

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Richland County

Honorable Brian M. Gibbons, Circuit Court Judge

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Oct 14 2020

S.C. SUPREME COURT

GERALD BERNARD HALTIWANGER, JR,  
PETITIONER

V.

STATE OF SOUTH CAROLINA,  
RESPONDENT

APPELLATE CASE NO 2020-000361

---

APPENDIX

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1 I've seen, and I'm very satisfied that they made their  
2 determination based upon their view of the evidence, and I  
3 understand that the jury was polled, so would respectfully  
4 deny your motion noting the exception thereto.

5 MR. SAWYER - Thank you, Your Honor.

6 THE COURT - Yes. All right, now, yes?

7 MS. WALKER - Thank you, Your Honor. The victim's  
8 family, his mother, brother's wife and sister have been  
9 here throughout the ---

10 THE COURT - Yes, they have.

11 MS. WALKER - --- entirety of the trial, Your  
12 Honor.

13 THE COURT - Yes, they have, yes.

14 MS. WALKER - As well as some other friends and  
15 family members, including representatives of Black Ops  
16 which is the security company that the victim worked for.  
17 This is the second week they've been with us, because on  
18 consecutive weekends, Your Honor, a member of that security  
19 team was murdered by a belligerent drunk person being asked  
20 to leave a night -- asked to leave a night club. Your  
21 Honor, I think it's my understanding that both the victim's  
22 sister and wife would like to speak, and I think we'll  
23 start with the sister, Ms. Dove Moti.

24 THE COURT - Thank you, Ms. Walker. Will be happy  
25 to hear from them.

1 MS. WALKER - Thank you, Your Honor. State your  
2 name for the record.

3 THE COURT - Oh, you're so far away, come up.

4 MS. MOTI - Good afternoon, Judge.

5 THE COURT - Good afternoon.

6 MS. MOTI - My name is Dove Moti.

7 THE COURT - And my court reporter's going to want  
8 you to spell that. I know she is. If you'd be so kind.

9 MS. DOVE MOTI - D-o-v-e M-o-t-i. I'm here today  
10 not because of what my brother did, but of the choice  
11 someone else decided to make. What I had to listen to  
12 today was not at all what my brother or who he was. My  
13 mother raised four of us by herself since we were  
14 teenagers, and she always taught us to take  
15 responsibilities for our actions. Jimmy was the best big  
16 brother anyone could ask for. And I'm not saying that  
17 because he is my brother, but because of the way he was.  
18 When there -- when there was a situation, Jimmy always took  
19 a step back, looked at the situation before he acted. My  
20 family I'm known as the big mouth; my other brother is  
21 known as the one with the temper, and from being a child  
22 Jimmy always looked out for us. Having to go through what  
23 we did over the past 15 months, if I could've taken Jimmy's  
24 place I would've done it gladly. Not only did I lose my  
25 brother, my mom lost her first born, my sister-in-law lost

1 her husband on her 11<sup>th</sup> anniversary. His two children lost  
2 their father, and Jimmy was a hands-on father. Even with  
3 his disability he refused to take any hands-out. If you  
4 have to go to work and make minimum wage he would rather do  
5 that than depend on anyone. So I stand here and I'm proud  
6 of my brother. I can hold my head up high even though he's  
7 not here and I can tell anyone that if I have to do it over  
8 again, I would rather have my brother be where he is even  
9 though I can't pick up the phone and call him. You know, I  
10 still know that he did the right thing, and that's not  
11 something no one can take away from me or my family. What  
12 I learned and what my mom taught me is that vengeance  
13 belongs to God. I'm here solely because I wanted justice  
14 for my brother. And I'm happy and I'm sorry for what the  
15 defendant's family had to go through, but that's the choice  
16 he made, but I can't pick up the phone to call my brother;  
17 I can't see his face; I can't go to visit him; I can't talk  
18 to him. The last time I saw my brother alive was August  
19 24<sup>th</sup>, and I went and stopped by to see him and without fail  
20 -- that was a Friday. I always talked to him on Fridays.  
21 I always visited with them even if I talked to him a couple  
22 of times or saw him during the week, Fridays was without  
23 fail one time I knew I'd see my brother. And I remember  
24 going to the house and he was getting dressed to go out  
25 with my sister-in-law, and I went in the room and he was

1 buttoning up his shirt and I went and I kissed him, and I  
2 knew they were in a hurry, so I kissed him on his cheek for  
3 the last time and I said goodbye. He brought the children  
4 over by my mom and I to spend the weekend and that  
5 Saturday, the day of their anniversary which was August  
6 25<sup>th</sup>, I talked to him, I wished him a happy anniversary and  
7 asked him if he would reconsider going in to work and  
8 coming over by us, but he was proud of his job. He took it  
9 seriously and he loved his work and he loved the people he  
10 worked with. And that night I remember my niece and nephew  
11 they wanted to sleep with me, and I decided it was time --  
12 my nephew was five at that time, my niece was eight -- and  
13 I decided it was time to teach them about God, and I  
14 started over the beginning, and my nephew asked me about  
15 guns, and he said, Auntie, why do people kill each other,  
16 why do they use guns, and I explained to him, I said, not  
17 everybody uses guns to kill each other; the work your daddy  
18 does, he uses his gun to defend people; other people who  
19 have no respect for others or human lives, they use their  
20 guns to kill each other, and he decided that he wanted to  
21 go call my brother, and luckily he did speak to my brother.  
22 Little did I know that that was the night that my brother  
23 was shot 15 minutes after the conversation; 2:00 o'clock in  
24 the morning we got a call because there was such confusing  
25 information. By the time my sister-in-law made it to the

1 hospital -- we didn't know what was going on, but we had  
2 hope that he was alive. And we were told after 4:00 in the  
3 morning that he didn't make it. Mom was home alone with  
4 the two children. I had to lie just because I knew how my  
5 mom would've reacted towards that. My brother was on his  
6 way from North Carolina, couldn't tell him the truth,  
7 because he had every hope. Judge, to see my brother walk  
8 in at 6:30 in the morning in a hospital with a smile  
9 thinking that his big brother was alive, and when he saw my  
10 face, his life just drained out of him, no emotions.  
11 Having to go home and see my mom -- never heard my mom  
12 scream. In all my years never heard my mom scream, and I  
13 wish -- that's something no one ever has to hear their  
14 mother go through, and knowing that there's nothing I could  
15 do to console any of them, to hear my niece scream out, I  
16 want daddy, and knowing that you can't bring daddy back - I  
17 wanted my brother, too. And going back to the funeral  
18 home and had to get to see my brother to see his ice cold,  
19 lifeless body in a casket. That's something I don't wish  
20 on my worst enemy. I know who my brother was and that he  
21 was a bright -- he wasn't perfect, but what he was accused  
22 of, there's no truth to that. I know that and God knows  
23 that, and I'm satisfied with that. And I'm asking if I  
24 could have my way, I would ask to have all communication  
25 with the defendant's family revoked. I know I can't do

1 that, but I'm asking you to consider life, because I can't  
2 get my brother back, and knowing that it's something that  
3 was done to him and nothing ---

4 THE COURT - Thank you so much.

5 MS. DOVE MOTI - Thank you.

6 MS. WALKER - Your Honor, next is Lisa Moti; she's  
7 Jimmy's wife.

8 MS. LISA MOTI - I'm Lisa Moti. I first want to  
9 start out and say thank you to the State, the detectives  
10 for their hard work they've done in this case. My husband,  
11 Jimmy Moti, was a great man. He liked to go fishing and  
12 spend time with his family. He was always kind-hearted and  
13 always willing to do things to help others. He was the  
14 father who always cooked for his two young children every  
15 day so that they would be healthy, a father who picked his  
16 children up from school every day so they could spend time  
17 with him, so he could spend time with them. He loved his  
18 children with all his heart and did everything that he  
19 could to make sure that they were taken care of. On August  
20 25<sup>th</sup>, 2012, the day Jimmy was shot, it was our 11 year  
21 anniversary.

22 (WHEREUPON, MS. MOTI BEING VISIBLY UPSET ALLOWS  
23 THE VICTIM ADVOCATE TO READ HER STATEMENT)

24 VICTIM ADVOCATE - We were married 11 years but  
25 together for 20 years. When I lost my husband, I lost

1 myself too. He was my love, my companion and my best  
2 friend, my everything. My two young children lost their  
3 father -- lost the father that they loved who cared and  
4 took care of them. I am now a single mother who works a  
5 full-time job trying to do the best that I can to make sure  
6 that my children are taken care of mentally and physically.  
7 As a single mother I struggle to make -- excuse me -- to  
8 make sure all the bills are paid each month but now have  
9 more to worry about, hospital bills from the night of the  
10 incident totaling over fifty thousand dollars. One of the  
11 hardest things I ever had to do was tell my children that  
12 their daddy was gone, that he had died and see them try to  
13 comprehend, understand why someone would shoot their daddy  
14 when he was doing his job to the best of their ability. It  
15 is so hard to try and explain this to a child, especially  
16 when their daddy did nothing wrong and it was not -- and  
17 was not at fault with any of the actions that he took that  
18 night. He did the right thing and did not deserve to get  
19 shot when doing what he was supposed to do. It is so hard  
20 to put on paper everything I feel. Nothing I say or do  
21 will ever bring Jimmy back. Thanks to Mr. Haltiwanger I  
22 lost the most important person in my life, and my two  
23 children will have to grow up without their father. Since  
24 Jimmy is not around to enjoy his life, I believe Mr.  
25 Haltiwanger shouldn't be able to enjoy his. The difference

1 is that he can see his children and they can visit him. My  
2 children have to look at pictures now to see their daddy.  
3 After everything Mr. Haltiwanger put my family and I  
4 through and for Jimmy, I hope that he spends the rest of  
5 his life in jail so you can hurt and kill no one else.

6 MS. WALKER - That's all we have, Your Honor.

7 THE COURT - All right, yes, sir.

8 MR. SAWYER - Thank you, Your Honor. May it  
9 please the Court.

10 THE COURT - Yes, sir.

11 MR. SAWYER - I think I'd just like to start out  
12 for Bernard -- I think his family would like to speak a  
13 little about his ---

14 THE COURT - Certainly, certainly. Absolutely.

15 MR. SAWYER - Your Honor, this is his mother,  
16 Samantha Vaughn.

17 THE COURT - And how do you spell her last name?

18 MS. VAUGHN - V as in victory ---

19 THE COURT - Yes.

20 MS. VAUGHN - --- a-u-g-h-n.

21 THE COURT - Thank you, Ms. Vaughn. Yes, ma'am.

22 MS. VAUGHN - On behalf of me and my family, we  
23 apologize for what happened, and Gerald has always been a  
24 good humble person. He never gave anybody no problems or  
25 nothing like that.

1 THE COURT - Ms. Vaughn, if you'll direct your --  
2 thank you.

3 MS. VAUGHN - He never gave anyone no problems or  
4 nothing like that. He's always been like a family man. As  
5 far as going out doing things that he's not supposed to do,  
6 I always worked two, if not two jobs, three jobs; I always  
7 gave my kids the best and everything. Gerald's just always  
8 a good nice humble person, always keep a smile on his face.  
9 I always taught my kids to have manners and respect for  
10 everyone. I just feel like he was just at the wrong place  
11 at the wrong time, and like again, like I said, I hate it  
12 happened. I really do. My heart really does -- do goes  
13 out to your family, and I don't feel that he deserves life  
14 like, but I feel that he do deserve some time because two  
15 wrongs don't make no right. I just -- I really don't feel  
16 like he deserve to be gone for life like. I really don't.  
17 And I'm not just saying it because he's my child. I'm  
18 saying it because he's a good person, nice humble person,  
19 always been a family person. If he can help people out, he  
20 would do that. He was just at the wrong place at the wrong  
21 time. And I'm speaking this from the kindness of my heart.  
22 I been raised up -- I moved my kids out of the city to the  
23 country to keep from them getting in trouble. I never  
24 believed in violence or nothing like that. Of course, yes,  
25 I used to work up here at the public defender's office, so

1 I come from a good background; my kids come from a good  
2 background. Again, like I say, he was just at the wrong  
3 place at the wrong time, and again I apologize for what  
4 happened. I didn't know nothing about nothing. You know  
5 what I'm saying? So like I said, my heart just really goes  
6 out to y'all.

7 THE COURT - Thank you, Ms. Vaughn. Thank you  
8 very much.

9 MR. SAWYER - And Your Honor, I think his sister  
10 would like to speak.

11 THE COURT - Yes, and ---

12 MR. SAWYER - Oh cousin, excuse me, Judge.

13 THE COURT - Cousin? And your name?

14 MS. HAMPTON - Sierra Hampton.

15 THE COURT - Yes, ma'am?

16 MS. HAMPTON - Bernard is my first cousin, and  
17 he's a very good, smart young man. He's a family man. And  
18 things happen. We are human and we make mistakes, and I  
19 think he realized that this is a mistake. But I believe  
20 that Bernard will rise up from this occasions. He was  
21 taught by my grandfather who passed away in 2000. My  
22 grandfather was the matriarch -- the patriarch, excuse me -  
23 - of our family. He taught us right from wrong. We didn't  
24 have summers; our summers consist of all the grandkids come  
25 to grandmother house and read our bibles. We took family

1 trips and he taught us morals and values. He always told  
2 us to go out and respect, hold our head up high. And  
3 Bernard would do that. There was times that we would all  
4 cut up and my grandmamma would not mind disciplining us,  
5 but I don't think my cousin deserves life. I'm not saying  
6 what he did was wrong, (sic) but I don't think he deserves  
7 life. He has two kids out here that needs him. My heart  
8 does go out the to family. They lost someone. It's a  
9 win/lose situation, but life for someone who has two kids  
10 that he does need to see -- I'm not saying he doesn't need  
11 life (sic) -- but a couple of years, yes, definitely,  
12 because like his mother said, two wrongs don't make a  
13 right, but to cut off communication from his kids and his  
14 family, I don't think so. And my heart and prayers go out  
15 to his family, and I love my cousin and I want the best for  
16 him.

17 THE COURT - Thank you very much. All right, is  
18 there anyone else?

19 MR. SAWYER - Thank you, Your Honor. I'll just --  
20 I just want to say very briefly just on Bernard's behalf.  
21 We've known Bernard for about a year now and one thing that  
22 we've had so much trouble in this case is just knowing him  
23 as his attorneys, he's been one of the most laid back  
24 affable human beings I've ever met down at the county jail.  
25 Quite honestly that's why it's been so baffling to come in

1 this case -- I understand where this came to -- I truly  
2 believe that him with all his brothers that night drunk and  
3 acting fools is what caused this. I don't think he ever  
4 went there with ill will, but obviously Bernard did  
5 something horrific that night. He understands that. Your  
6 Honor, I just, you know, add as us as defense attorneys we  
7 do give our sympathies to the family and it's tough for us  
8 to walk a fine line between being disrespectful of the dead  
9 and engaging in zealous advocacy, and we'd just ask that,  
10 of course, you don't hold that against Bernard, because we  
11 do what we do to try our best for Bernard, and if that  
12 crosses the line, that's on our part, that's not his. I  
13 think Bernard would just like to address you, Judge.

14 THE COURT - Thank you, Mr. Sawyer.

15 MR. HALTIWANGER - Your Honor, first I would like  
16 to apologize to the family for their loss and I also like  
17 to let them know that this was never supposed to happen.  
18 It never was supposed to happen and I understand how it  
19 feels for him not to be there with his kids no more, you  
20 know, but this is really eating me up on the inside not  
21 being there for my kids no more and not just for that but  
22 just I apologize for this whole situation. I just wish I  
23 would've stayed home like my girlfriend asked me to that  
24 night. She said, don't go out, don't go nowhere, why you  
25 always like to go out. I figure I wasn't causing no

1 problems or something, you know, and I wasn't bothering no  
2 one, so I figured, you know, it's all right to go out. But  
3 this happens. Only thing I'm asking is, you know, for the  
4 family to forgive me, because I'm not -- I'm not that type  
5 of guy. I'm not. Because I figure if I was, you know, I  
6 just accept things for what it is and go with it, but it's  
7 really eating me up on the inside. Thank you.

8           THE COURT - Thank you. (Pause) A couple -- just  
9 -- if you will in terms of security, if you would just hold  
10 Mr. Haltiwanger's family here in the courtroom while the  
11 victim's family leaves. Again, y'all have been so good at  
12 helping me. I am so grateful to you in helping these  
13 families, because obviously we have a large participation  
14 on both sides. What is true, Mr. Haltiwanger, is that you  
15 created victims not only for the family and Mr. Moti, but  
16 you have created victims in your own family. And there  
17 were an awful lot of opportunities for you to make other  
18 choices, and I'm going to just tell you how much I wish you  
19 had made other choices for yourself because of the direct  
20 affect it's going to have on your family. I have entered  
21 my sentence and I'm going to pass sentence in just a  
22 moment, but I wanted just to say to Ms. Moti and Ms. Moti,  
23 I just wanted to say to you that I heard in your words that  
24 you felt a little bit like the conduct of your brother and  
25 your husband on that evening somehow needed some

1 explanation, and I want you to know that I listened to the  
2 testimony throughout the trial, and there's no question in  
3 my mind but that what he was doing that night was going to  
4 work, and obviously doing that which he had been employed  
5 to do, and there is no -- there should be no residual in  
6 your minds about anything other than he was doing exactly  
7 what he was charged to do, and that was to make those  
8 premises safe for the people who wanted to go out to maybe  
9 have a little celebration in their lives. It was his job  
10 to afford people a place and an opportunity to do that. We  
11 work so hard; we're under so much stress, and he was there  
12 to afford for other people that opportunity. So I know  
13 that counsel did a very fine job depending Mr. Haltiwanger  
14 and doing what they could do with the evidence, but I don't  
15 want you to think for one moment that I think that he was  
16 doing anything other than doing exactly what was  
17 appropriate under the circumstances, and had he not been  
18 appropriate to keep order, there's no way for us to know  
19 what would have been the next day. I guess that's what I  
20 wanted you to know, that I get that, and from what I heard,  
21 I think it was very restrained and very appropriate. And  
22 without a doubt, you are left picking up the pieces, you  
23 are, and I know that. And what so often happens to  
24 victim's families is that they wonder does the Judge even  
25 know I'm here, does the Judge even know the family is here,

1 because there's so much that's focused on the trial and the  
2 process of the trial, and it is at this point it always  
3 gives me an opportunity to let families know how grateful I  
4 am that you have been a part of this system and that I know  
5 and have known that you are there every moment, but under  
6 our system of justice it is my job to be sure that justice  
7 is done, and so so often I know that victim's feel like  
8 they're invisible. You are not invisible. And at this  
9 point I'm always grateful to the families, because they let  
10 me know a little something about Jimmy, because I don't get  
11 to know anything about Jimmy. I get to -- and I shouldn't  
12 know anything about Jimmy, but it's always very special  
13 because this was a real live human being with obviously a  
14 family who loved him so very much. Insofar as children  
15 are concerned, he must live through you, and you will be  
16 the message to those children as they grow up so that they  
17 get to know and they get to love their dad and understand  
18 how much he loved them. I know the pain is raw and I am so  
19 sorry that you find yourself here. I did want you to know  
20 that I certainly -- you've not been invisible to the Court,  
21 but what is so important, of course, is for our system to  
22 work appropriately for all of us, we must be focused on  
23 justice and the fact that Mr. Haltiwanger who has been  
24 before the Court, that our law protects us all and it  
25 protects him as it protects Jimmy. So and I would say to

1 Mr. Haltiwanger's family, I'm heartbroken that he made the  
2 choices that he made. I'm heartbroken that when there were  
3 indications that Mr. Haltiwanger would resort to violence  
4 and vice. I wish I could wave a magic wand and make that  
5 go away, because I hear what you're saying, that there's a  
6 part of him that is a dear part and precious to you, and I  
7 get that. And I don't know what it is. I don't know what  
8 it is that would cause Mr. Haltiwanger who comes from such  
9 lovely people to choose violence over peace. It's a  
10 fascinating part of what we do and what we see. And you're  
11 exactly right, it is a consequence that he must be  
12 responsible for. And, Mr. Haltiwanger, your actions on  
13 that night, your record of violence, your record of having  
14 guns is one that you will spend the rest of your life as a  
15 consequence. So with those comments, Mr. Haltiwanger, I am  
16 going to commit you to the State Department of Corrections  
17 for the balance of your life, and that is the sentence.

18 (UPON SENTENCING BEING ADMINISTERED THERE IS AN  
19 OUTBURST IN THE COURTROOM)

20 THE COURT - Security you need to take them on  
21 out. There will be order in the courtroom. All right,  
22 y'all, you all need to go on out of the Court, please.

