

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Colleton County

Honorable J. Derham Cole, Circuit Court Judge

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KELVIN GANTT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-001339

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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**Mar 25 2025**

S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective for failing to adequately cross-examine a witness who at trial testified that she saw Petitioner walking away from the shooting but failed to mention that information on the 911 call on the night of the shooting?

## STATEMENT

In October of 2017, the Colleton County Grand Jury indicted Petitioner, Kelvin Gant, for attempted murder and possession of a weapon during the commission of a violent crime, indictments #2017-GS-15-699, 700. (App. pp. 359-362). On June 17, 2019, Petitioner proceeded to jury trial before the Honorable Steven H. John. Helen Dovell represented Petitioner at trial. Ceth Utsey and Catherine Orville prosecuted the case. The jury returned verdicts of guilty. Judge John sentenced Petitioner to twenty (20) years for attempted murder and five (5) years concurrent for the weapon charge. (App. pp. 363-364). A timely notice of intent to appeal was served on June 20, 2019, and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Gantt, 2021-UP-392 (S.C. Ct.App. filed November 3, 2021).

On February 9, 2022, Petitioner filed a timely application for post-conviction relief [PCR]. (App. pp. 365-371). On June 17, 2022, the State filed a return and motion for a more definite statement. (App. pp. 372-384). In a written order the Honorable Bentley Price granted the State's motion for a more definite statement. (App. pp. 385-387). Counsel for Petitioner filed an amended application dated April 30, 2024. (App. pp. 388-389). On May 6, 2024, Petitioner appeared before the Honorable J. Derham Cole for an evidentiary hearing. Chelsey F. Marto represented Petitioner at the hearing. Bryan T. Hall represented the State. In a written order signed August 2, 2024, Judge Cole denied relief and dismissed the application. (App. pp. 423-431). A timely notice of intent to appeal was filed on August 16, 2024. This petition for writ of certiorari follows.

## ARGUMENT

**The PCR judge erred in refusing to find trial counsel ineffective for failing to adequately cross-examine a witness who at trial testified that she saw Petitioner walking away from the shooting but failed to mention that information on the 911 call on the night of the shooting.**

The jury found Petitioner guilty of shooting Herbert Brown outside of the store/club that Brown's common law wife, Karen Holmes, operated illegally. Holmes called 911 after the shooting. (App. p. 101, lines 6-21). The police responded to this shooting call at approximately 11:30 PM on June 24, 2017. (App. p. 130, line 17 – p. 131, 132, lines 1-10). Brown identified Petitioner as the shooter. (App. pp. 183-185). Earlier in the evening, around 9:30 PM, Karen Holmes called the police after hearing shots fired. (App. p. 92, line 24 – p. 93, lines 1-25). The police arrived at the store/club and then went down the street to Ruben Boatwright's house. (App. p. 127, lines 1-10). Petitioner was at Boatwright's house when the police arrived. Petitioner can be seen in a video from a police body camera. (App. p. 238, line 9 - p. 239, lines 1-17; p. 127, lines 1-10). Petitioner is seen wearing a Nike shoe on one foot and a flip flop on the other foot. (App. p. 239, lines 1-17).

Petitioner testified that on the night of the shooting he was at Ruben Boatwright's house with friends and recovering from being shot in the foot. (App. p. 237, line 5 – p. 238, 239, lines 1-17). The injury caused Petitioner to limp. (App. p. 243, lines 10-13). Petitioner testified that around 11:25 PM he left Boatwright's house with Jahleel who drove Petitioner to his aunt's house. (App. p. 242, lines 6-12). Jahleel Dubois testified that he was with Petitioner at Boatwright's house on June 24, 2017, and took Petitioner home to his aunt's house between 11:10 and 11:20 PM. (App. p. 274, line 12 – p. 275, line 1). Petitioner denied shooting Brown.

(App. p. 236, lines 23-24). Petitioner denied being at the club/store on the night of the shooting. (App. p. 242, lines 2-5). No witness testified that the shooter walked with a limp.

At trial Holmes testified she saw Petitioner walking away from the shooting. (App. p. 99, line 17- p. 100, 101, lines 1-8). When Holmes called 911 at the time of the shooting, however, Holmes did not tell the 911 operator that she saw Petitioner walking away. Trial counsel failed to cross-examine Holmes about the 911 call. (App. pp. 104-109). In closing trial counsel reminded the jury that Holmes told the 911 operator that **Brown said** the guy who shot him was “K.” (App. p. 313, lines 17-22). Trial counsel argued, “At this point, she would have already gone out to the roadway to see who was there. If she had seen Kelvin, she would have known what name to give, but she did not say that.” (App. p. 313, line 23 – p. 314, line 1).

In the amended PCR application Petitioner alleged, “Ineffective assistance of counsel for failure to properly cross-examine and impeach Ms. Homes and Mr. Brown.” (App. p. 388). During the PCR hearing trial counsel testified, “As far as the 911 call though, I do think I made good use of the 911 call, because she very clearly says, I don’t know, I don’t know, I don’t know, and that was in evidence already. I don’t feel like I needed to necessarily ask her about that, but it was argued during closing and that she said whatever, as she doesn’t know who the shooter was, where the shooter went, and I argued that during closing.” (App. p. 406, lines 16-23). Trial counsel was deficient in failing to cross examine Holmes about the fact she did not tell the 911 operator that she saw Petitioner walking away from the shooting.

In the order of dismissal the PCR judge wrote, “This Court finds Counsel’s cross-examination of Karen Holmes was reasonable under prevailing norms, and thus was not deficient. The record reflects Counsel cross-examined Holmes on her business operations and memory regarding a written statement Holmes gave to law enforcement. (Tr. 105-108). This

Court finds credible Counsel's testimony that she tried to refresh Holmes' memory about the statement given to law enforcement, and Counsel believed she made good use of Holmes' 911 call in closing arguments." (App. p. 430). The PCR judge erred. First, as to the statement, trial counsel testified, "As far as Ms. Holmes' testimony, I could have tried to refresh her recollection." (App. p. 406, lines 8-9). She did not testify that she tried to refresh her memory as stated in the order of dismissal. Second, while counsel believed she made good use of the 911 call in closing, she should have cross-examined Holmes about the inconsistency between the 911 call and her trial testimony.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was deficient in failing to cross examine Holmes about the fact she did not tell the 911 operator that she saw Petitioner walking away from the shooting, as she testified at trial. Petitioner was prejudiced by the deficient performance. In Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), the South Carolina Supreme Court wrote:

In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. See Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...,” and “we must consider the totality of the evidence before the jury.”). In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. See Strickland, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 (stating “a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”).

Petitioner denied shooting Brown and presented an alibi defense. Holmes' credibility was an important factor for the jury to determine as her testimony corroborated Brown's testimony about the identity of the shooter. Pointing out the inconsistency in closing without an adequate cross-examination was not sufficient. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



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Kathrine H. Hudgins  
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 25<sup>th</sup> day of March, 2025.

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Counsel for Kelvin Gantt states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the record of Petitioner's post-conviction relief hearing before Judge J. Derham Cole, which was held on May 6, 2024, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Kelvin Gantt.

Respectfully Submitted,



Kathrine H. Hudgins  
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 25<sup>th</sup> day of March, 2025.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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This 25<sup>th</sup> day of March, 2025.