement of the porter in Vaughn was testimonial in that the primary purpose of the police interview was to establish past events relevant to a later criminal prosecution. The approach taken by the Nebraska Supreme Court flies in the face of the Sixth Amendment protections and allows for the admission of potentially damning evidence to the jury without the opportunity to cross examine the declarant who provided that damning information to the police.

Applying this logic, the Confrontation Clause is completely neutered. Using this approach, there is nothing to prevent the admissibility of a statement by an absent witness asserting that he saw the defendant shoot and kill a victim, but since it is offered to show the effect on the police officer listener to explain why the defendant was arrested and charged. Consider that playing out in a case where there is no direct evidence to place the defendant at the scene and the court deciding such statement is admissible to show why the defendant was arrested. This nightmare scenario is clearly possible under the Nebraska Supreme Court's application of the Confrontation Clause.

As a matter of fact that is basically what has happened in this case. The statements of Mathok and Dilang Dat were placed in front of the jury with no objection from trial counsel, and as a result, no limiting instruction telling the jury that those statements were not offered for the truth of the matter. As far as the jury was concerned, the statements were in fact offered for the truth of the matter asserted.

The statements are an attempt to identify Mabior as the person in the video wearing red or orange who appears to shoot at one of the victims and also that Mabior is the lone shooter who went through the clothing of the victims. As a matter of fact, in closing remarks, when describing the conflicting testimony of what Mabior was wearing that night, the prosecutor stated that Abuk Mathok stated that Mabior was wearing red. (App B, Pg 1, lines 5-9) This argument lends further credence to the fact that Mathok's statement about Mabior's clothing was admitted for the truth of the matter asserted.

The fact that the Nebraska Attorney General and the Nebraska Supreme Court play Monday morning quarterback and claims that Mathok's statement was not offered for the truth of the matter is a weak attempt to justify affirming Mabior's conviction. Unlike the prosecutors in Vaughn *supra*, the trial prosecutor's in this case never attempted to justify the admission of Mathok's statement to show the effect on the listener. The jury never was given a limiting instruction and the prosecutor's argument illustrates that it was offered for the truth of the matter.

Similarly, Dilang Dat's statement concerning the existence of only one shooter and that the shooter went through the victim's clothing was offered for the truth of the matter asserted. While the Nebraska Supreme Court, at least tacitly, acknowledges that the statement was hearsay and implicated the Confrontation Clause, determined that the statement's admission was "harmless error" because it was cumulative. Nothing could be further from the truth. As stated earlier, no witness who testified at trial claimed to have seen Mabior do the shooting. Dilang Dat's statement is that the shooter went through the victim's clothing. No other witness made the same connection. Mabior's statement to police indicated that Dilang Dat's brother, Goa Dat did the shooting, and only after that, did Mabior try to search the victims for his cell phone. Dilang Dat's testimony was clearly not cumulative and the jury was free to use it as substantive evidence that Mabior did the shooting. That is not harmless error.

**II. THE FAILURE OF TRIAL COUNSEL TO OBJECT
TO THE STATEMENTS OF MATHOK AND DAT ON
HEARSAY AND CONFRONTATION GROUNDS
VIOLATED THE DEFENDANT'S SIXTH AMENDMENT
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**

Strickland v. Washington 466 U.S. 668, 104 S. Ct. 2052 (1984) holds that the Sixth Amendment right to counsel is the right to effective assistance of counsel.

In this case, trial counsel clearly failed to object to either of the complained of statements from Abuk Mathok and Dilang Dat. Had trial counsel done so, the jury never would have heard Dilang Dat's statement implicating Mabior as the shooter. Additionally, had trial counsel objected to Young's testimony from Mathok about the red hoodie, the trial court would have been required to address both the hearsay and Confrontation Clause issues. Had the trial court determined that Young's testimony concerning these testimonial statements was inadmissible hearsay and also violated the Confrontation Clause, the jury would never have heard Mathok's out of court statement that Mabior was wearing a red hoodie. On the other hand, if the trial court pursued the same avenue as the Nebraska Supreme Court, and determined the statement was not admitted for the truth of the matter, the trial court would have been required to give a limiting instruction to the jury indicating that they could only use that statement to explain why Mabior was re-interviewed.

Since no objections were made, the jurors were free to consider the out of court statements made by Mathok and Dilang Dat for the truth of the matter asserted. As stated previously, contrary to the Nebraska Supreme Court's assessment that these statements, even if erroneously admitted, were harmless error, the out of court statements of Mathok and Dat provided the jury with the only evidence that Mabior was the shooter in this case.

As stated in *Strickland* *supra*, any claim of ineffective assistance of counsel must demonstrate that counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Trial counsel's failure to object to these statements resulted in a colossal failure of the adversarial system. As stated in all of this Court's cases dealing with the Confrontation clause, the crucible of cross examination is the hallmark of the truth seeking process and the defendant's inability to cross examine Mathok and Dat on these crucial statements was highly prejudicial and as a result Mabior's trial did not produce a just result.

CONCLUSION

Petitioner prays that this Court grant his Petition for Writ of Certiorari and reverse and remand this case for a new trial to be conducted by applying the appropriate application of the Sixth Amendment right to confrontation.

RESPECTFULLY SUBMITTED
Thomas C. Riley, #13523
Douglas County Public Defender
Attorney for Petitioner

CERTIFICATE OF WORD COUNT

I certify that the accompanying brief complies with S.Ct. R. 33, in that it is prepared using Century Schoolbook 12-pt typeface and contains ____ words, excluding this certificate. This certificate was prepared in reliance on the word-count function of Microsoft Word, part of Microsoft Office Professional Plus 2016.

/s/ Thomas C. Riley, #13523
Douglas County Public Defender