23 (FAMILY MEMBERS ESCORTED FROM THE COURTROOM)

24 THE COURT - All right, Ms. Pat anything further?

25 DEPUTY CLERK - No, Your Honor.

1 THE COURT - From the State, anything further for  
2 the Court.

3 MS. WALKER - Nothing from the State, Your Honor.

4 THE COURT - All right, we are adjourned, sine  
5 die.

6 (COURT IN RECESS AT 5:20 P.M.)

7 (END OF TRANSCRIPT)

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STATE OF SOUTH CAROLINA )

) C E R T I F I C A T E

COUNTY OF YORK )

I, Shirley G. Broom, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing 990 pages consisting of five volumes is a true, accurate and complete transcript of record of the proceedings had and the evidence introduced in the trial of the State of South Carolina vs. Gerald Bernard Haltiwanger, Jr., as taken by me relative to appeal, in the Court of General Sessions for Richland County, South Carolina, November 12, 13, 14, 15 and 18th and delivered on this the 29<sup>th</sup> day of March, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party herein.



Shirley G. Broom

16<sup>th</sup> Judicial Circuit Court Reporter

**STATE OF SOUTH CAROLINA**  
**IN THE COURT OF APPEALS**

---

Appeal from Richland County

Diane Schafer Goodstein, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

GERALD BERNARD HALTIWANGER

APPELLANT

Appellate Case No. 2013-002460

---

**FINAL BRIEF OF APPELLANT**

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**ISSUES ON APPEAL**

Was it unduly prejudicial under Rule 403, SCRE, for the trial court to admit in evidence the partial recording of the custodial interrogation of Appellant where the recording was recorded exclusively by the police and contained only those parts of Appellant's statement the police viewed as pertinent to their case and omitted portions that more fully explained Appellant's entire statement?

**STATEMENT OF THE CASE**

Gerald Bernard Haltiwanger, Jr. was indicted for Murder by Richland County grand jury on October 10, 2012. The indictment alleged that Mr. Haltiwanger did in Richland County, on or about August 25, 2012, willfully, feloniously, and intentionally kill the victim, Jimmy Moti, with malice aforethought, either express or implied, by means of gunshot wound, and the victim did die as a proximate result thereof, in violation of S.C. Code § 16-03-0010.

A trial was held November 12-15 and 18, 2013 before the Honorable Diane Schafer Goodstein and a jury. Assistant Public Defenders Mark Sawyer, Alicia Dyar, and Pat Sharpe represented appellant. Assistant Solicitors Luck Campbell, Megan Walker, and Sandra Vriesinga represented the state.

Pre-trial hearings pursuant to Jackson v. Denno and Neil v. Biggers were held. At issue in the Jackson v. Denno hearing was whether a statement typed by the police and purported to be Appellant's statement was voluntarily made. After the hearing, Appellant conceded that the statement was voluntary but argued to suppress the statement based on fact that the statement was a partial recording of a custodial interrogation between himself and the police and that it was misleading to the jury to admit only the partial recording. R. p. 39, lines 5-14.

The trial court admitted the statement in evidence, stating that Appellant's argument went to "weight rather than admissibility." R. p. 39, lines 15-21. The state moved the statement into evidence and published it to the jury over Appellant's objection. R. p. 209, lines 3-15; 210-213. On November 18, 2013, the jury found Appellant guilty of Murder. R. pp. 454-455. Judge Goodstein sentenced Appellant to a life term in prison. R. p. 456. This appeal follows.

**STATEMENT OF FACTS**

Officers from the Richland County Sheriff's Office arrested Appellant on August 29, 2012 and transported him to the police department headquarters. Sergeant Lindler verbally advised Appellant of his rights. R. 2, lines 24, 25; R. p. 3, lines 1-13; R. p. 25, 1-6. Once Appellant was put into a room at police headquarters, Sgt. Lindler and Officer Jordan gave Appellant a written Advice of Rights form, which they read to Appellant and had him sign. R. p. 5-8, lines 25-26. Appellant signed the Advice of Rights form at 1755 hours. R. p. 9, lines 18-20. Sgt. Lindler began typing Appellant's statement at 1900 hours. R. p.10, lines 4-6. Sgt. Lindler then read the statement to Appellant and gave Appellant a copy of it. R. p.11, lines 18-19.

A second interview took place on August 31, 2012. Once again, Sgt. Lindler advised Appellant of his rights by reading him the Advice of Rights form and Appellant signed the form. R. p. 14-15, R. p. 29, lines 21-23. Appellant was not allowed to sit at the computer to review and make changes to his statement. R. p. 19, lines 16-19. Appellant was not allowed to write his own statement in his own handwriting or type his statement. R. p.19, lines 20-21. The police did not audio or video record the statements or interrogation. R. p. 19, lines 22-25, p. 20, lines1-6; R. p. 31, lines 9-12. The police typed the statement with information that they viewed as "pertinent to the case." R. p. 31, lines 13-25.

The second typed statement is the focus of this appeal. The trial court admitted the statement in evidence, stating that the it being a partial recording went to the "weight rather than admissibility." R. p. 39, lines 15-21. The state moved the statement into evidence and published it to the jury over Appellant's objection. R. p. 209, lines 3-15; p. 210-213; R. p. 451.

Appellant continued to challenge the completeness of the statement at trial. On cross-examination, Officer Jordan conceded that not everything that was discussed in the interview with the Appellant was recorded in the typewritten statement. R. p. 134, lines 1-4. However, Officer Jordan maintained that what was left out of the statement was not in the officers' opinion "pertinent" to the case. R. p. 134, lines 6-10.

Appellant testified at trial as to the missing parts of the typed statement. Specifically, Appellant testified that he told the police during the second conversation, on August 31, 2012, about the victim pulling the gun out before he maced Appellant. R. p. 337, lines 8-16. He also told the police about the women in the truck and that the victim "never put his gun away and that he was charging off the porch-way of the club pointing his gun at my car." R. p. 337. He testified that those parts were missing from the typed statement that the State introduced into evidence. R. p. 337. Furthermore, Appellant testified that the last question the police asked him was not "Is there anything else you need to tell us?" but "This is your moment to tell the family, you know, basically give the family closure, so what do you have to tell the family?" R. p. 338. At that point, Appellant stated that he was sorry. R. p. 338, lines 15-22.

On cross, the state accused Appellant of telling his story for the first time that day, meaning that he had not told the police the version he just testified to. R. p. 340, lines 7-11. At one point, the prosecutor asked, "So you didn't do anything to provoke [victim], for him to then pull – which is the first time we've heard this – your – the gun out." R. p. 360, lines 1-4. Later in the cross examination, the prosecutor asked, "And according to your testimony here today in November 2013 he pulled his gun." R. p. 362, lines 9-10. Appellant testified, "I told the jury the same thing I said when I was talking to the Ser – investigators. I told them the same thing today." R. p. 391, lines 11-13.

The trial judge instructed the jury on murder, voluntary manslaughter, and self-defense. The jury returned a verdict of guilty on the charge of murder. R. pp. 454-455. Judge Goodstein sentenced Appellant to life. R. p. 456.

**LEGAL ARGUMENT**

**I. The trial court erred in admitting the partial recording of the police interrogation of Appellant by failing to properly conduct a Rule 403 analysis.**

The trial court erred by admitting in evidence a partial recording of Appellant’s statement to the police because, despite Appellant’s request to do so, the trial court failed to properly conduct a Rule 403 analysis. The failure to conduct this requested analysis was an error of law warranting reversal of Appellant’s conviction and a remand for new trial.

The trial court properly held a Jackson v. Denno hearing to determine the admissibility of Appellant’s statement regarding whether it was given to the police after knowingly and voluntarily waiving his *Miranda* rights. R. pp. 18-39. However, when asked by Appellant to conduct further analysis of the admissibility of the partial statement under the Rules of Evidence, the trial court erred by ruling that Appellant’s objections went to the “weight rather than to the admissibility” of the partial statement. R. p. 39, lines 15-21. This was not a “compressed” analysis by the trial court, as was found in State v. King, 349 S.C. 142, 157, 561 S.E.2d 640, 647 (Ct. App. 2002). Instead this was a total failure of the trial court to consider or conduct any Rule 403 analysis as requested by Appellant, R. p. 39, lines 15-21, 24-25; p. 40, lines 1-7, and warranted by the facts and relevant law.

Our Supreme Court held in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), that “[i]t is now the overwhelming majority rule that relevant evidence may be excluded for undue prejudice even though no specific exclusionary rule requires exclusion” pursuant to Rule 403, SCRE. Id. at 382. Consequently, a Rule 403 analysis should be conducted—especially when requested by the adverse party—on evidence that is relevant and otherwise admissible. The trial

court's failure to conduct a Rule 403 analysis was an error of law. Moreover, as is discussed further below, this error was not harmless because it reasonably affected the result of the trial.

An analysis under Rule 403, SCRE, requires a trial judge to balance the probative value and prejudicial effect of the proffered evidence. State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586 (S.C. App. 2010). The trial court should have balanced the probative value of the typed statement, which contained Appellant's admission to shooting the victim, with the prejudicial effect of misleading the jury into believing that the typed statement was a complete statement of the conversation Appellant had had with the police.

There was ample evidence in this case that Appellant was the shooter. In fact, Appellant admitted in his opening statement to the jury that he shot the victim. R. p. 45, line 25-p. 46, line 1. Appellant had an explanation for shooting the victim but that was not included in the statement the police typed-up, despite the fact that Appellant contended at trial that he told this to the police. R. p. 337, lines 8-25, p.338, line 1. The police admitted under cross examination that they did not record the entire conversation. R. p. 134, lines 1-10; 15-24. They admitted to recording only what, in their view, was "pertinent" to their case. R. p. 134, lines 6-10; p. 31, lines 13-25.

Because the police recorded only what they viewed was pertinent and relevant to their case, the typed statement did not contain the remaining statements explaining or qualifying Appellant's statements as to why he shot the victim. At trial, Appellant testified to the parts of the conversation that were not recorded in the typed statement. Appellant testified that the victim "pulled his firearm. As soon as he pulled it, he cocked it back; he put a bullet in the chamber." R. p. 314, lines 21-22. Appellant further testified that as he walked away, with his hands in the air, the victim followed him with the gun to Appellant's back. R. p. 315, lines 23-24. Then the

victim grabbed a can of mace with his left hand and maced Appellant from behind. R. p. 317, lines 10-17. At that point, Appellant's brother walked up and hit the victim, causing the victim's gun to fall out of his hand. R. p. 319, lines 3-4. The victim then picked up the gun and started threatening Appellant and his brother. R. p. 319, lines 6-8; p. 321, lines 13-17. Appellant and his brother got into their cars and started to pull out of the driveway when Appellant noticed that the victim was jumping off the porch with his gun pointed at the car. R. pp. 330-331. Appellant grabbed his gun from between the bucket seats and began shooting. R. p. 331, lines 14-24. Appellant testified that he pulled his gun out and shot out the window because he feared for his own safety. R. p. 332, lines 2-5.

Appellant's claim that he feared for his safety because the victim had his gun drawn is evidence that would have changed the course of the trial had it been in the typed statement. Appellant testified, "I was scared; I was terrified. I thought he was going to shoot, you know, my car, at my car and hit me and my brother, either or, one or the other." R. p. 332, lines 3-5. Appellant's version of events as testified at trial, coupled with testimony of the State's witness, Lamar Ray, would have changed the outcome of the trial. Ray, who was working at El Toro restaurant with the victim the night of the shooting, also testified that the victim had his gun out. R. p. 88, line 19. Ray did not testify that the victim holstered his gun. R. pp. 88-89. This information supported Appellant's voluntary manslaughter and self-defense claims. The typed statement in evidence was presented by the State as the entire statement of relevant information about the shooting that Appellant made to the police. R. p. 134, lines 1-22; p. 282, lines 21-23; p. 283, lines 22-25. When Appellant challenged the fact that portions of the statement were missing, the state accused Appellant of telling a new version of the story for the first time at trial. R. p. 340, lines 7-11. At one point, the prosecutor asked Appellant, "So you didn't do anything to

provoke [victim], for him to then pull – which is the first time we’ve heard this – your – the gun out.” R. p. 360, lines 1-4. Later in the questioning, the prosecutor says, “And according to your testimony here today in November 2013 he [victim] pulled his gun.” R. p. 362, lines 9-10.

Appellant testified, “I told the jury the same thing I said when I was talking to the Ser – investigators. I told them the same thing today.” R. p. 391, lines 11-13. The fact that Appellant’s testimony included parts that were not in the typed statement could have been viewed by the jury as inconsistent, and therefore, not credible. The credibility of Appellant was directly impacted by the missing parts of the typed statement.

The State played upon this inconsistency, arguing in closing that the Appellant made up a new version of the story. R. p. 442, lines 11-22. The State’s closing highlights the unfair prejudice of allowing the typed statement into evidence and of inaccurately presenting it as a complete record of the conversation between the police and Appellant. There should not be a dispute as to what Appellant told the police because the entire conversation could have and should have been recorded, either electronically or in writing. The State should not get to benefit from strategically failing to preserve evidence. The police should not get to decide what evidence to record and then argue that the missing parts were not “pertinent” to their case without detailing what parts are missing. Allowing the State and the police to strategically fail to preserve evidence creates confusion for the jury and misrepresents to the jury the circumstances surrounding the statement.

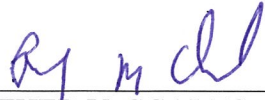
The police intentionally deprived Appellant of the opportunity to provide the jury with two consistent statements (i.e., a written statement and in-court testimony) by not preserving the conversation with Appellant in its entirety. If the entire conversation between the police and Appellant had been recorded, the case would still have come down to a test of the credibility of

the witnesses, as it did in the trial. However, Appellant would have been able to present evidence of his consistent account of what happened beginning with what he told the police during his interrogation in August 2012 and what he told the jury in November 2013. Moreover, the State would have been prevented from attempting to confuse the jury and mislead it into believing that the nearly three hours of conversation that was not recorded was somehow irrelevant to the case. Additionally, a proper recording would have created no unfair position for either party; since it would have reflected the entirety of what was said. Instead, the State intentionally—and with the purpose of gaining the strategic advantage of presenting the evidence in a way that support its conclusion—failed to record the entire, or even most of, the statement. Given the nearly three hours of conversation that was missing, there is a reasonable probability that the jury’s verdict was influenced by the admission of the partial statement. The admission of the partial statement misled the jury and unfairly prejudiced Appellant’s case.

**CONCLUSION**

For the above stated reasons, this Court should reverse and remand for a new trial.

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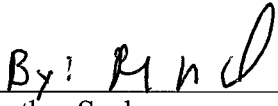
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June 25<sup>th</sup>, 2015

## CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Richland County  
The Honorable Diane Goodstein, Circuit Court Judge

THE STATE, \_\_\_\_\_

RESPONDENT,

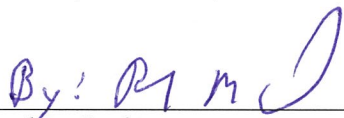
V.

GERALD BERNARD HALTIWANGER,

APPELLANT

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25<sup>th</sup> day of June, 2015.

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SUBSCRIBED AND SWORN TO before me  
this 25<sup>th</sup> day of June, 2015.

Mark Hendrix (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County  
The Honorable Diane Goodstein, Circuit Court Judge  
Appeal Case No. 2013-002460

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THE STATE

RESPONDENT, SC Court of Appeals

V.

GERALD BERNARD HALTIWANGER, JR.,

APPELLANT

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Was it unduly prejudicial under Rule 403, SCRE, for the trial court to admit in evidence the partial recording of the custodial interrogation of Appellant where the recording was recorded exclusively by the police and contained only those parts of Appellant's statement the police viewed as pertinent to their case and omitted portions that more fully explained Appellant's entire statement?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion in admitting Appellant's second statement to law enforcement into evidence when Appellant did not assert that it was inadmissible under Rule 403, SCORE, the statement was highly probative, the probative value was not substantially outweighed by unfair prejudice, and any error in admitting the statement into evidence was harmless?

STATEMENT OF THE CASE

On November 12-18, 2013, Appellant Gerald Bernard Haltiwanger Jr. ("Appellant") was tried by a jury for the murder of Jimmy Moti. Appellant was tried in the Richland County Court of General Sessions before the Honorable Diane Goodstein, Circuit Court Judge. Mark Sawyer, Alicia Dyar, and Pat Sharpe, all Assistant Public Defenders for the Fifth Judicial Circuit, represented Appellant. The State was represented by Assistant Solicitors Luck Campbell, Megan Walker, and Sandra Vriesinga of the Fifth Judicial Circuit Solicitor's Office.

On November 18, 2013, Appellant was convicted of murder. (Supp. R. pp. 1-2). He was sentenced to life imprisonment for the murder conviction. (Supp. R. p. 3). Before this Court is Appellant's direct appeal of his conviction. Appellant requests this Court reverse his conviction and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his conviction.

STATEMENT OF FACTS

On August 25, 2012, Appellant Gerald Bernard Haltiwanger, Jr., ("Appellant") shot and killed Jimmy Moti, a security officer at El Toro Bar and Grill in Columbia, SC. Moti was shot in the right back flank. (R. p. 139). The bullet went through his liver and the small bowel before exiting. (R. p. 139). It hit blood vessels in the liver, and Moti bled to death as a result. (R. p. 139).

Lamar Ray, who was working the front desk at El Toro on August 25, testified that Moti was working at the front door that evening. (R. pp. 80-81). Moti was outside checking IDs and searching for weapons. (R. p. 82). Ray testified he remembered Moti did not let a guy in with a fake ID, and the guy started arguing with Moti. (R. p. 83). Ray recalled the guy attempted to pay Moti an extra \$100, but Moti would not let him enter. (R. p. 83). An argument between Moti and the guy ensued. (R. p. 84). Ray testified that Moti started escorting the guy off the parking lot and the guy turned around. (R. p. 84). At that point, Moti started spraying mace. (R. pp. 84-86).

Around that time, Ray saw other guys leave El Toro. (R. p. 87). He recalled that one with dreads swung on Moti from behind. (R. p. 87). Shortly thereafter, Moti pulled his gun on the guy, and the guy backed up and fell. (R. p. 88). At that point, they were at the edge of the El Toro parking lot near the gas station. (R. p. 88). Moti then got on his phone and called the police. (R. p. 88). Ray talked with Moti and told him they needed to head back to the building. (R. p. 88). Ray had noticed that some of the guys who had exited the club were going to their car, popping their hoods and trunks. (R. p. 88).

As Ray got to inside the front door at El Toro, he heard a girl yell out that someone was shooting. (R. p. 89). He also heard the gunshots as he was walking in. (R. p. 89). Ray turned around and saw a black Crown Victoria driving off. (R. p. 89). He also saw a white Crown Victoria around the same time. Ray testified that the gunshots came from the black car. (R. p. 89). Ray also testified that he saw the individual firing the shots. (R. p. 90). He noted it was someone who was in line to go in the club earlier, and he described the man as having gold teeth, dark skin, and shorter than Ray. (R. p. 90). Ray also identified Appellant in a photo lineup, and he testified that Appellant was the one who shot at Moti. (R. pp. 93-95, 97). Ray also identified Appellant as the shooter in the courtroom. (R. p. 97). He noted that the guy who was attempting to use a fake ID was the one who did the shooting. (R. p. 99).

One of Appellant's girlfriends, Zondra Gilyard, testified that on the morning after the shooting, Appellant initially only indicated that he had gotten into an altercation at the club the night before. (R. p. 155). He later told Zondra that he had gotten into an incident with the bouncer at the club, that one thing led to another, and he just started shooting. (R. p. 155). Gilyard noted that Appellant did provide more details regarding the evening. Initially, there was an issue relating to an ID and Appellant could not get into the club. (R. p. 156). Appellant told Gilyard that he was walking away, and he was maced in the back of his shirt. (R. p. 156). Gilyard did confirm that she saw red spray on the back of Appellant's shirt, which was baby blue. (R. p. 156). Appellant also told Gilyard that his younger brother Jonathan tried to hit the bouncer, and that Jonathan did hit the

bouncer once. (R. pp. 156-157). Appellant indicated that he and Jonathan approached the gas station. (R. p. 157). Eventually, they got into their respective cars, and at that point Appellant was upset and angry. (R. p. 157). Appellant indicated to Gilyard that he rolled down the window and just started shooting. (R. p. 157). He was angry because he believed had was maced for no reason. (R. p. 157).

Gilyard noted that she did not know what happened to the car until she was informed by law enforcement where the car was located. (R. p. 158). She also admitted that she found Appellant's gold teeth in a diaper bag. (R. pp. 164-165, 169). She denied having any conversations with Appellant about getting rid of the teeth, a gun, and the car. (R. pp. 165).

