

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_

Certiorari to Richland County

Honorable Brian M. Gibbons, Circuit Court Judge

\_\_\_\_\_

GERALD BERNARD HALTIWANGER, JR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000361

\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_

Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**RECEIVED**

**Oct 14 2020**

**S.C. SUPREME COURT**

**INDEX**

INDEX ..... i

ISSUE PRESENTED ..... 1

STATEMENT ..... 2

ARGUMENT ..... 3

CONCLUSION ..... 7

PETITION TO BE RELIEVED AS COUNSEL ..... 8

### **ISSUE PRESENTED**

Whether the PCR court erred in denying relief, where trial counsel failed to utilize an eyewitness statement which would have helped establish Petitioner's self-defense claim, where the statement may have been admissible even though the witness invoked his Fifth Amendment rights?

## STATEMENT

Petitioner was indicted on October 10, 2012 by a Richland County grand jury for murder. App. 1180 – 1181. He proceeded to trial before the Honorable Diane Goodstein on November 12, 2013. App. 1. Mark Sawyer, Alicia Dyar, and Pat Sharpe represented Petitioner. Luck Campbell, Megan Walker, and Sandra Vriesinga appeared on behalf of the state.

The jury found Petitioner guilty as indicted. App. 993 l. 21 – 994 l. 2. Judge Goodstein sentenced him to life imprisonment. App. 1016 ll. 15 – 17. Petitioner's conviction was affirmed. State v. Haltiwanger, Op. No. 2016-UP-175 (S.C. Ct. App. filed April 13, 2016).

Petitioner filed an application for post-conviction relief on March 24, 2017. App. 1074. It contained allegations of ineffective assistance of counsel. The state filed a Return and Partial Motion to Dismiss on or about September 29, 2017. App. 1080 – 1085.

An evidentiary hearing occurred on October 28, 2019 before the Honorable Brian M. Gibbons. App. 1087. Christopher Leonard represented Petitioner; Samuel Key appeared on behalf of the state. Judge Gibbons took the matter under advisement. App. 1138 l. 18 – 1139 l. 9. PCR counsel submitted a proposed order granting relief. App. 1174. The state in turn submitted a memorandum in support of denying relief. App. 1162

An Order of Dismissal was signed on January 13, 2020. App. 1149 – 1161. The PCR court found that trial counsel was not deficient.

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where trial counsel failed to utilize an eyewitness statement which would have helped establish Petitioner's self-defense claim, where the statement may have been admissible even though the witness invoked his Fifth Amendment rights.**

### Relevant facts

The allegation against Petitioner at trial was that he shot and killed a security guard at a nightclub. App. 1092 ll. 13 – 14. The PCR court heard from four witnesses at the evidentiary hearing: two members of Petitioner's defense team, Petitioner's brother, and Petitioner. Jonathan Sterling, Petitioner's younger brother, was charged with accessory to murder. App. 1096 ll. 8 – 12. He provided a statement to law enforcement a few days after the shooting. App. 1096 ll. 13 – 23. That statement was made an exhibit at the PCR hearing. App. 1141 – 1148. Sterling asserted his Fifth Amendment right at Petitioner's trial and therefore was unable to testify. App. 1103 ll. 1 – 3.

Sterling's statement furthered the self-defense claim established at Petitioner's trial. The statement indicated that the decedent was spraying Petitioner with mace. App. 1144. Sterling, present outside the club, noticed this occurring and then defended his brother. Id. According to the statement, after being hit by Sterling, the decedent pulled out a gun. Id. The statement also noted that the decedent threatened to shoot Sterling or Petitioner if they returned. Id. Sterling testified at the PCR evidentiary hearing that he spoke with an investigator from Petitioner's defense team. App. 1102 ll. 16 – 21. He provided an identical version of events to the investigator. Id.

Petitioner was the only witness in his defense at trial. His testimony mirrored Sterling's statement. App. 776 l. 8 – 781 l. 8; App. 783 l. 2 – 788 l. 16. Petitioner testified that the decedent pointed his gun at him after Petitioner retreated and got into his car. App. 793 ll. 3 – 11. Petitioner ducked and fired his gun. App. 793 ll. 12 – 17. Notably, Petitioner testified that he was terrified: "I thought he was going to shoot ... and hit me and my brother." App. 794 ll. 2 – 5. At the PCR evidentiary hearing, his testimony was identical. Petitioner unequivocally stated that if he had not shot, either he or his brother would have been dead. App. 1106 ll. 22 – 25.