Marquita Mobley testified that she and her friend Kristina Nuttry attempted to go to El Toro that night. (R. p. 66). They did not go in because Nuttry was not allowed in because she did not have an ID with her. (R. p. 66). After they were unable to get into the club, the two eventually caught a ride with someone. (R. pp. 68-69). The three ended up at the gas station that was immediately adjacent to El Toro. (R. p. 70). While the man from whom the two caught a ride was in the gas station, Mobley observed a commotion between the security officer at El Toro and some other guys. (R. p. 69). Mobley noted that Nuttry called Appellant to the vehicle while they were sitting there. (R. p. 70). She noted that Appellant indicated that someone got maced, and he warned Nuttry that they needed to get out of the way because he was going to shoot up the club. (R. p. 70).

Specifically, Mobley testified Appellant stated "that he about to let rounds go and we need to go." (R. p. 70, ll 24).

Mobley then went inside and retrieved the man who was giving them a ride. (R. p. 71). Mobley testified that she saw Appellant go to a car, get a gun, and start shooting out of the window. (R. p. 72). She identified Appellant in a photo lineup. (R. p. 73-74)

Kristina Nuttry testified that she and Mobley did attempt to go into El Toro, but could not get in because Nuttry did not have an ID. (R. pp. 176-177). Shortly thereafter, a man offered them a ride home. (R. p. 177). The three initially went to the gas station that was next to El Toro. (R. pp. 177-178). While the driver went inside, Nuttry observed some commotion in the El Toro parking lot. (R. p. 179). She called one of the two men causing the commotion over to the truck. She described him as wearing a baby blue t-shirt, jean shorts and sneakers, and he was no more than six feet tall. (R. p. 179). She also described the other male as having dreads, and she believed he was wearing a red shirt. (R. p. 179). Nuttry noted that she saw the two with the security officer earlier, and they were yelling at the security officer. (R. pp. 179-181). Nuttry indicated the guy with the dreads had hit the security officer in the back of the head from behind, and the officer pulled his gun in response. (R. p. 181).

Nuttry testified that the guy she spoke with expressed that he was asked to be removed from the club and was not being allowed back in. (R. p. 182). He also told her that he was maced by the officer in the back of the head, and he expressed that he was upset about the whole situation. (R. p. 183). She also

noted that the guy indicated he was "going to light the place up." (R. pp. 183, ll 19-20).

When Nuttry, Mobley, and the guy who offered them a ride left the gas station, Nuttry heard gunshots. (R. p. 184). She saw a black car and a white car in front of El Toro, and she could tell the shots were coming from one of the two cars. (R. pp. 184-185, 192).

### **Law Enforcement Investigation**

Deputy Brunson, the first to arrive on the scene, testified that when he arrived, he received initial reports that three subjects were denied entry into the club because they were trying to use someone else's identification. (R. p. 52). After they could not gain access to the club, the victim attempted to escort them to their vehicle and advised them to leave the property. (R. p. 52). Brunson was also informed there was a physical altercation, and the victim was struck in the back of the head. (R. p. 52). Brunson also learned that shots were fired, and an older black Marquis vehicle was possibly involved in the shooting. (R. p. 52). Brunson also recovered the tactical vest the victim was wearing along with the items in the vest, which included a flashlight, a badge, a .40 caliber pistol, a magazine with eleven unfired .40 caliber cartridges, a baton, a knife, handcuffs and keys, a notepad and pens, gloves, a taser, and an identification card for Carlos Brown. (R. pp. 53-54, 57, 59-63). Sergeant Lindler noted that when the

gun was recovered from the victim's vest, it was recovered from the holster.<sup>1</sup> (R. pp. 237-238).

Investigators were able to obtain video from the gas station that was next to El Toro. (R. pp. 107-108, 241-243). Based upon the video, law enforcement contacted a potential witness, and that potential witness led the investigators to Mobley and Nuttry. (R. pp. 109-111, 253-254). The investigators also received a tip through Crimestoppers that Appellant may have been involved in the shooting. (R. p. 114; see R. p. 257). With that information, Appellant's photo was placed in a photo lineup. (R. pp. 114-115, 257-258). Mobley identified Appellant in the photo lineup. (R. p. 259).

Appellant was arrested on August 29, 2012. (R. pp. 116-117, 260-261). On that date, he gave a statement in which he denied any involvement in the shooting. (R. pp. 121-125, 268-271; State's Exhibit 2 – R. pp. 446-49). After Appellant was arrested, Gilyard turned over a set of gold teeth belonging to Appellant that were located in the bottom of a diaper bag. (R. p. 274).

On August 31, 2012, Appellant was interviewed a second time by Deputy Chief Wilson and Sgt. Lindler. During that interview, the investigators confronted Appellant with excerpts of statements from Appellant's brothers and with Gilyard's statement. (R. p. 209). During the discussion about Gilyard's statement, Appellant indicated he wanted to provide another statement. (R. p. 209).

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<sup>1</sup> The paramedic who treated the victim at the scene also testified that the victim's gun was in its holster in the vest that night. (R. pp. 398-399).

Wilson and Lindler both testified that in his statement, Appellant indicated that he gave the security officer his brother's ID. (R. pp. 211, 282). Appellant stated the man looked at the ID, told Appellant he was not the man in the ID, and told Appellant to get out of his face. (R. pp. 211, 282-283). Appellant turned away, but continued to argue with the victim. (R. pp. 211, 283). The victim followed Appellant as Appellant was walking to his car. (R. pp. 211, 283). The victim told Appellant to put his hands on the car, and Appellant refused. (R. pp. 211, 283). The victim then pulled out his gun, and Appellant responded by putting his hands in the air and turning his back to the victim. (R. pp. 211, 283). Appellant asserted the victim then pulled out pepper spray and sprayed Appellant in the back of the head. (R. pp. 211, 283). One of Appellant's brothers then hit the victim in the head, and Appellant and his brother ended up in the gas station parking lot. (R. pp. 211, 283). Appellant indicated that after he got in his car, he and his brother left out of the parking lot and Appellant started shooting. (R. pp. 211, 283). He even acknowledged that he shot the door handle off of his car. (R. pp. 211, 283).

In the statement, Appellant also told law enforcement that he wiped his car down with gas and that he sold the gun he used to a man from New York. (R. pp. 212, 284). Appellant also indicated the gun was a .40 caliber handgun. (R. pp. 212, 284). Appellant also stated that he threw the shell casings into the river. (R. pp. 212, 284).

No gunshot residue was found on the victim's hands. (R. p. 148). Law enforcement found Appellant's car, an older model black Crown Victoria, under a

car cover at another of Appellant's girlfriend's homes. (R. pp. 171-173). A search of the car revealed an impact point on the passenger door. (R. p. 227). It appeared that a projectile entered the passenger side interior door and exited out of the passenger side exterior door, perforating the door where the door handle would be. (R. p. 227). The passenger side door handle was missing. (R. p. 228).

### **Appellant's Testimony**

Appellant testified that he was hanging out with his brothers on the day of the shooting. (R. pp. 305-307). He noted that they decided to go out, and on the way, picked up his friend Cuz. (R. pp. 307-309). He admitted that he did not have his ID with him when they got to El Toro, and he indicated that he grabbed his Carlos' ID from the car and attempted to use it to get into the club. (R. pp. 312-313). Appellant testified that the victim would not let him in, and the victim got an aggressive tone after Appellant attempted to bribe the victim to get inside without an ID. (R. p. 313). Appellant then testified that he engaged in a verbal exchange with the victim, and during that exchange, the victim pulled his gun on Appellant. (R. pp. 314-315). Appellant also asserted the victim cocked the pistol and put a bullet in the chamber. (R. pp. 314-315).

Appellant indicated that after that happened, he turned around, put his hands in the air, and started to walk away. (R. p. 315). The victim then asked Appellant to put his hands on a car, but Appellant refused to comply. (R. pp. 315-317). Appellant then indicated that the victim sprayed him with mace in the back of the head and shirt. (R. pp. 317-318). Appellant confirmed that his

brother Jonathan then hit the victim in the head. (R. pp. 318-319). According to Appellant, the victim then dropped the gun, but he immediately picked it back up. (R. p. 319). Appellant and Jonathan then went to the gas station parking lot. (R. p. 319).

Appellant claimed the victim made threats during an exchange while they were at the gas station parking lot. (R. pp. 321-322). He noted that someone from the club did walk the victim back towards the club. (R. pp. 322-323). Appellant also confirmed that he spoke with the females that were in the truck at the gas station. (R. pp. 324-325). Once he was able to get back in his car, Appellant got in. (R. pp. 329-330). Appellant claimed that as he was attempting to pull away, he saw the victim jump from the porch and head towards Appellant's car with his gun drawn. (R. pp. 330-331). Appellant indicated that he grabbed his pistol from between the bucket seats and started shooting at the victim in response to what he perceived to be the threat. (R. pp. 331-332). He also noted that he realized later that he had shot the door handle off of his car. (R. p. 333).

Appellant agreed that the statement he gave on August 31, 2012 basically described what he told law enforcement. (R. p. 337). He indicated that the statement did not include what he said about the victim pulling out his gun before making Appellant, what Appellant told the women in the truck, that the victim never put his gun away, or that the victim was charging off of the porch and pointing his gun at Appellant's car immediately before the shooting. (R. p. 337).

Appellant also contested what the last question and response in the statement.  
(R. p. 338).

## ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING APPELLANT'S AUGUST 31, 2012 STATEMENT INTO EVIDENCE. APPELLANT DID NOT ARGUE THE STATEMENT WAS INADMISSIBLE UNDER RULE 403, SCRE, THE STATEMENT WAS RELEVANT AND HIGHLY PROBATIVE, ITS PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY ANY UNFAIR PREJUDICE, AND ANY ERROR IN ADMITTING THE STATEMENT WAS HARMLESS.

### Discussion at the Pre-Trial Hearing and at Trial

A Jackson v. Denno<sup>2</sup> hearing was held in this case on November 12, 2013. At issue was the admissibility of Appellant's statements to law enforcement given on August 29, 2012 and August 31, 2012. (See R. pp. 2-22, 24-30, 31-33, 34-38). During the hearing, Sgt. Lindler testified that he and Investigator Jordan advised Appellant of his rights and spoke with him on the day he was arrested. (R. pp. 2-3). Lindler noted that Appellant appeared coherent and did not appear to be under the influence of any drugs or alcohol. Lindler also indicated that they made no promises to Appellant, they did not threaten Appellant, and they did not coerce him in any way. (R. pp. 3-4). Lindler further testified that they did not deprive him of any comforts. (R. p. 4). Once they were at headquarters, Appellant was advised of his rights again, and they went through the rights that were on the Advice of Rights form. (R. pp. 4-7). Appellant signed the form and signed the waiver. (R. pp. 7-8).

Again, Lindler testified that law enforcement made no promises to Appellant, did not threaten Appellant, and did not coerce him in any way. (R. pp. 8-9). After that, Lindler explained the process by which law enforcement took the

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<sup>2</sup> Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

August 29, 2012 statement. (R. pp. 9-12). He noted that Appellant never invoked any of his rights during the conversation. (R. pp. 12-13).

Lindler then testified about the statement Appellant provided on August 31, 2012. (R. pp. 14-18). Lindler again confirmed Appellant was advised of his rights, and he signed the Advice of Rights form and waiver. (R. pp. 14-15). Lindler testified that Appellant was not threatened, he was not deprived of any comforts, and he did not invoke any of his rights during that conversation. (R. pp. 14-15). Lindler also explained the process of taking the statement from Appellant. (R. pp. 15-17).

During cross-examination, Appellant asked questions relating to Appellant's ability to type his own statement, whether the statements could have been audio recorded or video recorded, and whether the statement on paper reflected the full conversation that was had between Appellant and the investigators. (R. pp. 19-21).

Investigator Jordan also testified regarding the August 29, 2012 statement. Jordan indicated that Lindler read Appellant his Miranda rights, and Appellant acknowledged his rights and waived them. (R. pp. 25-26). Jordan agreed Appellant never invoked his rights, and Appellant was neither threatened, nor promised anything, nor denied any creature comforts. (R. p. 26). He further explained how the statement was taken. (R. pp. 27-28). In regards to the August 31, 2012 statement, Jordan testified that he did witness Lindler read Appellant his rights before questioning, and while Jordan was there, Appellant

was not promised anything, threatened, or denied any creature comforts. (R. p. 30). He also noted that Appellant appeared to voluntarily want to talk. (R. p. 30).

During cross-examination, Jordan noted that it was policy to not audio record or videotape statements. (R. p. 31). Jordan also indicated that items that were not included in the statement were not pertinent to the case. (R. p. 31).

Deputy Chief Wilson also testified about his involvement in obtaining the August 31, 2012 statement. Wilson indicated that he became involved after Jordan had to leave for a family situation. (R. p. 34). Wilson was aware that Appellant had been advised of his rights and had chosen to waive his rights. (R. p. 34). Wilson noted that during his involvement in the interrogation, Appellant did not invoke his rights, and no one threatened Appellant or promised Appellant anything. (R. p. 34). Appellant was not coerced in any way, and he appeared to be talking voluntarily. (R. p. 35). During cross-examination, Wilson acknowledged that the sheriff's department had a policy to not audio record or video record any statements. (R. p. 37).

In the argument regarding whether the statement was freely and voluntarily given, Appellant engaged in the following exchange with the trial court:

Sorry, Your Honor, just briefly with the Denno hearing. Obviously, you heard me get into that and I just — I believe they said the proper words to get the Denno hearing in. Judge, you know, I just — I have a problem in 2013 that they're going to be able to enter in his statement into evidence saying that this is Bernard Haltiwanger's words, and I've got a cell phone in my pocket that were his words. I think that it's misleading to the jury to be able to be — to say that you are going to rule that these are his words.

THE COURT - And here's what's going to happen at some point. Don't know when, Mr. Sawyer, and it may be this case, but what's

going to happen is that the jury because of the development of technology is going to walk that path with you, but again that does go to the weight rather than to the admissibility and it will happen one day. I have no question in my mind.

MR. SAWYER - Judge, it can be the jurist to bring that to the Supreme Court for the first time

THE COURT - Thank you so much for that opportunity. You know, I am such a stare decisis kind of girl. I would respectfully not walk down that path, but I do — I genuinely mean what I say. I do think that ultimately because of the development and technology, Mr. Sawyer, because it does go to the weight, at some point that's going to happen because juries are going to become suspect, but it doesn't go to the — again, it doesn't go to the admissibility; it goes to the weight, I think.

MR. SAWYER - Thank you. Your Honor.

(R. p. 39, l 5 – R. p. 40, l 8).

Appellant renewed this objection when the first statement was introduced during trial and when the second statement was introduced at trial. (R. p. 122, ll 9-10; R. p. 209, l 13).

**A. Appellant's argument is not preserved for appellate review.**

Appellant contends the trial court erred in admitting Appellant's second statement without doing a proper analysis under Rule 403, SCRE, after Appellant requested such an analysis. (Initial Brief of Appellant at p. 7). Respondent submits such a request was not actually made to the trial court. Appellant did complain that the Richland County Sheriff's Department did not utilize the best means in documenting the interview and statement. However, Appellant did not assert the information in the statement was unfairly prejudicial or claim that pertinent information was deliberately omitted from the statement. Nor did Appellant inform the trial court of the nature of the information that might not have

been included in the statement that was pertinent to Appellant's case. Since Appellant did not present these arguments to the trial court, they are not preserved for appellate review. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal); see State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (concluding appellant did not preserve for review arguments that trial court conducted an improper analysis under Rule 403, SCRE, where the arguments were never presented to the trial judge).

**B. Appellant's statement was properly admitted at trial. The statement was clearly relevant and highly probative, and the probative value was not substantially outweighed by any danger of unfair prejudice.**

The trial court did not abuse its discretion when it admitted Appellant's August 31, 2012 statement into evidence. The statement was highly probative, and the probative value of the statement was not substantially outweighed by any unfair prejudice.

Standard of Review

"In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion."

State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears. State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. “Unfair prejudice means an undue tendency to suggest a decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). “When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case.” State v. Lyles, 379 S.C. 328, 336-37, 665 S.E.2d 201, 206 (Ct. App. 2008). “A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in ‘exceptional circumstances.’” State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001).

The trial court did not abuse its discretion in admitting Appellant's second statement into evidence. First, Appellant's statement was very probative. In the statement, Appellant essentially recants his first statement in which he claimed to have no involvement in the shooting at all. Appellant admits he gave the victim an ID that belonged to Appellant's brother. (R. pp. 211, 282-283; State's 4, R. p. 451). Appellant further admits that he instigated the confrontation between him and the victim by "talking junk" and cursing at the victim. (R. pp. 211, 283; State's 4, R. p. 451). Appellant noted that he was sprayed with pepper spray in the back of the head. (R. pp. 211, 283; State's 4, R. p. 451). Appellant also acknowledged that his brother hit the victim in the head, and that the two ended up in the gas station parking lot. (R. pp. 211, 283; State's 4, R. p. 451). Appellant admitted that he fired at the victim, and that he shot his own passenger side door handle off. (R. pp. 211, 283; State's 4, R. p. 451).

In the statement, Appellant also indicated that he drove a black LTD, and noted that his brothers took the car to the country after the incident. (R. pp. 212, 283; State's 4, R. p. 452). He admitted in the statement that he wiped the car down with gas. (R. pp. 212, 284; State's 4, R. p. 452). Appellant also admitted that he sold his gun to a guy from New York, and he threw the shell casings from the shooting into a river. (R. pp. 212, 284; State's 4, R. p. 453).

Appellant was charged with murder. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). Appellant's statement was relevant and material to showing all of the elements of murder. Appellant admits that he was involved in the killing of the

victim. His statement also reflected his involvement was intentional, and that he acted with malice. In all, Appellant admits that he is guilty of murdering the victim; corroborates the testimony of eyewitnesses and Gilyard regarding the actions that led to the shooting, the shooting, and the aftermath; and provided information explaining why law enforcement was unable to recover forensic evidence relating to the shooting. "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. Evidence is admissible to corroborate the testimony of a previous witness, and whether it in fact corroborates the witness' testimony is a question for the jury." State v. Stroman, 281 S.C. 508, 510, 316 S.E.2d 395, 397 (1984) (internal citations omitted).

Altogether, the statement was highly probative. Respondent would note that Appellant's contention that the statement was not probative because Appellant admitted he was the shooter in his opening statement is unfounded. First, opening statements are not evidence. See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). Second, by making such a concession in opening statement, Appellant could not dictate how the State presented its case. Further, the admission during opening statement did not relieve the State of its burden of proving beyond a reasonable doubt that Appellant was involved in the shooting. See, e.g., State v. Cheatham, 349 S.C. 101, 110, 561 S.E.2d 618, 623 (Ct. App. 2002)(noting the State is not required to accept a defendant's stipulation of proof because the State still bears the burden of proving every element of a crime beyond a reasonable doubt. Third, Appellant's opening

statement and the other evidence presented at trial did not lessen the probative value of Appellant's statement to law enforcement.

The probative value of the statement was not substantially outweighed by any unfair prejudice. Appellant contends the trial court erred in admitting his second statement because it was unfairly prejudicial. Specifically, Appellant asserts the statement as presented was prejudicial because it was not a complete reflection of the interview between Appellant and law enforcement. Appellant's argument is flawed in several respects. First, nothing in the August 31, 2015 statement as entered into evidence is unfairly prejudicial. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009).

Prejudice that is "unfair" is distinguished from the legitimate impact all evidence has on the outcome of a case. " 'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.' " State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)). " 'All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].' " Id. (quoting United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir.1989)); see also United States v. Mohr, 318 F.3d 613, 619–20 (4th Cir.2003) ("Rule 403 only requires suppression of evidence that results in unfair prejudice—prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion....").

State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014).

Appellant's statement was not unfairly prejudicial. The statement was found to be knowingly and voluntarily given. It does not contain information that would have unfairly influenced the passions or prejudices of the jury. The

statement does not appeal to emotion. It does not provoke an unfair basis for finding Appellant guilty in this case. Appellant's complaints regarding how the admission of the statement was prejudicial are all consistent with the type of prejudice that resolves from the probative value of the statement, not the type of unfair prejudice contemplated by Rule 403.

Furthermore, Respondent submits Appellant has not shown the statement was misleading or that it was missing pertinent information. In the argument during the Jackson v. Denno hearing, Appellant never presented any testimony or evidence indicating that pertinent information was not included in the statement. Importantly, Appellant never argued that the statement did not include facts regarding the victim's alleged actions that Appellant testified led him to shoot at the victim. The statement reflects that Appellant certified that he read or had the statement read to him, and that he gave the statement freely and voluntarily. Also, Appellant never elicited any evidence or testimony that would support Appellant's contention that the statement should have contained more information. During the cross-examination of Deputy Chief Wilson and Sgt. Lindler, Appellant never questioned either about the pertinent information that Appellant would later allege was not included in the statement.<sup>3</sup> (See R. pp. 215-

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<sup>3</sup> Respondent would further note that there was no evidence presented at trial to support his contention that the sheriff's department intentionally omitted any pertinent information from Appellant's statement. To the contrary, the testimony at trial reflected that the statement was recorded in accordance with long standing department policy, and Appellant was provided with ample opportunity to revise the statement at the interview if it did not comport with his responses to the questions. (R. pp. 220-222). Furthermore, it should not be forgotten that the statement was freely and voluntarily given, and that it was signed by Appellant.

222, 292-299). Ultimately, the trial court was correct in noting that Appellant's concern that the typed statement was not the best means by which the sheriff's department could have recorded Appellant's statement went to the weight of the evidence to be considered by the jury and not its admissibility. In light of the lack of unfair prejudice from the statement, and the high probative value of the statement, it was clearly admissible under Rule 403. The probative value of the statement was not substantially outweighed by any unfair prejudice. Thus, the trial court did not abuse its discretion in admitting the statement into evidence.

**C. Appellant is not entitled to a new trial because any error by the trial court in admitting the August 31, 2012 statement was harmless.**

Assuming *arguendo* this Court finds the August 31, 2012 statement was improperly admitted, any error by the trial court in admitting the statement was harmless. Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In this case, the State presented overwhelming evidence of Appellant's guilt. Ray, who was working the front desk at El Toro on the night of the

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He did not have to sign the statement if he did not believe it accurately reflected what he told law enforcement that morning.

shooting, identified Appellant in a photo lineup, and he testified that Appellant was the one who shot at Moti. (R. pp. 93-95, 97). Ray also identified Appellant as the shooter in the courtroom. (R. p. 97). He noted that the guy who was attempting to use a fake ID was the one who did the shooting. (R. p. 99).

Both Mobley and Nuttry testified that Appellant warned them shortly before the shooting that he planned on shooting up the club. Mobley testified Appellant stated “that he about to let rounds go and we need to go.” (R. p. 70, ll 24). Nuttry noted that the guy she was speaking with indicated he was “going to light the place up.” (R. p. 183, ll 19-20). Mobley also identified Appellant in a photo lineup and in court. (R. pp. 73-74).

Appellant’s girlfriend, Gilyard, testified that Appellant admitted his involvement in the shooting. (R. p. 157). She stated that Appellant told her he rolled down the window and just started shooting. (R. p. 157).

Furthermore, evidence was presented that Appellant attempted to hide his involvement in the shooting. His car was found in the backyard of another girlfriend’s house underneath a car cover. In phone calls Appellant made to Gilyard after his arrest, he requested that she take certain actions to get rid of some of the evidence. (R. pp. 205, 207, 272-273).

The testimony and evidence presented clearly refuted any allegation that Appellant was acting in self-defense when he shot the victim.<sup>4</sup> The testimony of

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<sup>4</sup> Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing

several witnesses indicated that Appellant was at fault in bringing on the difficulty in that he attempted enter the club without proper identification, and he instigated the confrontation between himself and the victim. Further, by all accounts, Appellant had other means of avoiding the danger. He simply could have driven away from the scene as requested by the victim in the beginning.

Also, the testimony and evidence outside of the statement that was presented at trial did not support a finding he was only guilty of voluntary manslaughter. Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). The evidence presented indicated that Appellant did not act in a sudden heat of passion as there was at least a few minutes between the initial confrontation with the victim and the shooting, and there was a sufficiently reasonable cooling period. State v. Hernandez, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010); State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001). Even considering Appellant's assertion that

---

his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

the victim pointed the gun at his car when they were leaving would not have warranted a finding Appellant was guilty of voluntary manslaughter. First, the statement was undermined by all of the other testimony and evidence which reflected Appellant's account was inaccurate. It was also undermined by the testimony that the victim's gun was holstered when first responders arrived on the scene. (R. pp. 286, 398-399). In light of Appellant's testimony, the contention also would only have supported a self-defense claim, and not a voluntary manslaughter claim. See generally State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010); State v. Niles, No. 2012-213592, 2015 WL 1325887 (S.C. Mar. 25, 2015) (opinion withdrawn, substituted by State v. Niles, No. 2012-213592, 2015 WL 3634237 (S.C. June 10, 2015)).

Altogether, any error made by the trial court in admitting the statement was harmless. Appellant's conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his conviction in the murder of Jimmy Moti.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

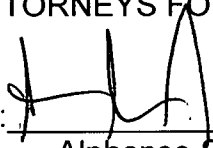
DONALD J. ZELENKA  
Assistant Deputy Attorney General

ALPHONSO SIMON JR.  
Assistant Attorney General  
Bar No. 74713

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

DANIEL E. JOHNSON  
Solicitor, Fifth Judicial Circuit  
Post Office Box 192  
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT

By:   
Alphonso Simon Jr.

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

July 6, 2015

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Richland County  
The Honorable Diane Goodstein, Circuit Court Judge  
Appeal Case No. 2013-002460

---

**RECEIVED**

JUL 06 2015

SC Court of Appeals

THE STATE

RESPONDENT,

V.

GERALD BERNARD HALTIWANGER, JR.,

APPELLANT.

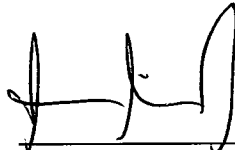
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**CERTIFICATE OF COMPLIANCE**

---

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 6<sup>th</sup> day of July, 2015.



---

ALPHONSO SIMON, JR.  
Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

JUL 06 2015

Appeal from Richland County  
The Honorable Diane Goodstein, Circuit Court Judge  
Appeal Case No. 2013-002460

SC Court of Appeals

THE STATE

RESPONDENT,

V.

GERALD BERNARD HALTIWANGER, JR.,

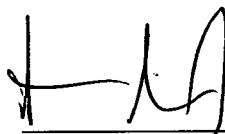
APPELLANT.

**CERTIFICATE OF SERVICE**

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Heather Vry Scalzo, Esq., 9 Graystone Road, Greenville, South Carolina 29615.

I further certify that all parties required by Rule to be served have been served.

This 6<sup>th</sup> day of July, 2015.



ALPHONSO SIMON, JR.  
Office of Attorney General  
P. O. Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

ATTORNEY FOR RESPONDENT

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Gerald Bernard Haltiwanger, Jr., Appellant.

Appellate Case No. 2013-002460

---

Appeal From Richland County  
Diane Schafer Goodstein, Circuit Court Judge

---

Unpublished Opinion No. 2016-UP-175  
Heard February 1, 2016 – Filed April 13, 2016

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**AFFIRMED**

---

Heather Vry Scalzo, of Byford & Scalzo, LLC, of  
Greenville, and Chief Appellate Defender Robert  
Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy  
Attorney General John W. McIntosh, Senior Assistant  
Deputy Attorney General Donald J. Zelenka, Assistant  
Attorney General Alphonso Simon, Jr., and Solicitor  
Daniel Edward Johnson, all of Columbia, for  
Respondent.

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**PER CURIAM:** Gerald Bernard Haltiwanger appeals his conviction for murder, arguing the trial court erred in admitting his statement to police because the statement was typewritten by law enforcement and was not a complete record of his interview. Haltiwanger contends the trial court's failure to properly weigh the prejudicial effect of the statement against its probative value, under Rule 403 of the South Carolina Rules of Evidence, resulted in undue prejudice and misled the jury. We affirm.

We find the trial court did not err in admitting Haltiwanger's statement to police because the probative value of the statement was not substantially outweighed by its prejudicial effect. *See* Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina."); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."); *Jamison v. Ford Motor Co.*, 373 S.C. 248, 269, 644 S.E.2d 755, 766 (Ct. App. 2007) ("[T]he dictates of Rule 401 are subject to the balancing requirement of Rule 403, SCRE, which requires a court to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative." (quoting *Watson ex rel. Watson v. Chapman*, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000))); *State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 169 (Ct. App. 2014) ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403]." (alteration by court) (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 469 S.E.2d 424, 429 (Ct. App. 1998))); *id.* ("Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case."); *State v. McGee*, 408 S.C. 278, 288-89, 758 S.E.2d 730, 736 (Ct. App. 2014) ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather[,] it refers to evidence which tends to suggest [a] decision on an improper basis." (quoting *State v. Dennis*, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013))), *cert. denied*, Dec. 4, 2014; *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009) ("[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.").

Haltiwanger argues the trial court erred in failing to weigh the probative value of the typed statement against the prejudicial effect of misleading the jury into

believing the typed statement was a complete version of Haltiwanger's interview with police. We disagree. Haltiwanger's statement to police contained an admission as to his involvement in the shooting and subsequent death of Victim; his statement was knowingly and voluntarily given;<sup>1</sup> and he was given the opportunity to read, review, and make changes to the statement—though he elected not to make any changes—prior to signing it. Additionally, the jury was properly given the opportunity to consider the typewritten statement and Haltiwanger's trial testimony that the statement did not include additional information he provided to police—specifically, his testimony he shot Victim because he was afraid Victim was going to shoot him as Victim charged towards Haltiwanger's car with his gun raised. *See State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) (finding once the trial court determines a defendant's confession is valid because it was knowingly and voluntarily given, it must then submit the defendant's statement to the jury); *State v. Atchison*, 268 S.C. 588, 599, 235 S.E.2d 294, 299 (1977) ("Whenever there is conflicting evidence relative to the validity of a statement or a confession, . . . it becomes the initial duty of the trial court to make a factual finding as to the validity of the statement. If found valid, the court should allow the statement to go to the jury for its ultimate determination of validity."); *McGee*, 408 S.C. at 288-289, 758 S.E.2d at 736 ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather[,] it refers to evidence which tends to suggest [a] decision on an improper basis.' 'Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.'" (quoting *Dennis*, 402 S.C. at 636, 742 S.E.2d at 26, and *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001))).

**AFFIRMED.**

**HUFF, A.C.J., and KONDUROS and GEATHERS, JJ., concur.**

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<sup>1</sup> During a pretrial hearing, conducted pursuant to *Jackson v. Denno*, 378 U.S. 386 (1964), the trial court determined Haltiwanger's statement was knowingly and voluntarily given.

1072 STATE OF SOUTH CAROLINA

COUNTY OF RichlandGerald Bernard Hallwanger  
Plaintiff(s)

vs.

State of South Carolina  
Defendant(s)Submitted By: Christopher LeonardAddress: P.O. Box 880, Columbia SC 29202

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2017CP400-1784

SC Bar #: 80166Telephone #: 803-667-3186Fax #: 803-667-3157

Other:

E-mail: Chris@KendrickLeonard.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

## DOCKETING INFORMATION (Check all that apply)

- ☐ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
- ☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

## NATURE OF ACTION (Check One Box Below)

- Contracts**
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199)

- Torts - Professional Malpractice**
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20 -NI-
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

- Torts - Personal Injury**
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399)

- Real Property**
- ☐ Eminent Domain (400)
- ☐ Easement (410)
- ☐ Encroachment (420)
- ☐ Foreclosure (430)
- ☐ Mechanic's Lien (440)
- ☐ Partition (450)
- ☐ Possession (460)
- ☐ Building Code Violation (470)
- ☐ Other (499)

- Inmate Petitions**
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

- Administrative Law/Relief**
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture-Consent Order (850)
- ☐ Other (899)

- Judgments/Settlements**
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

- Appeals**
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

- Special/Complex /Other**
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: [Signature]Date: 3-24-17

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.**

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

**Pursuant to the ADR Rules, you are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

## FORM 5

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Gerald Bernard Haltiwanger )  
Full name and prison number (if any) of Applicant. )

v. )

State of South Carolina )

IN THE COURT OF COMMON PLEAS

APPLICATION FOR  
POST-CONVICTION RELIEF2017 MAR 24 PM 12:23  
JEANETTE W. MCBRIDE  
CLERK  
S.C.P. & G.S.  
RICHLAND COUNTY  
FILED**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence Richland County Court of General Sessions, Columbia, South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2009-GS-40-8567
  - (b) 2012-GS-40-5298
  - (c)
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) 12/12/12 - 5 years

- (b) 8/29/12 - Life
- (c) \_\_\_\_\_
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC Court of Appeals
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. 4/13/2016
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Op. No. 2016-UP-175
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of counsel
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel failed to locate, interview, and subpoena crucial defense witnesses.
  - (b) Counsel failed to properly develop a defense in the case, including self-defense
  - (c) \_\_\_\_\_
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
  - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
  - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
  - (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
  - (b) the name and location of the Court in which each was filed:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
    - iv. \_\_\_\_\_
  - (c) the disposition thereof:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_

- iv. \_\_\_\_\_
- (d) the date of each such disposition:
- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- no
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (b) the proceedings in which each ground was raised:
- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Ineffective assistance of counsel unavailable on direct appeal
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
17. Were you represented by an attorney at any time during the course of:

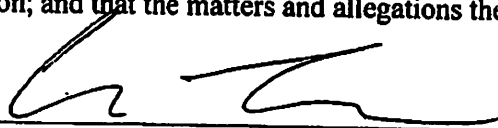
- (a) your arraignment and plea? y
  - (b) your trial, if any? y
  - (c) your sentencing? y
  - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? y
  - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
    - i. Mark Sawyer, Alicia Dyar, Pat Sharpe; Richland County Public Defenders Office, 1701 Main Street, Columbia, SC 29201
    - ii. Robert Dudek, South Carolina Office of Appellate Defense, 1330 Lady St, Columbia, SC 29201
    - iii. Heather Scalzo, 419 Vardry St, Greenville, SC 29601
  - (b) the proceedings at which each such attorney represented you:
    - i. through sentencing
    - ii. direct appeal
    - iii. direct appeal
19. State clearly the relief you seek in filing this application:  
Vacate conviction and sentence
20. Are you now under sentence from any other court that you have not challenged?  
No

STATE OF SOUTH CAROLINA )

County of Richland )

VERIFICATION

I, Christopher Leonard attorney for Gerald Bernard Haltiwanger, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 24th  
day of MARCH, 2017.

Glenn H. Thayer (L.S.)  
Notary Public

My Commission Expires: MAY 3, 2019

FILED  
2017 MAR 24 PM 3:10  
CHARLOTTE W. MOSENFELDER  
C.C.P. & G.S.

|                                           |   |                                     |
|-------------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS        |
| COUNTY OF RICHLAND                        | ) | IN THE FIFTH JUDICIAL CIRCUIT       |
|                                           | ) |                                     |
|                                           | ) |                                     |
| Gerald Bernard Haltiwanger, Jr., #314454, | ) | Case No.: 2017-CP-40-1784           |
| Applicant,                                | ) |                                     |
|                                           | ) |                                     |
| v.                                        | ) | <b>RETURN AND PARTIAL MOTION TO</b> |
|                                           | ) | <b>DISMISS</b>                      |
| State of South Carolina,                  | ) |                                     |
| Respondent.                               | ) |                                     |
| _____                                     | ) |                                     |

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on March 24, 2017 by and through Christopher Leonard, Esquire, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. He presents to this court two different sets of charges and sentences for its consideration.

Firstly, in December 2009, Applicant waived presentment to the grand jury for the charge of assault and battery of a high and aggravated nature (2009-GS-40-8567). Applicant further waived presentment to the grand jury on criminal domestic violence of a high and aggravated nature (2009-GS-40-2678) and criminal domestic violence, first offense (2009-GS-40-11882). Laura Kris Hines, Esquire represented Applicant. Assistant Solicitor Sasquisha Octavia Tobin, Esquire prosecuted the case. On January 7, 2010, Applicant pleaded guilty as indicted to assault and battery of a high and aggravated nature and criminal domestic violence, first offense in addition to the lesser included charge of criminal domestic violence, first offense before the Honorable J. Michelle Childs. Judge Childs sentenced Applicant to imprisonment for time served for both criminal domestic violence

counts and six years for assault and battery of a high and aggravated nature provided that upon the service of one year, the balance is suspended with probation for two years. Applicant did not appeal his conviction or sentence.

Additionally, in October 2012, the Richland County Grand Jury indicted Applicant for murder (2012-GS-40-05298). Mark Sawyer, Alicia Dyer, and Pat Sharpe, Esquires, represented Applicant. Solicitors Luck Campbell, Megan Walker, and Sandra Vriesinga, Esquires, prosecuted the case. On November 12-18, 2013, Applicant proceeded to trial before the Honorable Diane Goodstein. The jury found Applicant guilty as indicted. Judge Goodstein sentenced Applicant to imprisonment for life.

Applicant filed a timely notice of appeal. Robert Michael Dudek, Esquire, of the Office of Appellate Defense and Heather Vry Scalzo, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on April 13, 2016. State v. Haltiwanger, Op. No. 2016-UP-175 (S.C. Ct. App. filed April 13, 2016). The remittitur was returned to the circuit court on May 11, 2016.

Attached to this return and incorporated by reference are the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcripts, Applicant's appellate records, and the application. Respondent reserves the right to amend this return upon receipt of any relevant materials.

## II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
  - a. "Counsel failed to locate, interview, and subpoena crucial defense witnesses."
  - b. "Counsel failed to properly develop a defense in the case, including self-defense."

## III.

Respondent argues that any allegations relating to Applicant's 2010 guilty pleas should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(a).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Applicant pled guilty to two counts of criminal domestic violence, first offense and to assault and battery of a high and aggravated nature on January 17, 2010. The Application was therefore due Monday, January 17, 2011. The current application was filed March 24, 2017 – well after the one-year statutory filing period expired. Therefore, any and all allegations relating to Applicant's 2010 guilty pleas should be summarily dismissed as barred by the statute of limitations.

## IV.

In regard to the later charges, Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the

allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

## VI.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of trial counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that

there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VIII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFERY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JESSICA E. KINARD  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
Telephone: (803) 734-3737

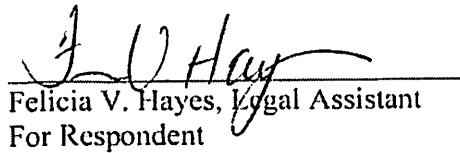
29 Sept., 2017

|                                           |   |                              |
|-------------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA                   | ) |                              |
|                                           | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND                        | ) |                              |
|                                           | ) | <b>2017-CP-40-01784</b>      |
|                                           | ) |                              |
| Gerald Bernard Haltiwanger, Jr., #314454, | ) |                              |
|                                           | ) |                              |
| Applicant,                                | ) |                              |
|                                           | ) |                              |
| vs                                        | ) | AFFIDAVIT OF SERVICE BY MAIL |
|                                           | ) |                              |
| State Of South Carolina,                  | ) |                              |
|                                           | ) |                              |
| Respondent,                               | ) |                              |
| _____                                     | ) |                              |

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Partial Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Christopher S. Leonard, Esquire**  
**Kendrick & Leonard, P.C.**  
**P. O. Box 886**  
**Columbia, SC 29202**

DATED this the 29<sup>th</sup> day of September, 2017.

  
 Felicia V. Hayes, Legal Assistant  
 For Respondent

1 STATE OF SOUTH CAROLINA

2 COURT OF COMMON PLEAS

3 COUNTY OF RICHLAND

4 -----x

5 GERALD BERNARD )

)

6 HALTIWANGER, )

)

7 Applicant, )

)

8 vs. )

Transcript of Record

2017-CP-40-01784

9 STATE OF SOUTH CAROLINA, )

)

10 Defendant. )

11 -----x

12 October 28, 2019

13 B E F O R E:

14 The Honorable Brian M. Gibbons, Presiding Judge

15  
16 A P P E A R A N C E S:

17 Christopher Leonard, Esq.  
Attorney for the Applicant

18 Samuel L. Key, Esq.  
19 Attorney for the State

20  
21  
22  
23  
24 Court Reporter: Bonnie H. Kelly

25 Transcribed by: Bobbi J. Fisher, RPR, CET

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1 P R O C E E D I N G S

2 (Whereupon, the following proceedings commenced as follows:)

3 (Applicant Exhibit Nos. 1 and 2 were marked for  
4 identification.)

5 THE COURT: Is this the Haltiwanger case?

6 MR. KEY: Yes, Your Honor.

7 MR. LEONARD: Yes, sir.

8 THE COURT: All right. Sounds good. All right.

9 Mr. Key?

10 MR. KEY: May it please the Court.

11 THE COURT: Yes, sir.

12 MR. KEY: This is Gerald Bernard Haltiwanger, Jr., versus  
13 the State of South Carolina, Case No. 2017-CP-40-1784.

14 Mr. Haltiwanger commenced this PCR action March 24th, 2017.  
15 He is presently confined in the South Carolina Department of  
16 Corrections pursuant to orders of commitment of the Richland  
17 County Clerk of Court.