Trial counsel attempted to get Sterling's statement before the jury. App. 694 l. 7 – 700 l. 21. Outside the presence of the jury, counsel argued:

There's a lot more than just those simple three words that I think prejudices [Petitioner] from being able to fully explore what the implications of that statement are. Because right now all we're hearing is he is the shooter and the jury's going to think, well, he just went out and shot him. His brother is - - I'll tell you right now, a lot of his statements have pretty good stuff that we will likely use, but - - claiming the Fifth, so we can't. So, Judge, I'm kind of stuck with this statement coming out without me having any ability to explain this statement to the jury.

App. 694 l. 22 – 695 l. 7. The trial judge remarked that a witness invoking the Fifth Amendment "doesn't make [the statements] inadmissible." App. 697 ll. 5 – 22. Nonetheless, Sterling's statement was never before the jury at Petitioner's trial.

At the PCR evidentiary hearing, trial counsel Sawyer indicated that had the statement been admissible, he would have entered it into evidence. App. 1123 ll. 4 – 13. He admitted that "there was no other evidence besides Mr. Haltiwanger's testimony that led to a self-defense charge." *Id.* On cross-examination, when presented with the fact that Sterling's statement was similar to Petitioner's testimony, trial counsel Sawyer noted that although it was different, "it's

just someone else other than my client up there saying ... he's the only one that said it happened the way it did." App. 1125 ll. 3 – 11.

During closing arguments at the PCR hearing, PCR counsel noted the importance of Sterling's statement:

This was a self-defense, possibly manslaughter theory of the case, but the only evidence that the jury gets to hear from is Mr. Haltiwanger, who, while [he] did a great job on testimony as both the defendant and given a previous inconsistent statement, the jury did not have much of anything to rest any belief on self-defense anywhere in this case, which is why it's crucial that the statement of Jonathan Sterling came in.

App. 1131 l. 21 – 1132 l. 3.

### Discussion

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). As to allegations of ineffective assistance of counsel, the applicant must show his counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, *supra*.

The Order of Dismissal relied on two cases for the notion that Sterling's statement would not have been admissible in its entirety: State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999) and State v. Holmes, 342 S.C. 113, 536 S.E.2d 671 (2000). These opinions are from related incidents and chronicle attempts by both defendants and the state to enter statements into evidence.

In State v. Fuller, this Court examined whether the testimony of a potential accomplice, Bernard McKinney, was permissible. 337 S.C. at 242, 523 S.E.2d at 171. The issue before this Court was “whether a non-self-inculpatory statement, which is collateral to a self-inculpatory statement, may nonetheless come in under Rule 804(b)(3), SCRE, as a statement made by an unavailable declarant against his penal interest.” Id. at 243-4, 523 S.E.2d at 172. This Court held that such statements are inadmissible. Id.

In Holmes, the appellant argued that the trial court erred in allowing Bernard McKinney to testify to statements made to him by Bernard Holmes. This Court agreed and cited Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). The non-self-inculpatory statements made collateral to a self-inculpatory statement were inadmissible under Rule 804(b)(3), SCRE. Holmes at 118, 536 S.E.2d at 673.

Under Rule 804(b)(3), SCRE, a statement against interest is not excluded by the hearsay rule if the declarant is unavailable as a witness. A witness who invokes his Fifth Amendment right to silence is unavailable for hearsay purposes. Rule 804(a)(1), SCRE; State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992).

Counsel should have been aware of the nuances under Rule 804, SCRE. Had he realized that there was a potential avenue for getting Sterling’s statement before the jury, he could have proffered them and made a motion to be further argued on appeal. Although Petitioner testified in his defense, corroborating testimony from a statement created five days after the shooting would have added some credibility to his testimony. Counsel provided deficient representation; the failure to further pursue admission of the statement was ineffective assistance of counsel. Had the jury seen Sterling’s statement, there is a reasonable likelihood that they would have returned a different verdict.

**CONCLUSION**

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari and allow further briefing.

s/Taylor D. Gilliam  
Taylor D. Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of October, 2020.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

Oct 14 2020

S.C. SUPREME COURT

—————  
Certiorari to Richland County

Honorable Brian M. Gibbons, Circuit Court Judge

—————  
GERALD BERNARD HALTIWANGER, JR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

—————  
PETITION TO BE RELIEVED AS COUNSEL  
—————

Counsel for Gerald Bernard Haltiwanger states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Brian M. Gibbons, which was held on October 28, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Gerald Bernard Haltiwanger.

Respectfully Submitted,

s/Taylor D. Gilliam  
Taylor D. Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 14th day of October, 2020.

RECEIVED

Oct 14 2020

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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.”

s/Taylor D. Gilliam

Taylor D Gilliam

Appellate Defender

South Carolina Commission on Indigent  
Defense

Division of Appellate Defense

PO Box 11589

Columbia, SC 29211-1589

(803) 734-1330

ATTORNEY FOR PETITIONER

This 14th day of October, 2020.