18 In October of 2012, the Richland County grand jury  
19 indicted Applicant for murder. He was represented by Mark  
20 Sawyer, Alicia Dyar Goode, and Patrick Sharpe. Solicitors  
21 Luck Campbell, Megan Walker, and Sandra Resinger -- Resingo  
22 (ph) prosecuted the case on November 12th through 18th, 2013.  
23 He proceeded to trial before the Honorable Diane Schafer  
24 Goodstein, and the jury convicted him as indicted. Judge  
25 Goodstein sentenced him to life imprisonment.

1           He filed a timely notice of appeal, and he was  
2 represented by Chief Appellant Defender Robert Dudek. And  
3 Heather Vry Scalzo perfected the appeal. I believe it was an  
4 appellant practice project assignment.

5           And the South Carolina Court of Appeals affirmed his  
6 conviction on April 13th, 2016, and the case was remitted to  
7 the circuit court on May 11th, 2016.

8           In his PCR application, he alleged ineffective assistance  
9 of counsel, alleging counsel failed to locate, interview, and  
10 subpoena crucial defense witnesses; counsel failed to properly  
11 develop a defense in the case, including self-defense.

12           Mr. Haltiwanger is present today and represented by  
13 Christopher Leonard, and at this time, we'll hand it over to  
14 Mr. Leonard.

15           THE COURT: All right. Thank you.

16           Mr. Leonard?

17           MR. LEONARD: Thank you, Your Honor. May it please the  
18 Court.

19           THE COURT: Yes, sir.

20           MR. LEONARD: Petitioner calls Patrick Sharpe to the  
21 stand.

22           THE COURT: All right. Mr. Sharpe.

23           MR. SHARPE: Good morning, Your Honor.

24           THE COURT: Good morning. All right. Place your left  
25 hand on the Bible and raise your right hand.

1 PATRICK SHARPE,  
2 the witness, after having been duly sworn by the Court, was  
3 examined and testified to as follows:

4 THE COURT: Thank you, sir. Have a seat.

5 DIRECT EXAMINATION

6 BY MR. LEONARD:

7 Q Good morning, Mr. Sharpe. How are you doing today?

8 A Good morning. I'm doing fine. Thank you.

9 Q You were involved as part of the defense team for Gerald  
10 Haltiwanger's trial; is that correct?

11 A That's right.

12 Q And what was your role in that trial?

13 A I did the opening statement.

14 Q The opening statement. Was that your entire role?

15 A I did a couple of witnesses too. So I was, like, the  
16 second or third seat, I guess you could say.

17 Q You had a chance to review your opening statement?

18 A I have.

19 Q Would you mind taking a look at it?

20 A Absolutely.

21 Q Would you publish a portion of your opening statement,  
22 starting on page 221 with "I'll let the cat out of the bag."

23 A "I just wanted to go ahead and try to save everyone some  
24 time and let the cat out of the bag. On August 25th, 2012,  
25 Bernard Haltiwanger shot Jimmy Moti. That's just a fact."

1 Good?

2 Q That's good.

3 So that was the opening of the opening statement; is that  
4 correct?

5 A Yeah, close to it. I mean, right in the introduction  
6 pretty much, yes.

7 Q So what is this case -- what was this case about?

8 A We were trying to set up a self-defense claim --

9 THE COURT: Let me stop you right there. Move your  
10 microphone up.

11 THE WITNESS: I could hear it and we need to, yeah.

12 BY MR. LEONARD:

13 Q What was the allegation against Mr. Haltiwanger?

14 A That he shot and killed a security guard at a nightclub.

15 Q And you were about to say, what was the defense's theory?

16 A Our theory was that it was self-defense because the  
17 victim in the case had, just prior to the shooting, he pulled  
18 a gun out on Mr. Haltiwanger. He sprayed him with mace too, I  
19 believe.

20 Q At the beginning of y'all's opening argument, you admit  
21 that Mr. Haltiwanger was actually the shooter of the victim in  
22 this trial?

23 A Right.

24 Q Was that your decision?

25 A Not individually. It was kind of -- we discussed that

1 decision, that that was going to be our way to, you know, set  
2 up the self-defense claim.

3 Q Was Mr. Haltiwanger aware of that decision?

4 A I can't really remember, but I would imagine he was.

5 Q You reviewed your opening argument -- opening statement.  
6 Was the word "self-defense," which was the theory of the case,  
7 mentioned in that argument?

8 A No, it is not.

9 Q So the jury, at that point, didn't know what the theory  
10 of the case was?

11 A Correct.

12 Q Would you agree that any possible evidence supporting  
13 that self-defense theory would be important to  
14 Mr. Haltiwanger's trial?

15 A Absolutely.

16 MR. LEONARD: No further questions. Please answer any  
17 questions by the Attorney General's Office.

18 THE COURT: All right. Mr. Key?

19 CROSS-EXAMINATION

20 BY MR. KEY:

21 Q Mr. Sharpe, when you started your opening statement, was  
22 that based upon a strategy?

23 A I mean, just the strategy that we -- I mean, our theory  
24 was self-defense. So, I mean, I guess the strategy was to try  
25 to get the State to eliminate some of their witnesses.

1 Q Was there ever any question in preparation for the case  
2 that the Applicant was not the shooter?

3 A No.

4 Q Do you recall if there was a video of the incident?

5 A I remember that there -- that there was some video, but I  
6 don't know that it was, you know, of the actual incident. I  
7 think there's video from that night, but I don't know that you  
8 can actually see the actual shooting on the video.

9 Q Did Mr. Haltiwanger receive a self-defense charge -- jury  
10 charge?

11 A I don't remember.

12 Q But if it's in the record --

13 A If it's in the record, I mean, certainly, I can't argue  
14 with the record.

15 Q Okay. Did you make it clear to the jury in your opening  
16 statement that opening statements are not evidence for the  
17 jury to consider?

18 A I don't know if I made it clear. Probably not.

19 Q Okay. Do you know if the judge or the State ever  
20 specified that what's said in opening statements is not  
21 evidence?

22 A I don't remember. I would imagine the judge would have.  
23 And the State maybe did say something, but I couldn't really  
24 tell you, honestly.

25 Q But you said that Mr. Haltiwanger shot the victim

1 based -- to set up the self-defense strategy?

2 **A** Correct.

3 **Q** And if it's in the record -- if Mr. Haltiwanger got a  
4 self-defense jury charge, that would be in the record?

5 **A** I would believe so, yes.

6 **Q** Okay.

7 MR. KEY: No further questions.

8 THE COURT: All right. Any redirect?

9 MR. LEONARD: Nothing further, Your Honor.

10 THE COURT: All right. Thank you, sir. You may step  
11 down.

12 MR. LEONARD: May this witness be excused?

13 THE COURT: Any objection? Any objection to him leaving?

14 MR. KEY: No, sir, Your Honor.

15 THE COURT: All right. See you later.

16 THE WITNESS: Thank you, Your Honor.

17 THE COURT: Thank you.

18 All right. Call your next witness.

19 MR. LEONARD: The Petitioner will now call Jonathan  
20 Sterling to the stand.

21 THE COURT: All right. Mr. Sterling. Sir, if you'd  
22 place your left hand on the Bible and look at me and raise  
23 your right.

24 JONATHAN STERLING,

25 the witness, after having been duly sworn by the Court, was

1 examined and testified to as follows:

2 THE COURT: Thank you, sir. Have a seat.

3 DIRECT EXAMINATION

4 BY MR. LEONARD:

5 Q Good morning, Mr. Sterling. Thank you for being here  
6 today. How are you doing today?

7 A All right. Pretty good.

8 Q A little background, were you also charged in connection  
9 with that murder regarding Mr. Haltiwanger in this trial?

10 A Yes, sir.

11 Q And what were you charged with?

12 A Accessory after the fact of the murder.

13 Q I'm going to show you this document that's been marked as  
14 Petitioner's Exhibit 1. Can you take a look at that.

15 Are you familiar with that document, Mr. Sterling?

16 A Yes, sir.

17 Q And what is that?

18 A A statement.

19 Q That's the statement that you gave to the police  
20 officers?

21 A I guess.

22 Q What's the date of that? Top of the second page.

23 A 8/30/2012.

24 MR. LEONARD: Your Honor, at this time, Petitioner moves  
25 into evidence Exhibit 1.

1 THE COURT: Any objection?

2 MR. KEY: No objection.

3 THE COURT: Without objection, introduced.

4 (Petitioner Exhibit No. 1 was received into evidence.)

5 BY MR. LEONARD:

6 Q So you gave a statement to the Richland County police  
7 involving the investigation in this matter?

8 A Yes, sir.

9 Q I'm going to go over some of the statement with you, if  
10 you don't mind answering the questions as stated.

11 A Yes, sir.

12 Q Before we go any further, you did not testify at trial;  
13 is that correct?

14 A That's correct.

15 Q And, in fact, you pled the Fifth Amendment.

16 A Yes, sir.

17 Q So you were unavailable to testify?

18 A Yes, sir.

19 Q I will read the part of Investigator Jordan. You can  
20 read your part.

21 [As read:] "Were you at the El Toro Mexican restaurant  
22 on 8/25/2012?"

23 A "Yes."

24 Q "Who were you with?"

25 A "Myself and Tyrobia."

1 Q "How did you and Tyrobia get to El Toro's?"  
2 A "In my car."  
3 Q "What kind of car do you have?"  
4 A "A Crown Vic."  
5 Q "What color is the Crown Victoria?"  
6 A "White."  
7 Q "What were you wearing on 8/25 at El Toro's?"  
8 A "A brown shirt, white shorts, and a pair of Adidas."  
9 Q "Did the white shirt [verbatim] you have on have anything  
10 on it?"  
11 A "Yes. It had a black logo on the back."  
12 Q "What was the logo?"  
13 A "It was a design that said Banfam (ph)."  
14 Q "What color was the Adidas you were wearing?"  
15 A "Red."  
16 Q "What was Tyrobia wearing on 8/25/2012?"  
17 A "I don't know. He had on a black shirt, but I'm not sure  
18 about his pants."  
19 Q "Did the black shirt have anything written on it?"  
20 A "Not that I can recall."  
21 Q "Did you see anyone else at El Toro on 8/25 that you  
22 recognized?"  
23 A "Yes. My bro."  
24 Q "What is your brother's name that you saw at El Toro on  
25 8/25/2012?"

- 1    **A**     "Gerald."
- 2    **Q**     "What was Gerald wearing?"
- 3    **A**     "He had on some shorts. I'm not sure about the clothes."
- 4    **Q**     "What color were the shorts that Gerald had on?"
- 5    **A**     "I can't remember."
- 6    **Q**     "Did you plan to meet Gerald at El Toro on 8/25/2012?"
- 7    **A**     "Yes."
- 8    **Q**     "Did you see Terrell at El Toro on 8/25/2012?"
- 9    **A**     "No."
- 10   **Q**     "When you saw Gerald at El Toro's, where were you?"
- 11   **A**     "I was sitting in my car."
- 12   **Q**     "When you saw Gerald, what was he doing?"
- 13   **A**     "He was walking up from the security guard. The security
- 14   guard was spraying him with mace. I got out my car and ran
- 15   over to where they was. The security guard was still macing
- 16   Gerald when I ran up to them, and I hit the security guard in
- 17   the face."
- 18   **Q**     "What did you hit the security guard with?"
- 19   **A**     "My fist."
- 20   **Q**     "How many times did you hit the security guard?"
- 21   **A**     "One time."
- 22   **Q**     "When you hit the security guard, what did he do?"
- 23   **A**     "His head turned from the hit, and he put the mace up and
- 24   drew what I thought was a Taser, and I realized it was a gun."
- 25   **Q**     "When you realized it was a gun, what did you do?"

1     **A**       "I was already backing up when I thought he was pulling  
2     the Taser out and I realized it was a gun, because I was  
3     backing up, I fell down tonight ground at the Exxon gas  
4     station parking lot."

5     **Q**       "After you fell down, what did you do?"

6     **A**       "I jumped up and I tried to back up a little bit more.  
7     The security guard was saying, 'I could shoot you -- y'all  
8     motherfuckers. I will shoot y'all ass if y'all come back on  
9     the property.'"

10    **Q**       "And you were charged in this case as well; right?"

11    **A**       "Yes, sir."

12    **Q**       "And you said accessory after the fact of the murder?"

13    **A**       "Yes, sir."

14    **Q**       "And you admitted to hitting the security guard in the  
15    face?"

16    **A**       "Yes."

17    **Q**       And that's it.

18           At some point prior to the trial of your brother,  
19    Mr. Haltiwanger, did you give a telephone interview to the  
20    public defender's investigator?"

21    **A**       Yes, sir.

22    **Q**       No further questions. Please answer any questions the  
23    Attorney General's Office might have.

24           THE COURT: All right. Mr. Key?

25                                   CROSS-EXAMINATION

1 BY MR. KEY:

2 Q Mr. Sterling, are you related to Mr. Haltiwanger?

3 A Yes, sir.

4 Q Is he your older brother?

5 A Yes, sir.

6 Q And you were there the night at El Toro with him?

7 A Yes, sir.

8 Q How did he get to El Toro that night?

9 A Say that again.

10 Q Do you know how he got to El Toro that night?

11 A Who? Gerald?

12 Q Yes.

13 A In his vehicle.

14 Q Okay. What type of vehicle was that?

15 A An LTD.

16 Q What color?

17 A It was black.

18 Q And you said, in your police statement, that you hit the  
19 security guard in the back of the head?

20 A No.

21 Q No?

22 A I hit him in the face.

23 Q Okay. So you hit him in the face?

24 A Yes, sir.

25 Q And then he pulled what you thought was a Taser, realized

1 it was a gun, and then fell down?

2 **A** Well, he put the mace up and then I thought he was  
3 pulling out a Taser; he pulled out a gun.

4 **Q** And you fell down.

5 **A** Yes, sir.

6 **Q** Okay. Have you ever had a chance to see the video from  
7 the Exxon gas station of the incident?

8 **A** Yes, sir, but you can only see -- you can see me falling  
9 down in the parking lot, and you can also see him with a gun  
10 in his hand, but it's not really that clear.

11 **Q** And your brother testified at trial?

12 **A** Yes, sir.

13 **Q** Did he testify -- or were you at trial?

14 **A** Yeah, I couldn't be in the room.

15 **Q** You couldn't be there. Okay.

16 But you talked to the public defender's office  
17 investigator?

18 **A** Yes, sir, I talked with him.

19 **Q** And did you tell them the story of events that you're  
20 saying right now?

21 **A** Yes, sir.

22 **Q** Okay. Did you know what your brother was -- claimed that  
23 had happened?

24 **A** No, sir.

25 **Q** No. Okay.

1           And you ultimately pled the Fifth and were unavailable to  
2 testify at trial?

3     **A**     Yes, sir.

4     **Q**     Okay.

5           MR. KEY: No further questions, Your Honor.

6           THE COURT: Any redirect?

7           MR. LEONARD: No, Your Honor.

8           THE COURT: All right. Thank you, sir. You can step  
9 down.

10          Hand me that exhibit, if you would.

11          All right. Call your next witness.

12          MR. LEONARD: The Petitioner calls Mr. Haltiwanger.

13          THE COURT: All right, sir. Just place your left hand on  
14 the Bible. Sir, you don't have to raise it with those  
15 shackles on.

16                       GERALD BERNARD HALTIWANGER, JR.,  
17 the witness, after having been duly sworn by the Court, was  
18 examined and testified to as follows:

19          THE COURT: Thank you, sir. You may have the seat behind  
20 the microphone there.

21                       DIRECT EXAMINATION

22     BY MR. LEONARD:

23     **Q**     How are you doing today?

24     **A**     Oh, I'm okay.

25     **Q**     You testified for yourself in this trial; is that

1 correct?

2 **A** Correct.

3 **Q** Were you the sole witness called by the defense?

4 **A** Correct.

5 **Q** So the only testimony that the jury heard about  
6 self-defense came from you?

7 **A** Yes, sir.

8 **Q** Had you given the statement to the police?

9 **A** Yes, sir.

10 **Q** And you explained to them your situation?

11 **A** Yes, sir.

12 **Q** And the incidents that happened that night?

13 **A** Yes, sir.

14 **Q** Was everything that you told the police reported in that  
15 statement that they typed up?

16 **A** No. Everything wasn't included in the statement that  
17 they typed up.

18 **Q** So there was stuff that you told the police about the  
19 self-defense that wasn't included?

20 **A** Yes, sir.

21 **Q** Before that statement, had you given a previous  
22 statement?

23 **A** Have I gave a previous statement before that?

24 **Q** Yeah.

25 **A** Yes, sir.

1 Q And you were not entirely truthful in that statement?

2 A No, sir.

3 Q So tell -- let's get into what happened that night at El  
4 Toro.

5 A Well, me and my brothers, we had a cookout at my house  
6 earlier that day. After the cookout, we decided to go out to  
7 the bar and have a few drinks and having some fun. Get to the  
8 doorway of the club and the officer or security guard wouldn't  
9 let me in the door, so I just was like bump it, I'll go  
10 somewhere else and spend my money.

11 At that point in time, he got aggressive, like, "What you  
12 said?" Oh, and pulled the gun. When he pulled the gun, I put  
13 my hands in the air. I was walking across the parking lot  
14 with my hands in the air, telling him "fuck you, I know my  
15 rights. You shoot me in the back, you're going down."

16 So he started macing me in the back. Then that's when  
17 Jonathan ran over there and hit him. I turned -- because he  
18 had been macing me in the back. I turned, I'm standing there  
19 between the security guard and Jonathan. I'm telling him,  
20 "Don't shoot. We're about to go."

21 So, now, my other brother, he pulls my car up. He pulls  
22 my car up, I get in my car. Now, Jimmy is, like, trying to  
23 stop me from --

24 Q Let me stop you there. You said Jimmy. And that's the  
25 bouncer's name; right?

1     **A**     Correct.

2     **Q**     How were you feeling at this point?

3     **A**     I'm scared. I never been in a situation like this before  
4     so, like, I'm thinking it's either my life or either his life,  
5     so...

6     **Q**     And Jimmy, the bouncer, he had a gun pointed at you?

7     **A**     Correct.

8     **Q**     Did he say anything to you and your brothers?

9     **A**     He said, "I should shoot y'all." He said, "If you come  
10    back on the premises, I'm going to shoot y'all ass." But my  
11    car was on the premises.

12    **Q**     Did you take him seriously?

13    **A**     I took him very seriously.

14    **Q**     What happened next?

15    **A**     After that, my brother pulled my car up on the curb. I  
16    got in the car. When I got in the car, Jimmy's, like,  
17    standing, like, at an angle trying to, like, block me from  
18    leaving, saying, "Y'all are not going nowhere."

19            I'm scared. He got a gun in his hand. He done assaulted  
20    me. He done maced me in the back. So I shot him. And that  
21    was that.

22    **Q**     And you believe, if you had not shot, what would have  
23    happened?

24    **A**     Either I would have been dead or my brother would have  
25    been dead.

1 Q And this was your testimony at trial; is that correct?

2 A Correct.

3 Q Was there any other witnesses called to back up your  
4 story?

5 A It wasn't nobody else called. I just was the only one  
6 placed on the stand and that was it.

7 Q And you believe that, had more evidence been presented,  
8 the jury would have (indiscernible)?

9 A I know if more evidence would have been presented,  
10 instead of just putting me on the stand to tell what happened,  
11 the outcome would have been different.

12 Q (Indiscernible)?

13 A No, sir.

14 Q Please answer any questions the Attorney General's Office  
15 may have for you.

16 THE COURT: All right.

17 CROSS-EXAMINATION

18 BY MR. KEY:

19 Q Mr. Haltiwanger, do you recall if the trial judge gave a  
20 self-defense charge?

21 A They said they couldn't because my lawyer never brought  
22 it up before trial.

23 Q So if there is a self-defense charge in the record, would  
24 you dispute that?

25 A Could you repeat that, please?

1 Q If the judge -- if the record, your trial transcript  
2 reflects that the judge gave a self-defense charge, would you  
3 dispute that?

4 A I wouldn't dispute the matter that, if the extra evidence  
5 would have been brought to the jury, the outcome would have  
6 been different. I don't dispute that.

7 Q Okay. But you testified similarly today as you did at  
8 trial?

9 A Correct. The exact same thing.

10 Q You testified you were scared?

11 A Correct.

12 Q You saw Mr. Moti coming at you.

13 A Correct.

14 Q And so you fired.

15 A Correct.

16 Q Do you know how many shots you fired?

17 A I can't -- I can't recall. This has been so long ago.

18 Q Okay. Did your car have any bullet holes in it?

19 A Yes, it had one hole in it.

20 Q Okay. Do you know where that bullet came from?

21 A Yes.

22 Q Okay. Where did it come from?

23 A It come from me.

24 Q Okay. Was anyone in the car with you when you fired?

25 A Yes. My brother was in the car with me.

1 Q Okay. Which brother?

2 A Terrell Vaughn.

3 Q And where was he sitting?

4 A In the passenger seat.

5 Q And where was the bullet hole located?

6 A In the passenger door.

7 Q But coming from your gun?

8 A Correct.

9 Q And you heard your brother's testimony just a minute ago;  
10 correct?

11 A Correct.

12 Q Was that his version of events similar to what you just  
13 testified to?

14 A That's exactly what happened that night.

15 Q Okay. That Mr. Moti was threatening you, that if you  
16 came back on the property, he was going to shoot you?

17 A Correct.

18 Q You testified that, in your second statement, the police  
19 officers didn't report it exactly how you gave him that  
20 statement?

21 A Correct. And the officer also admitted to saying that  
22 everything that I stated was not in the -- in my statement.

23 Q At trial.

24 A Correct.

25 Q He said that in front of the jury?

1     **A**     Correct.

2     **Q**     Did you sign that statement?

3     **A**     Yes, I did. I was -- like, I was just -- I was down. I  
4     had never been in this situation like that, like someone lost  
5     their life. I didn't know what to do.

6     **Q**     But, at trial, the officer said that he did not record  
7     everything that you had said; correct?

8     **A**     Correct.

9     **Q**     And you also said at trial that not everything that you  
10    had said was written down in the statement?

11    **A**     Correct.

12    **Q**     So that was before the jury?

13    **A**     Correct.

14    **Q**     Did you give your attorneys specific names of people to  
15    investigate or look into?

16    **A**     I mean, as I was in -- when I was going through my Rule  
17    5, my motion discovery and, yeah, everybody that, you know,  
18    made statements basically dealing with the case basically just  
19    telling everything that they seen. Yeah, I asked to get them  
20    to come and testify.

21    **Q**     Okay. And your brother, John Sterling, he was  
22    unavailable to testify at your trial; correct?

23    **A**     I mean, correct. From my understanding, they was trying  
24    to get him to say things that wasn't true, so he was like,  
25    "No, I'm not testifying."

1 Q Okay. And he was charged, as he testified to, with  
2 accessory after the fact of murder?

3 A Correct.

4 Q Do you know why he was charged with that?

5 A Because -- I guess because he, like, followed me to drop  
6 my car off that the actual incident happened in. You know, so  
7 they charged him.

8 Q What did you do with your car after the incident?

9 A I took it to my other house.

10 Q Your other house. Okay.

11 And did you do anything to it to try to clean off the  
12 inside?

13 A I just really just wiped it down and put a car cover over  
14 it.

15 Q Okay. Do you recall what you wiped it down with?

16 A I really don't.

17 Q And then did you ever ask Mr. Sterling to do anything  
18 with the gun that you had used?

19 A Not that I recall, no.

20 Q Okay. Do you recall what you did with the gun?

21 A Don't even remember to this day.

22 Q Do you recall telling the police or testifying at trial  
23 that you sold the gun to someone from New York?

24 A I mean, it's possible but I -- like, it's been so long, I  
25 don't remember at this moment.

1 Q Okay.

2 MR. KEY: No further questions, Your Honor.

3 THE COURT: All right. Redirect?

4 MR. LEONARD: Briefly, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. LEONARD:

7 Q The Attorney General's Office mentioned that you filed a  
8 directed appeal in this case?

9 A Correct.

10 Q What was the issue in that appeal?

11 A I mean, that -- basically that they failed to submit the  
12 whole statement for the -- that the investigator made.

13 Q I'm going to hand you up a copy of the brief to your  
14 appeal. Would you read the paragraph highlighted.

15 A [As read:] "There was evidence in this case that  
16 Appellant was the shooter. In fact, Appellant admitted in his  
17 opening statement to the jury that he shot the victim.  
18 Appellant had an explanation for shooting the victim but that  
19 was not included in the statements the police typed up,  
20 despite the fact that Applicant continued at trial that he  
21 told this to the police. The police admitted under  
22 cross-examination that they did not record the entire  
23 conversation. They admitted to recording only what, in their  
24 view, was pertaining to their case."

25 MR. LEONARD: No further questions, Your Honor.

1 THE COURT: Any recross based upon that redirect?

2 MR. KEY: No, Your Honor.

3 THE COURT: All right. Thank you, sir. You may step  
4 down.

5 The applicant may call its next witness.

6 MR. LEONARD: Thank you, Your Honor. We would call Mark  
7 Sawyer to the stand.

8 THE COURT: All right, Mr. Sawyer.

9 Place your left hand on the Bible and raise your right  
10 hand.

11 MARK SAWYER,

12 the witness, after having been duly sworn, was examined and  
13 testified to as follows:

14 THE COURT: Thank you, sir. You may be seated there.

15 DIRECT EXAMINATION

16 BY MR. LEONARD:

17 Q Mr. Sawyer, how are you doing this morning?

18 A Well. How are you?

19 Q I'm doing great.

20 Did you have a chance to review any transcripts in  
21 preparation for today's --

22 A I reviewed it. I wouldn't say I read all 500 pages word  
23 for word, but...

24 Q I understand. Well, if you ever need to refer to  
25 anything, just let me know and we'll try to do that.

1           Now, you were the lead attorney for the defense?

2   **A**     Correct.

3   **Q**     But you were not the first attorney assigned to  
4   Mr. Haltiwanger's case?

5   **A**     I can't remember honestly. It's fairly common, as  
6   attorneys come and go from the public defender's office, cases  
7   get reassigned. But I have been representing Mr. Haltiwanger  
8   for a substantial period of time before trial.

9   **Q**     So the Sheely (ph) that's being alluded that's the  
10   original, you took over with plenty of time to prepare?

11   **A**     Correct.

12   **Q**     Who made the decision to admit to the shooting in the  
13   opening?

14   **A**     You know, we talked about it for a long while with  
15   Bernard and, of course, you know, the defense team, and we  
16   just thought that it was going to be very tough to get around  
17   that fact. There is just too much evidence the State had.

18           I also think that, frankly, the State thought we were  
19   going to try to say one of his brothers was the shooter, and  
20   so we decided instead that the better option would be to go  
21   ahead and admit that fact out there at the beginning and work  
22   toward either a manslaughter or self-defense charge.

23   **Q**     That was exactly my next question. So the theory of the  
24   case was either self-defense or try and get enough for a  
25   manslaughter charge?

1   **A**     Correct.

2   **Q**     One of the issues that Mr. Haltiwanger mentioned was that  
3   the judge refused to charge self-defense. That's not true.  
4   She charged self-defense; is that correct?

5   **A**     Correct. It was -- I think we were trying to get certain  
6   elements of the Protection of Persons and Property Act as part  
7   of the self-defense charge, and she would not charge that.

8   **Q**     So you asked to have Judge Goodstein charge the  
9   stand-your-ground protection?

10  **A**     Correct.

11  **Q**     And she refused?

12  **A**     Correct.

13  **Q**     Was the stand-your-ground motion made before the trial  
14  started?

15  **A**     It was not.

16  **Q**     Would that have been the time to have done so?

17  **A**     It would have.

18  **Q**     Would that have triggered an immunity hearing?

19  **A**     It would have.

20  **Q**     Where the possible outcome could have been immunity for  
21  Mr. Haltiwanger?

22  **A**     Yes.

23  **Q**     And that was not done in this case?

24  **A**     Correct.

25  **Q**     So because of the admission of that, Mr. Haltiwanger

1 being the shooter, self-defense has to be the theory?

2 **A** Correct.

3 **Q** It is not talked about in opening statements, though; is  
4 that correct?

5 **A** I'm sorry? What's --

6 **Q** Self-defense wasn't mentioned in opening statements.

7 **A** I can't remember but I don't believe so.

8 **Q** Were the co-defendants interviewed by the public  
9 defender's office?

10 **A** I believe they were.

11 **Q** Would you have done that personally or would you have had  
12 an investigator?

13 **A** Had an investigator.

14 **Q** If I show you a document, would you take a look at it for  
15 me?

16 **A** Sure.

17 **Q** Do you recognize that document, Mr. Sawyer?

18 **A** From the context at least, it looks like something one of  
19 our investigators would likely have done.

20 **Q** And how would you describe what that document is?

21 **A** It's an interview of Jonathan Sterling, one of Bernard's  
22 family members. It's a telephone interview.

23 **Q** And that's the brother that testified here this morning?

24 **A** I believe so.

25 **MR. LEONARD:** Your Honor, at this time, I would move in

1 as Exhibit 2 is summary of the telephone conversation between  
2 the public defender's investigator and Mr. Sterling.

3 THE COURT: Any objection?

4 MR. KEY: Just one moment, Your Honor.

5 No objection.

6 THE COURT: Without objection, admitted into evidence.

7 (Applicant's Exhibit No. 2 was marked for identification  
8 and received into evidence.)

9 BY MR. LEONARD:

10 Q Mr. Sawyer, would you summarize that interview to be  
11 similar to how Mr. Sterling testified here this morning?

12 A Yes.

13 Q And what's the date of that interview?

14 A May 6th of '13.

15 Q And this trial would have been in November; is that  
16 correct?

17 A Correct.

18 Q So your office and presumably you knew what Mr. Sterling  
19 would have -- what his version of the events was?

20 A Correct.

21 Q At any time, did you plan on calling Mr. Sterling as a  
22 witness in the case?

23 A Our understanding from the State was that they were going  
24 to -- if they were brought up, they were going to plead the  
25 Fifth immediately. It would be unavailable as witnesses.

1 Q And that was from the prosecution's office?

2 A Correct.

3 Q Did you reach out to Mr. Sterling's defense attorney?

4 A I honestly cannot remember.

5 Q Were you aware that Mr. Sterling gave a statement to the  
6 police at the beginning of the investigation?

7 A Yes.

8 Q Would you say that that statement included useful  
9 language with the preparation of Mr. Haltiwanger's  
10 self-defense trial?

11 A I'd have to look at the statement again, but I assume if  
12 it's in line with what was testified to here today, then, yes.

13 Q And specifically these two questions (indicating).

14 A Okay.

15 Q So Mr. Haltiwanger testified at trial that Jimmy, the  
16 bouncer, had threatened to kill him at gunpoint?

17 A Correct.

18 Q In fact, Mr. Sterling's statement says the same.

19 A Correct.

20 Q But, at trial, nobody else was called to corroborate  
21 Mr. Haltiwanger's story?

22 A Unfortunately, the only two folks that we were able to  
23 find investigatory-wise that would testify to that was, of  
24 course, Bernard and his brother.

25 Q It would have been useful had Mr. Sterling testified?

1     **A**     Correct.

2     **Q**     But he pled the Fifth. Did you call him to the stand to  
3     plead -- to take the Fifth or --

4     **A**     I can't remember off the top of my head. I'd have to  
5     look at the transcript again.

6     **Q**     During one of the directs by Investigator Limler (ph),  
7     the statements about Mr. Haltiwanger's brothers actually do  
8     somewhat come out. Do you recall that?

9     **A**     I do.

10    **Q**     In fact, Investigator Limler testified on direct that  
11    Mr. Haltiwanger's brothers had implicated him in the shooting.

12    **A**     Correct.

13    **Q**     At that point, you recall you asked for a mistrial.

14    **A**     I believe so.

15    **Q**     What was the basis for that motion?

16    **A**     I believe because we weren't able to bring them in as  
17    witnesses, since they were not going to be available to  
18    testify, essentially introducing their testimony at that point  
19    without us having an opportunity to question or cross-examine  
20    them.

21    **Q**     Very good memory. I was going to let you look at the  
22    transcript, but you pretty much nailed it.

23           And what was Judge Goodstein's rule? Do you recall?

24    **A**     I don't.

25    **Q**     Was the case mistried?

1     **A**     No.

2     **Q**     So she denied your request for a mistrial?

3     **A**     Correct.

4     **Q**     And you said the basis for the mistrial was that so now  
5 they have mentioned this statement that you don't have the  
6 ability to cross-examine his brothers?

7     **A**     Correct.

8     **Q**     I'm going to ask you to read a little bit of the  
9 transcript starting at page 680, line 22 to 681, line 7.

10    **A**     Sure.

11    **Q**     And this is part of your argument for the mistrial.

12    **A**     "There's a lot more than just those simple three words  
13 that I think prejudices Bernard from being able to fully  
14 explore what the implications that statement are because right  
15 now we're all hearing is he is the shooter and the jury is  
16 going to think, well, he just went out there and shot him.  
17 His brother is -- I'll tell you right now, a lot of the  
18 statements have pretty good stuff that we will likely use, but  
19 claiming the Fifth so we can't. So, Judge, I'm kind of stuck  
20 with the statement coming out without me having an ability to  
21 explain the statement to the jury."

22    **Q**     Judge Goodstein actually spent the night on that motion  
23 but, in the morning, denied the request for a mistrial. Is  
24 that correct?

25    **A**     Sure.

1 Q Now, in your argument, you mention that there's a lot of  
2 good stuff in that statement and you would like it but for  
3 Mr. Sterling taking the fifth. Did you try and introduce  
4 Mr. Sterling's statement?

5 A Again, I can't remember my -- I may be wrong again; I'd  
6 have to look at the transcript. I think they actually did  
7 have them come in and plead the Fifth at one point either  
8 pre-trial or during the trial; I can't remember exactly which  
9 it was. It could be blending together with another similar  
10 trial.

11 Q If I said one of the defense attorneys showed up and  
12 said, We're pleading the Fifth --

13 A That sounds right.

14 So, at that point, I'm not sure we could bring him in as  
15 a witness with him pleading the Fifth and just try to use his  
16 statement to impeach him with it solely on that basis.

17 Q Do you believe you could have introduced the statement  
18 through the investigator?

19 A It's hearsay.

20 Q Would Mr. Sterling have been unavailable for trial due to  
21 his pleading the Fifth?

22 A I don't know.

23 Q Assuming Mr. Sterling was unavailable for trial because  
24 he pled the Fifth and the statement was hearsay, did Judge  
25 Goodstein reference the fact that the standard could still be

1 admissible under exception against penal interest?

2 **A** I don't remember.

3 **Q** Show you (indiscernible) transcripts. Feel like we're in  
4 civil court. If you'll start on page 683, line 18, and not  
5 too fast for the court reporter.

6 **A** All right.

7 THE COURT: This is transcript day 3? Go ahead.

8 THE WITNESS: Correct.

9 **A** "Maybe. I don't know that. I know that because they  
10 take the Fifth Amendment, that, in and of itself, doesn't make  
11 them inadmissible and at least one of them I can make a pretty  
12 good argument is admissible. Now -- and then to look for --  
13 to look at the elements for that reason, but when declarants  
14 are unavailable, there are a certain set of hearsay rules that  
15 apply to them, one of which I think is applicable at least to  
16 the one that I looked at for that purpose."

17 **Q** And that was Judge Goodstein; correct? Sorry.

18 **A** Yes.

19 **Q** And she's talking about the standard that the brothers  
20 gave?

21 **A** I assume so, yes.

22 **Q** But at no time did the defense attempt to introduce  
23 Mr. Sterling's statements?

24 **A** If we didn't, then I'll take your word for it. I don't  
25 remember one way or the other.

1 Q And we believe that was hearsay because they would not be  
2 able to testify as they pled the Fifth.

3 A Correct.

4 Q So, for the sake of argument, let's say that statement  
5 could come in.

6 A Okay.

7 Q Would the defense have put it in?

8 A Yes.

9 Q Because there was no other evidence besides  
10 Mr. Haltiwanger's testimony that led to a self-defense charge.

11 A Or a manslaughter charge.

12 Q Or a manslaughter charge.

13 A Correct.

14 Q No further questions, Mr. Sawyer. Please answer any  
15 questions by Attorney General's Office.

16 THE COURT: All right. Mr. Key?

17 CROSS-EXAMINATION

18 BY MR. KEY:

19 Q Mr. Sawyer, I believe you testified that you were lead  
20 counsel on Mr. Haltiwanger's case?

21 A Correct.

22 Q So do you recall how many times you met with  
23 Mr. Haltiwanger?

24 A I don't. I know that, certainly as we led up toward  
25 trial, we were meeting fairly regularly, every couple of weeks

1 to every week. Other than that, as the discovery process was  
2 winding along, we had normally a 90-day visitation rule within  
3 our office; that, if our clients were incarcerated, we had to  
4 see them at least every 90 days. My rule is always, if I was  
5 going to the dorm that Bernard was in, if I had something just  
6 to say to him real quick or he wanted to come over and talk to  
7 me, I was always available.

8 Q Now, do you recall -- I believe you testified Judge  
9 Goodstein did give a self-defense charge to the jury.

10 A Yes.

11 Q Did she also give a manslaughter charge?

12 A I believe so.

13 Q Voluntary manslaughter?

14 A Yes.

15 Q But not an involuntary.

16 A Correct.

17 Q So your defense theory was to present self-defense or the  
18 lesser-included of voluntary manslaughter.

19 A Or involuntary, if we could have gotten the charge. I  
20 mean, negligent -- extreme recklessness, negligence, etc.

21 Q But you got two of the three charges --

22 A Correct.

23 Q -- that your defense was set up for.

24 A Correct.

25 Q Okay. Now, Mr. Sterling took the Fifth, and it was your

1 opinion that he was unavailable to testify at the trial.

2 **A** Correct.

3 **Q** If -- okay. Was there anything in his statement that was  
4 different from Mr. Haltiwanger's version of events?

5 **A** Not substantially but at least it's just someone else  
6 other than my client up there saying, you know, he's the only  
7 one that said it happened the way it did. You know, again, we  
8 try to find other witnesses to substantiate what they were  
9 there, but Mr. Sterling and Mr. Haltiwanger were the only two  
10 that were right next to Mr. Moti when the macing originally  
11 occurred.

12 **Q** But -- and Mr. Sterling is Mr. Haltiwanger's brother.

13 **A** Correct.

14 **Q** And was also charged in this case with accessory after  
15 the fact.

16 **A** Correct.

17 **Q** Do you recall what he was charged for -- why he was  
18 charged?

19 **A** Because they could.

20 **Q** Okay. Do you recall the State's version of events that  
21 happened or the State's theory of the case?

22 **A** I think that the theory of the cases were fairly similar  
23 in the grand scheme of things. It was really about the mens  
24 rea of the case, the intent; whether Bernard, that day, was  
25 just abjectly shooting to shoot or whether he was defending

1     himself or whether he was provoked.

2     **Q**     Okay. Do you recall if there was a video of the events  
3     leading up to the incident?

4     **A**     There was.

5     **Q**     Okay. On that video, did Mr. Haltiwanger speak to anyone  
6     other than the victim and his brother?

7     **A**     You can't hear anything on the video, so I don't know,  
8     obviously, if he actually talked to anyone. It was -- you had  
9     this Mexican restaurant that was a nightclub, you had the  
10    parking lot, and then adjacent to us was a BP station, I want  
11    to say -- or Exxon; I can't remember what it was off the top  
12    of my head. And it was video from the gas station.

13            So you could see the strip of grass that separated the  
14    two, the actions of Moti and Mr. Sterling and Mr. Haltiwanger,  
15    but, you know, you're talking about a camera that's 30 feet  
16    away. You can sort of see their movements around.

17            You do see Mr. Haltiwanger, I believe, wandering around  
18    the gas station fuel tanks, kind of yelling after he got  
19    maced, but that's about all I remember.

20    **Q**     Did the State present a witness that they alleged that he  
21    spoke to on that video?

22    **A**     I believe it was two women that were in a car.

23    **Q**     Markeya Moatley (ph), would that ring a bell?

24    **A**     Sounds right.

25    **Q**     And did she testify at trial?

1     **A**     I believe so.

2     **Q**     Do you recall what she testified to?

3     **A**     I don't. I'd have to look at the transcript again.

4     **Q**     Do you recall if she testified as an eyewitness or --

5     **A**     Again, I can't -- I'd have to review her testimony.

6     She -- I believe she was there at least for the initial  
7     confrontation. I believe she at least heard that or saw that,  
8     but, again, I rely on the transcript more than my memory on  
9     that point.

10    **Q**     Okay. So if it's in the transcript that she testified  
11    Mr. Haltiwanger spoke to her, the record would reflect that.

12    **A**     Sure.

13    **Q**     Now, when the officer testified that the co-defendant  
14    said something, you made a motion for a mistrial; correct?

15    **A**     Correct.

16    **Q**     And there was argument on that issue before Judge  
17    Goodstein.

18    **A**     Correct.

19    **Q**     And she wanted the night to think over her ruling.

20    **A**     Sure.

21    **Q**     And then, the next day, she denied the motion.

22    **A**     Correct.

23    **Q**     So you objected to the officer's testimony, ruled for a  
24    mistrial -- or moved for a mistrial, and that was denied;  
25    correct?

1     **A**     Correct.

2     **Q**     And what was your basis for moving for a mistrial?

3     **A**     Because he was unavailable -- Mr. Sterling would have  
4     been an unavailable witness at that point. The police officer  
5     was essentially bringing in -- cherry-picking his testimony,  
6     what he wanted to bring in, without us having a meaningful  
7     opportunity to cross-examine Mr. Sterling about what his  
8     testimony actually was.

9     **Q**     And you raised that objection to the trial court.

10    **A**     Correct.

11    **Q**     And the Court ruled on it.

12    **A**     Correct.

13    **Q**     Did -- in your meetings with Mr. Haltiwanger, did he ever  
14    claim that he was not the shooter?

15    **A**     I will tell you that, normally when I represent clients  
16    for serious crimes like that, we talk about the discovery.  
17    Because I might have to have him testify, I normally -- we  
18    talk about the context of the discovery. I don't necessarily  
19    have them tell me the exact fact pattern that they're going to  
20    testify to. It just allows us to be a little more open, and  
21    that, if he tells me one thing and something else comes up  
22    later, I'm not put in a position to sworn perjury,  
23    essentially.

24            So when -- my conversations with Bernard were, you know,  
25    I think this is our best strategy based on the totality of the

1 evidence, and I think everyone kind of agreed with that.

2 Q And so you came up with the strategy to just air it out  
3 that Mr. Haltiwanger shot the victim in this case?

4 A Yes.

5 Q And you had a reason for doing that. What was your  
6 reason?

7 A Again, it was a tough case. We just thought that the  
8 prosecution was going to assume we were going to blame the  
9 non-testifying co-defendants. We thought that by going  
10 forward with a mens rea argument that we had a better  
11 opportunity to try to secure the lesser-included or actually  
12 have him acquitted on self-defense. And so we decided to, for  
13 lack of a better term, start out by trying to put the  
14 prosecution on their heels a little bit in going a different  
15 direction than they assumed we would.

16 Q Do you recall why you didn't pursue an immunity hearing  
17 in this case?

18 A I don't. If -- I don't. I honestly don't.

19 Q From Mr. Haltiwanger's version of events, the security  
20 guard had ejected him from the premises?

21 A Correct.

22 Q Okay. And then from Mr. Haltiwanger's version of events,  
23 he also went back onto the premises to get into his car.

24 A Correct.

25 Q But you did present the self-defense theory.

1     **A**     Correct.

2     **Q**     Okay. And Mr. Haltiwanger testified that he feared for  
3     his life.

4     **A**     That's correct.

5     **Q**     Okay. And he testified that the victim jumped off of the  
6     porch and was charging him with what he thought was a gun.

7     **A**     Correct.

8     **Q**     And a self-defense charge was given.

9     **A**     Correct.

10    **Q**     Back to Mr. Sterling's statement, was that really a  
11    statement against his interests?

12    **A**     I don't know.

13    **Q**     He said he did not see who the shooter was. He heard who  
14    the shooter was; correct? Or have you seen the statement?

15    **A**     I mean, I'm looking at what the statement is right here.  
16    He did say that he heard the gunshots, I believe.

17           MR. KEY: No further questions.

18           THE COURT: Redirect?

19           MR. LEONARD: Nothing further, Your Honor.

20           THE COURT: All right. Thank you, sir. You may step  
21    down.

22           You got another witness?

23           MR. LEONARD: No other witness, Your Honor.

24           THE COURT: All right. Let's go ahead and take a break.

25           You rest after he rests?

1 MR. LEONARD: We rest.

2 THE COURT: The applicant rests. Let's take a recess.  
3 We'll reconvene in about 15 minutes.

4 (A brief recess was taken.)

5 MR. LEONARD: Your Honor, I wasn't sure if you wanted a  
6 short closing.

7 THE COURT: Yeah, we're going to do that in a moment.  
8 But anything else, Mr. Leonard? I think you had indicated  
9 that the applicant rested; is that correct?

10 MR. LEONARD: We rest, Your Honor.

11 THE COURT: All right. The applicant has rested.  
12 Anything to provide from the State?

13 MR. KEY: Nothing from the State, Your Honor.

14 THE COURT: All right. The State rests.  
15 Let me hear argument.

16 CLOSING ARGUMENT ON BEHALF OF THE APPLICANT

17 MR. LEONARD: Thank you, Your Honor. May it please the  
18 Court.

19 THE COURT: Yes, sir.

20 MR. LEONARD: The case from Mr. Haltiwanger is fairly  
21 simple. This was a self-defense, possibly manslaughter theory  
22 of the case, but the only evidence that the jury gets to hear  
23 from is Mr. Haltiwanger, who, while did a great job on  
24 testimony as both the defendant and given a previous  
25 inconsistent statement, the jury did not have much of anything

1 to rest any belief on self-defense anywhere in this case,  
2 which is why it's crucial that the statement of Jonathan  
3 Sterling came in.

4 Now, I agree it would have been best to have Jonathan  
5 testify, but he was charged with the same or accessory as  
6 Mr. Haltiwanger was, and his attorney, much like I would have  
7 done, told him to plead the Fifth. So he was unavailable for  
8 trial. However, his statement was not. And, Your Honor, I  
9 have given two cases to the Attorney General's Office, if I  
10 may give them to you.

11 The law is clear. These are both 2000 Supreme Court  
12 cases here in South Carolina. Pleading the Fifth makes one  
13 unavailable for purposes of hearsay. Judge Goodstein notes  
14 that in the trial. So then we look to what other exceptions  
15 to hearsay would Mr. Sterling's statement gone under, and  
16 Judge Goodstein notes that she can make a good argument  
17 against penal interest because, first of all, he is being  
18 charged with this murder so we know that there is some risk  
19 from any statement he gives, but he also admits to punching  
20 the victim in the face in this case at the exact time before  
21 he shot and killed him. So, clearly, this is a statement that  
22 is not in Jonathan's best interest.

23 I have spoken to criminal liability. He is unavailable  
24 for hearsay purposes. And this statement comes in under Rule  
25 804(b)(3). He's unavailable per 804(a)(1), and 804(b)(3) is

1 an exception that would let the statement in. And this is  
2 very important because the statement has already come in  
3 effectively but only for the State. The investigator  
4 testifies that all his brothers gave statements and they all  
5 implicated Haltiwanger as the shooter. That's when the motion  
6 for mistrial comes up. That's when Judge Goodstein shuts down  
7 court for the day because the defense has no opportunity, it  
8 believes, to put that statement that the investigator made  
9 into context.

10 What Mr. Sawyer testified was the jury now heard that the  
11 brother gave a statement that implicated Haltiwanger as the  
12 shooter, and that's it. But Mr. Sawyer could have put that  
13 statement in through that very same officer. He's the one who  
14 took his statement. There's a hearsay exception that would  
15 allow that statement to come in, which would have been crucial  
16 that both gives context to the investigator's comment that the  
17 brother has implicated Mr. Haltiwanger, but also something for  
18 the jury to hear a self-defense story from somebody other than  
19 the defendant.

20 The time that the statement was made by Mr. Sterling  
21 would have been prior to any chance that he or his brother had  
22 to offer those stories. I don't want to say it's cohesive  
23 (ph) proof; surely, the Attorney General's Office noted that  
24 they are brothers and there's always the brother's keeper  
25 defense, but it would have been credibility, given the fact

1 that there's no way the two brothers could have came up with  
2 the story prior to Mr. Sterling giving that statement to the  
3 police.

4 So that is crucial. We believe that satisfies the  
5 defect. Mr. Sawyer testified that -- and I think, you know,  
6 he's a great attorney. I think he even taught in my criminal  
7 clinic when I was in law school, but I think he believed that,  
8 because Mr. Sterling pled the Fifth, that statement can't come  
9 in. And that's just wrong, Your Honor.

10 And Judge Goodstein mentions that, that just because  
11 somebody pleads the Fifth does not mean any hearsay is  
12 inadmissible and there are exceptions. And that, in the  
13 transcript, she says I can make a good case for admissibility  
14 on Mr. Sterling's statement.

15 So we have, I believe, ineffective assistance of  
16 performance by the defense attorney. That's prong one. He  
17 didn't know that he could introduce that statement. He said  
18 he would have if he could have.

19 The second is prejudice, Your Honor. This is a  
20 self-defense case. Mens rea is the entire angle from both  
21 sides. Everybody agrees on multiple facts. So something for  
22 the jury to hang their hat on. What was going through  
23 Mr. Haltiwanger's mind at the time of the shooting is crucial  
24 to this case. It would have given the jury something to go  
25 back on.

1           Just to clean up the record a little bit, Mr. Sawyer also  
2 admits that he did not ask for a stand-your-ground hearing  
3 prior to the beginning of the trial. Didn't ask for the  
4 charge at the end. We believe that was a mistake. That was  
5 denied. The timeline, a new hearing has to come back the  
6 trial, (indiscernible) dating back to 2013.

7           Prejudice is a little tougher because we don't know for  
8 certain whether or not Judge Goodstein would grant immunity,  
9 but, obviously, the risk would have made the hearing  
10 important.

11           On those two grounds, we find or we would ask the Court  
12 to find there was insufficient performance in  
13 Mr. Haltiwanger's trial and grant him leave of having a new  
14 trial.

15           THE COURT: Thank you, sir.

16           All right. What's the State's position?

17                       CLOSING ARGUMENT ON BEHALF OF THE STATE

18           MR. KEY: Your Honor, I'm going to go in reverse order.  
19 On the failure to request for a stand-your-ground hearing,  
20 Mr. Haltiwanger's own testimony today and at trial shows that  
21 he was not lawfully in a place he was allowed to be. He said  
22 he was ejected from the premises by the security guard. He  
23 was at the Exxon, yet he reentered the premises without  
24 permission. So that alone, I believe, defeats the first  
25 element of the stand your ground Protection of Persons and

1 Property Act.

2 Second, there's case law that states that the Protection  
3 of Persons and Property Act is for a grant of immunity and it  
4 has self-defense in the act, but the immunity protections and  
5 property language is not to be charged to the jury. Just the  
6 regular self-defense charge should apply. So the trial court  
7 was proper in denying that motion to charge the Protections of  
8 Persons and Property Act language.

9 As for Mr. Sterling's testimony, first, Judge Goodstein  
10 found that the officer's testimony did not prejudice  
11 Mr. Haltiwanger. On page 689 of the trial transcript, she  
12 says, "I am not concerned because that is the position of the  
13 defense, so I respectfully deny your motion" that his brothers  
14 implicated him as the shooter. As we heard today, the defense  
15 strategy was self-defense after going over all the discovery  
16 with Mr. Haltiwanger that they took the position that he was  
17 the shooter to either throw the State off of their theory of  
18 the case or what the State thought their theory of the case  
19 would be and that gives credibility to their defense instead  
20 of trying to shift the blame and say their theory of  
21 self-defense, which they came up with, is better supported by  
22 just coming out and saying, "Yes, he is the one who shot him."

23 And it's not who shot the victim, it's why they shot the  
24 victim, was the question for the jury. The jury found that he  
25 was not acting in self-defense and convicted him of murder.

1           For Mr. Sterling's statement to corroborate  
2 Mr. Haltiwanger's statement, Mr. Haltiwanger's testimony, he  
3 is the only person who testified in the defense; however,  
4 during his testimony, defense counsel questioned him as to the  
5 gas station video of the events that Jonathan Sterling  
6 testified to. Jonathan Sterling did not say he saw the  
7 shooting. He said he heard the shooting. He says that he hit  
8 the security guard after his brother was maced, and then when  
9 he realized the security guard pulled a gun on him, he fell  
10 down. Mr. Haltiwanger testified to that and it's shown on the  
11 video -- and he points out and he says, "There. That's  
12 Jonathan falling down because the officer pulled a gun on  
13 him."

14           So that would be the State's position on the statement  
15 issue; however, I would request more time to research whether  
16 it falls within 804(b)(3), a statement against interest  
17 because it is a statement against his interest or it is not a  
18 statement against his interest because he does not ever  
19 testify to seeing about the shooting. It's about after the  
20 fact and what was said between him and his other brother when  
21 they took the car to Mr. Haltiwanger's other house.

22           So that would be the State's position.

23           THE COURT: All right. Anything in reply briefly?

24           MR. LEONARD: Very briefly, Your Honor. Obviously, we're  
25 not arguing that the immunity hearing charge denial was

1 ineffective. It was the fact that it was asked for at the  
2 charge stage and not (indiscernible). Judge Goodstein was  
3 very concerned with the prejudice resulting from the  
4 investigator's mentioning that the statements. She was not to  
5 the point of mistrial, and that's -- that's the extreme remedy  
6 that the defense was asking for. But she was very concerned  
7 and it was a close call. So to say she was not concerned  
8 about the statement and that she denied the motion is not  
9 accurate.

10 And then, finally, the statement is against  
11 Mr. Sterling -- is against (indiscernible). It doesn't have  
12 to be against the murder conviction. He clearly puts himself  
13 at the mercy by confronting the victim as well as later  
14 events. And that statement gives rise to the very fact that  
15 he started the accessory, so we would argue that is the  
16 exception to the hearsay.

17 THE COURT: All right. Thank you.

18 Counsel, obviously, I need to take this matter under  
19 advisement. I have a lot of stuff to read, and I've got to go  
20 over it and discuss the case law you handed up. To that end,  
21 I mean, if either one of you want to submit anything else in  
22 response to the evidence today or in furtherance of your  
23 argument, do so within the next ten days. I don't let these  
24 things sit, you know. Both sides have waited very patiently  
25 through this day and both sides are frustrated. Okay? I'm

1 sure the victim's family is here -- I don't know where they  
2 are, but I know they're probably -- there they go. They're  
3 probably frustrated as well, just like your client is  
4 frustrated. They don't want this thing to sit any longer. So  
5 I try to make these decisions just as soon as possible so  
6 everybody can know -- everybody knows where they are.

7 Okay. So ten days, submit anything additionally, but I  
8 intend to rule within the next couple of weeks. Okay? Thank  
9 you very much. That concludes the hearing in this case.

10 (The above hearing concluded.)  
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## 1 CERTIFICATE OF TRANSCRIBER

2 CASE/NO.: Gerald Haltiwanger v. The State

3 2017-CP-40-01784

4 DATE OF PROCEEDING: October 28, 2019

5  
6 I, Bobbi J. Fisher, do hereby certify that the  
7 foregoing transcript is a true and correct record of the  
8 recorded proceedings; that said proceedings were **transcribed**  
9 **to the best of my ability from the audio recording** and  
10 supporting information; and that I am neither counsel for,  
11 related to, nor employed by any of the parties to this case,  
12 and I have no interest, financial or otherwise, in its  
13 outcome.

14  
15 

16  
17 \_\_\_\_\_  
18 Bobbi J. Fisher, RPR, CET

19 NCRA Registered Professional Reporter (RPR)

20 AAERT Certified Electronic Transcriber No. CET-1148

21 Prepared: May 17, 2020  
22  
23  
24  
25

# RICHLAND COUNTY SHERIFF'S DEPARTMENT

## INTERROGATION: ADVICE OF RIGHTS

NAME: Jonathan Sterling PLACE: RCSD  
 OFFICER/SE: Jordan  
 DATE: 8/30/12 TIME: 1424

### YOUR RIGHTS

- JS ✓ Before we ask you any questions you must understand your rights.
- JS ✓ You have the right to remain silent.
- JS ✓ Anything you say can be used against in court.
- JS ✓ You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during any questioning..
- JS ✓ If you cannot afford a lawyer one will be appointed for you before any questioning if you wish.
- JS ✓ If you decide to answer questions now without a lawyer present you still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WITNESS: [Signature]

SIGNED: [Signature]

WITNESS: \_\_\_\_\_

### WAIVER OF RIGHTS

- JS ✓ I have read this statement of my rights and understand what my rights are. I am willing to talk and answer questions. I understand and know what I am doing. No promises have been made to me and no pressure or coercion of any kind has been used against me.

WITNESS: [Signature]

SIGNED: [Signature]

WITNESS: \_\_\_\_\_

RSOP TWO NOTCH ROAD COLUMBIA SC 29007  
 TELEPHONE: 803-737-6100  
 WEBSITE: [www.rcsd.net](http://www.rcsd.net)



## Statement of

Jonathan Sterling  
1017 Weston Rd  
Hopkins SC 29061  
803-297-4279

Made at

Columbia, South Carolina, this 30 day of August, 2012, at 1700 hours, in the presence of  
Inv. Jordan of the Richland County Sheriff's Department.

I, Jonathan Sterling, understand that I have the right to remain silent. Anything I say can be used against me in court. I have the right to talk to a lawyer for advice before you ask me any questions, and to have a lawyer with me during any questioning. If I cannot afford a lawyer, one will be appointed for me before any questioning, if I wish. If I decide to answer questions now, without a lawyer present, I still have the right to stop answering at any time. I also have the right to stop answering at any time until I talk to a lawyer.

Do make the following statement:

Q: Inv. Jordan

A: Jonathan Sterling

Q: Were you at El Toro Mexican restaurant on 08/25/12?

A: Yes

Q: Who were you there with?

A: Myself and Tyrobe.

Q: How did you and Tyrobe get to El Toro's?

A: In my car.

Q: What kind of car do you have?

A: A Crown Victoria.

Q: What color is the Crown Victoria?

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

Witness: [Signature]Signed: [Signature]

Witness: \_\_\_\_\_

This is to certify that I have read or have read to me the foregoing statement consisting of \_\_\_\_ pages and a true copy has been given to me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Sworn to and subscribed before me  
 This \_\_\_\_ day of \_\_\_\_\_, 20\_\_

Signed: [Signature]

Notary Public for South Carolina  
 My commission expires \_\_\_\_\_

A: White.

Q: What wear you wearing on 08/25/12 at El Toro's?

A: Brown shorts, white shirt and a pair of Adidas.

Q: Did the white shirt you have on have anything on it?

A: Yes, a black logo on the back.

Q: What was the logo?

A: It was a design that said BAM FAM.

Q: What color was the Adidas you were wearing?

A: Red.

Q: What was Tyrobe wearing on 08/25/12?

A: I know he had on a black shirt but i'm not sure about his pants.

Q: Did the black shirt have anything written on it?

A: Not that I can recall.

Q: Did you see anyone else at El Toro's on 08/25/12 that you recognized?

A: Yes my brother.

Q: What is your brother's name that you saw at El Toro's on 08/25/12?

A: Gerald.

Q: What was Gerald wearing?

A: He had on some shorts. Not sure about the other clothing.

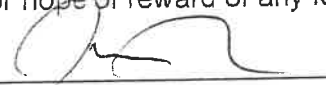
Q: What color wearing the shorts Gerald had on?

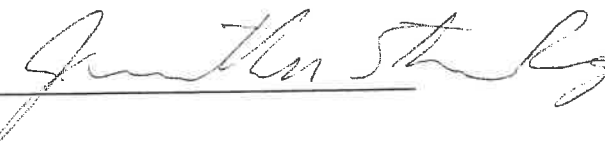
A: I can't remember.

Q: Did you plan to meet Gerald at El Toro's on 08/25/12?

A: Yes

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

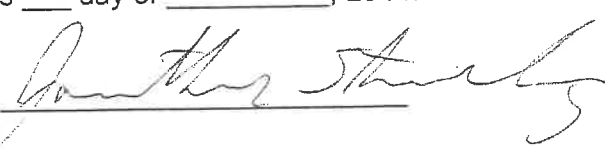
Witness: 

Signed: 

Witness: \_\_\_\_\_

This is to certify that I have read or have read to me the foregoing statement consisting of \_\_\_\_ pages and a true copy has been given to me this \_\_\_\_ day of \_\_\_\_\_, 2011.

Sworn to and subscribed before me  
This \_\_\_\_ day of \_\_\_\_\_, 2011

Signed: 

Notary Public for South Carolina  
My commission expires \_\_\_\_\_.

Q: Did you see Terrell at El Toro's on 08/25/12?

A: No.

Q: When you saw Gerald at El Toro's, where were you?

A: I sitting in my car.

Q: When you saw Gerald, what he doing?

A: He was walking off from the security guard talking while the security guard was spraying him with mace. I got out my car and ran over to where they were. The security guard was still macing Gerald when I ran up to them and I hit the security guard in his face.

Q: What did you hit the security guard with?

A: My fist.

Q: How many times did you hit the security guard?

A: One time.

Q: When you hit the security guard what did he do?

A: His head turned from the hit and he put the mace up and drew what I thought was a taser then I realized it was a gun.

Q: When you realized it was a gun what did you do?

A: I was already backing up when I thought he was pulling out his taser and I realized it was a gun. As I was backing up I fell to the ground in Exxon gas station parking lot.

Q: After you fell down what did you do?

A: I jumped up and I tried to back up a little bit more. The security guard was saying "I SHOULD SHOT YOUR MUTHAFUCKIN ASS!" "I WILL SHOOT YOUR ASS IF YOU COME BACK ON THIS PROPERTY!"

Q: What did you do after the security guard said that?

A: I stood there and waited until he walked off and then I walked back to my car.

Q: When you got back to your car were you alone?

A: Tyrobe was coming so I waited on him to get in.

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

Witness: \_\_\_\_\_

Signed: \_\_\_\_\_

Witness: \_\_\_\_\_

This is to certify that I have read or have read to me the foregoing statement consisting of \_\_\_\_ pages and a true copy has been given to me this \_\_\_\_ day of \_\_\_\_\_, 2011.

Sworn to and subscribed before me  
This \_\_\_\_ day of \_\_\_\_\_, 2011

Signed: \_\_\_\_\_

Notary Public for South Carolina  
My commission expires \_\_\_\_\_

Q: Once Tyrobe got in the car what did you two do?

A: We pulled out and stopped at the front entrance. I said "I FORGOT MY HAT ON THE GROUND!" I backed up and turned to go back to where I dropped my hat and it wasn't on the ground. I circled around and before I could get to the entrance I heard gunshots.

Q: How many gunshots did you hear?

A: I'm not sure.

Q: Did you see where the gunshots were coming from?

A: No sir.

Q: Where did you and Tyrobe go after leaving El Toro on 08/25/12?

A: We went to Club XO.

Q: Did anyone meet you and Tyrobe there?

A: No Gerald and some other dudes were already out there.

Q: How long did you stay at Club XO?

A: Not long. Maybe two hours before a female came and picked me up. Tyrobe drove my car from the club.

Q: When did you get your car from Tyrobe?

A: Sunday morning.

Q: Where did you meet Tyrobe to get your car?

A: Allen Benedict Court.

Q: Who was there with Tyrobe?

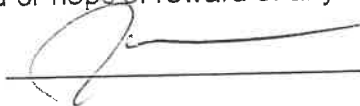
A: Gerald, Tyrobe and myself.

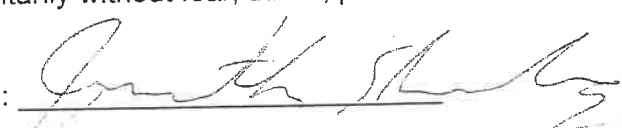
Q: What did you three do that day?

A: I followed Tyrobe to Bluff Rd to drop a car off.

Q: What kind of car was Tyrobe driving?

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

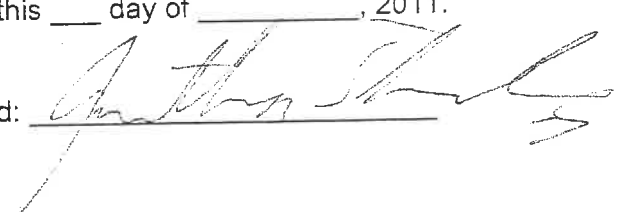
Witness: 

Signed: 

Witness: \_\_\_\_\_

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Sworn to and subscribed before me  
This \_\_\_\_ day of \_\_\_\_\_, 2011

Signed: 

Notary Public for South Carolina  
My commission expires \_\_\_\_\_.

A: A black car, I think is a Crown Victoria with rims.

Q: Who does that car that Tyrobe took to Bluff Rd belong to?

A: Gerald.

Q: Do you know why Tyrobe took that car to Bluff Rd.?

A: To put the car up because that car was involved in the shooting at El Toro's on 08/25/12.

Q: Where on Bluff Rd did Tyrobe take the car?

A: A female named Taquandra's house.

Q: Did you and Tyrobe talk about the shooting on the way back from Taquandra's house?

A: Yes.

Q: What was said?

A: Tyrobe said "BRUH MUST HAVE SHOT THAT MAN!"

Q: What man was Tyrobe referring to?

A: The security guard at El Toro.

Q: Where did you and Tyrobe go after leaving Taquandra's house?

A: To his sister's house.

Q: Did you talk to Gerald about the shooting?

A: No.

Q: Does Gerald have another name?

A: Yes Bernard.

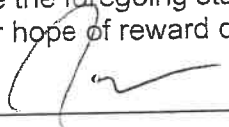
Q: Is Gerald and Bernard the same person?

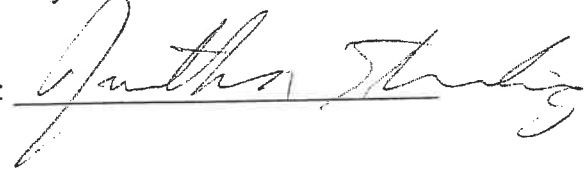
A: Yes.

Q: Is there anything else you want to add to this statement?

A: I'm sorry for what happened and for the family that lost their loved one.

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

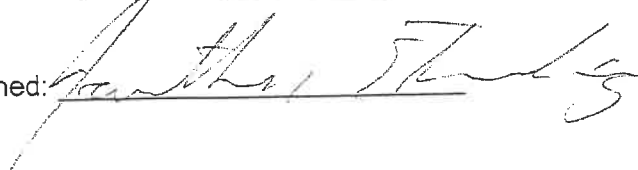
Witness: 

Signed: 

Witness: \_\_\_\_\_

This is to certify that I have read or have read to me the foregoing statement consisting of \_\_\_\_ pages and a true copy has been given to me this \_\_\_\_ day of \_\_\_\_\_, 2011.

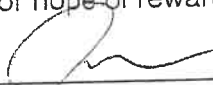
Sworn to and subscribed before me  
This \_\_\_\_ day of \_\_\_\_\_, 2011

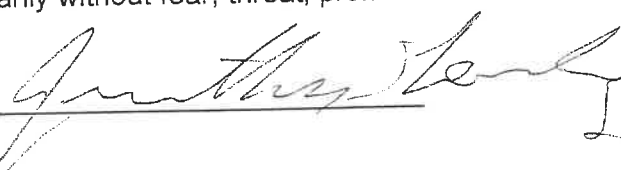
Signed: 

\_\_\_\_\_  
Notary Public for South Carolina  
My commission expires \_\_\_\_\_

Q: Is this statement the truth and the whole truth?  
A: Yes.

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

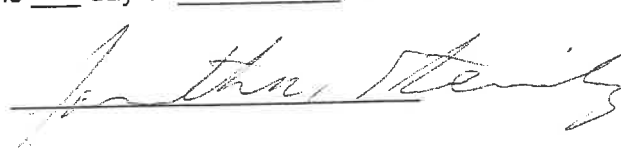
Witness: 

Signed: 

Witness: \_\_\_\_\_

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Sworn to and subscribed before me  
This \_\_\_\_ day of \_\_\_\_\_, 2011

Signed: 

\_\_\_\_\_  
Notary Public for South Carolina  
My commission expires \_\_\_\_\_.

## Interview

Witness: Jonathan Sterling (aka Trouble)

Date: May 6, 2013

Time: 12:48 pm

Phone Interview: 803.297.2290

I asked Jonathan what happened the night of the shooting at Eltoros? Jonathan stated that he and his brothers were going inside the club and he noticed a bouncer walking behind Gerald pointing a gun at him cursing. He said he went over there to see what was going on. Then the bouncer maced Gerald. That's when Jonathan ran and punched the bouncer. Jonathan said that the bouncer pointed the gun and said that "I should shoot all yall mother fuckers." He said that he went back to his car that was parked in the back club. The white car. He and Tyrobeya got in the car. He said he backed up to pick up his hat that was on the grounds and that's when he heard three gun shots. They rode by the front of the club, took a right on St. Andrews road and went to a strip club. He stated that he was in the car with Tyrobya and Terrell Vaugh was in the car with Gerald.



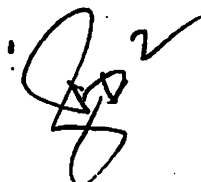


At the close of argument on the issues presented to the Court, Applicant provided the Court *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000), and *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), in support of his position on the Rule 804(b)(3) issue. The State requested leave to research and respond to the Rule 804(b)(3) issue because the issue was not specified until the evidentiary hearing. This Court granted the State and Applicant ten days to provide the Court with any additional information supporting each parties' respective position. After reviewing Applicant's proposed order granting relief, the State's memorandum in support of denying relief, the entire record, and the testimony presented, this Court finds Applicant has failed to establish any constitutional deprivations that would entitle Applicant to relief.

#### I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In his original PCR application, Applicant presented two different sets of charges and sentences for consideration.

First, in December 2009, Applicant waived presentment to the grand jury for the charge of assault and battery of a high and aggravated nature (2009-GS-40-8567). Applicant further waived presentment to the grand jury on criminal domestic violence of a high and aggravated nature (2009-GS-40-2678) and criminal domestic violence, first offense (2009-GS-40-11882). Laura Kris Hines, Esquire, represented Applicant. Assistant Solicitor Sasquisha Octavia Tobin prosecuted the case. On January 7, 2010, Applicant pleaded <sup>✓</sup>guilty as indicted to assault and battery of a high and aggravated nature and criminal domestic violence, first offense and to the lesser included charge of criminal domestic violence, first offense before the Honorable J. Michelle Childs. Judge Childs sentenced Applicant to imprisonment for time served for both criminal domestic violence counts and six years for assault and battery of a high and aggravated nature provided that upon the service



of one year, the balance is suspended with probation for two years. Applicant did not appeal his conviction or sentence.

Additionally, in October 2012, the Richland County Grand Jury indicted Applicant for murder (2012-GS-40-05298). Mark Sawyer, Alicia Dyer Goode, and Patrick Sharpe, Esquires, represented Applicant. Luck Campbell, Megan Walker, and Sandra Vriesinga prosecuted the case. On November 12-18, 2013, Applicant proceeded to trial before the Honorable Diane Schafer Goodstein. The jury found Applicant guilty as indicted. Judge Goodstein sentenced Applicant to life imprisonment. Applicant appealed.

Chief Appellate Defender Robert Michael Dudek and Heather Vry Scalzo, Esquire, perfected the appeal. The Court of Appeals affirmed Applicant's conviction on April 13, 2016. *State v. Haliwanger*, Op. No. 2016-UP-175 (S.C. Ct. App. filed April 13, 2016). The remittitur was returned to the circuit court on May 11, 2016.

Applicant untimely challenged his January 2010 guilty plea but timely challenged his November 2013 jury trial by commencing this PCR action on March 24, 2017.

## II. Issues Presented at the Evidentiary Hearing

1. Whether trial counsel was ineffective for failing to introduce Jonathan Sterling's statement made to law enforcement regarding the incident as a statement against interest pursuant to Rule 804(b)(3), SCRE; and
2. Whether trial counsel was ineffective for failing to seek pretrial immunity pursuant to the Protections of Parsons and Property Act, when trial counsel sought a jury instruction on immunity under the Act during the charge conference.

The State moved to dismiss all allegations not supported by evidence and testimony introduced at the evidentiary hearing. Specifically, the State argued Applicant's allegations regarding his 2010 guilty plea are additionally barred by the statute of limitations for PCR actions. Because the allegations regarding Applicant's guilty plea are untimely, and because no evidence

was presented in support of those claims at the evidentiary hearing, the Court grants the State's motion and dismisses those allegations with prejudice.

### III. Discussion<sup>8</sup>

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the evidence and witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Applicant alleges (1) trial counsel was ineffective for failing to introduce Jonathan Sterling's statement made to law enforcement regarding the incident as a statement against interest pursuant to Rule 804(b)(3), SCRE; and (2) trial counsel was ineffective for failing to seek pretrial immunity pursuant to the Protections of Persons and Property Act, where trial counsel sought a jury instruction on immunity under the Act during the charge conference.

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

*Strickland* requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.<sup>8</sup> *Strickland*, 466 U.S. at 688-689.



"Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

As discussed below, Applicant's allegations of ineffective assistance of trial counsel regarding his November 2013 jury trial are without merit. Therefore, these allegations are denied and dismissed with prejudice because Applicant failed to meet his burden under *Strickland*.

#### 1. Statement against interest

Applicant alleges trial counsel was ineffective for failing to introduce Jonathan Sterling's statement made to law enforcement regarding the incident as a statement against interest pursuant to Rule 804(b)(3), SCRE. The Court disagrees.

Rule 804, SCRE, provides exceptions to the rule against hearsay when the declarant is unavailable as a witness. It is undisputed Sterling was unavailable because he invoked his Fifth Amendment right to silence. *See State v. McDonald*, 343 S.C. 319, 323, 540 S.E.2d 464, 460 (2000) ("A witness who invokes his Fifth Amendment right to silence is unavailable for hearsay

purposes.”). Therefore, the issue here is whether Sterling’s out of court statement falls within an exception under Rule 804.

When the declarant is unavailable as a witness, the declarant’s prior statement may be admissible as a statement against the declarant’s interest. Rule 804(b)(3), SCRE. A statement against interest is:

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. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Rule 804(b)(3), SCRE. However, “[S]uch statements must meet the strict requirements of Rule 804(b)(3).” *State v. Fuller*, 337 S.C. 236, 245, 523 S.E.2d 168, 172 (1999).

In *State v. Fuller*, our Supreme Court was asked, among other things, to determine “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.” 337 S.C. at 243–44, 523 S.E.2d at 172. The *Fuller* court held such statements are inadmissible. *Id.* at 244, 523 S.E.2d at 172. Similarly, in *State v. Holmes*, our Supreme Court reaffirmed *Fuller* and stressed the Rule 804(b)(3) is to be applied “very narrowly to only those portions of a hearsay statement which are plainly self-inculpatory.” 342 S.C. 113, 117, 536 S.E.2d 671, 673 (2000) (emphasis added).

Here, trial counsel was not constitutionally ineffective for failing to introduce Sterling’s out of court statement because, as a matter of law, Sterling’s entire statement was not admissible as a statement against interest. The portions of the statement Applicant relies on as exculpatory

evidence corroborating his self-defense claim are hearsay and hearsay within hearsay, and those portions do not qualify as an exception to hearsay under Rule 804(b)(3). The Court further finds the potentially admissible portions of Sterling's statement add little, if anything, to corroborate Applicant's version of events and advance his defense.

Applicant asserts trial counsel should have entered Sterling's entire statement through the investigator who testified that Sterling implicated Applicant as the shooter to put the investigator's statement into context. Applicant contends Sterling's entire statement was admissible as a statement against interest under Rule 804(b)(3), and trial counsel should have attempted such strategy rather than moving for a mistrial. However, Applicant's reliance on Rule 804(b)(3) in asserting Sterling's entire statement was admissible as a statement against interest is misplaced. As a matter of law, only the plainly self-inculpatory portions within Sterling's statement were admissible. *See Holmes*, 342 S.C. at 117, 536 S.E.2d at 673 (stating Rule 804(b)(3) is applied "very narrowly to only those portions of a hearsay statement which are plainly self-inculpatory").

Sterling's plainly self-inculpatory statements are summarized as follows:

- a) He hit the security guard one time;
- b) He hit the security guard with his fist; and
- c) He followed Tyrobe, who was driving Applicant's car to Bluff Road to "put the car up because that car was involved in the shooting at El Toro's on [August 25, 2012]."

The remaining portions of Sterling's statement are collateral to his self-inculpatory statements; therefore, the remaining statements are inadmissible hearsay. *See Fuller*, 337 S.C. at 244, 523 S.E.2d at 172 (finding non-self-inculpatory statements which are made collateral to self-inculpatory statements are inadmissible).

First, Sterling's statement he hit Moti, the security guard, in the face because Moti was macing Applicant is not plainly self-inculpatory because the statement offers a defense of others defense for himself. As such, the statement is not plainly self-inculpatory and is inadmissible

hearsay. *See State v. Young*, 420 S.C. 608, 619–20, 803 S.E.2d 888, 894 (2017) (stating blame-spreading remarks should not be presented to the jury because attempts to absolve blame and other self-serving statements do not qualify as statements against penal interest).

Further, Sterling's statements regarding Moti's exclamations, "I SHOULD SHO[O]T YOUR MOTHERFUCKIN ASS!" and "I WILL SHOOT YOUR ASS IF YOU COME BACK ON THIS PROPERTY!" are also inadmissible non-self-inculpatory statements. Had Sterling been available to testify, these statements were potentially admissible as excited utterances. However, Sterling was unavailable, making Moti's exclamations hearsay within hearsay. Rule 804(b) does not provide an exception for this situation; therefore, the statements constitute inadmissible hearsay within hearsay. *See* Rule 805, SCRE ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."). Sterling's own statements to law enforcement were not excited utterances but merely statements relaying Moti's excited utterances. Therefore, trial counsel was not deficient for seeking to introduce Sterling's entire statement because the entire statement contained inadmissible hearsay and only Sterling's self-inculpatory statements within the entire statement were potentially admissible.

The potentially admissible portions of Sterling's statement do little, if anything, to aid Applicant's theory of self-defense. Arguably, an attempt to introduce the admissible portions of Sterling's statement would have been deficient as Sterling admitted he helped hide Applicant's car because the car was involved in the shooting. Therefore, trial counsel was not deficient for failing to introduce even the potentially admissible portions of Sterling's statement.

Applicant's assertion he was prejudiced by trial counsel's alleged failure to introduce Sterling's statement because the jury only had Applicant's testimony to consider in deciding

whether Applicant acted in self-defense is without merit. The transcript shows Applicant attempted to corroborate his testimony by explaining what the gas station video portrayed. (Tr. 760–67). Marquita Mobley and Kristina Nuttry both testified “the guy with the dreads” (Sterling) punched Moti. (Tr. 303; 581–82). Nuttry testified Moti pulled his gun out after being punched. (Tr. 582). Mobley and Nuttry also both saw Applicant and Moti arguing. (Tr. 294; 590). Another witness, Lamar Ray, testified as follows: Moti maced Applicant; Sterling punched Moti; Moti pulled his gun and then Sterling fell; Moti was telling Applicant to “go on, leave;” and Moti was standing outside El Toro’s door when he was shot. (Tr. 320; 323–25; 354; 325). The above-referenced testimony by Mobley, Nuttry, and Ray corroborate most of Applicant’s testimony. As such, Applicant’s testimony was not the only evidence presented for the jury to consider in deciding Applicant’s self-defense claim—the majority of his version of events were corroborated by other witnesses and the gas station video. Therefore, Applicant was not prejudiced by trial counsel’s alleged failure to introduce the admissible portions of Sterling’s statement, as those portions were cumulative to other evidence.

Further, trial counsel was not deficient for failing to seek to introduce Sterling’s statement to put Investigator Lindler’s testimony that Sterling implicated Applicant as the shooter, because trial counsel objected to and moved for a mistrial in response to the statement. (Tr. 676–77). As explained above, only the self-inculpatory portions within Sterling’s statements were potentially admissible as statements against interest. Sterling stated he and his brother Tyrobe talked about the shooting, and Tyrobe said “BRUH MUST HAVE SHOT THAT MAN!” This statement by Sterling is not a statement against his interest, and, therefore, is inadmissible under Rule 804(b)(3). The introduction of the entire statement to give context to Lindler’s statement goes beyond the reasoning for Rule 804(b)(3), as our courts have repeatedly held the rule is to be applied “very

narrowly to only those portions of a hearsay statement which are plainly self-inculpatory.” *Young*, 420 S.C. at 619, 803 S.E.2d at 894. As with Moti’s exclamation, this statement is hearsay within hearsay, and Tyrobe’s words could be an excited utterance or present sense impression to which Sterling could testify to. However, Sterling’s remarks implicating Applicant as the shooter were inadmissible because they do not constitute a statement against interest.

Further, trial counsel objected to Lindler’s statement and moved for a mistrial. Trial counsel’s decision to move for a mistrial rather than seek to introduce inadmissible hearsay was reasonable. *See Whitehead*, 308 S.C. at , 417 S.E.2d at (“Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct will not be deemed ineffective assistance of counsel.”). As such, trial counsel was not ineffective for failing to introduce the portion of Sterling’s statement implicating Applicant as the shooter to put Lindler’s statement into context. Finally, Applicant admitted to being the shooter; therefore, there is no prejudice from Lindler’s statement because who was the shooter was not a disputed fact.

Based on the foregoing, trial counsel was not deficient nor was Applicant prejudiced by Sterling’s statement not being introduced into evidence. As such this allegation is denied and dismissed with prejudice.

## 2. Immunity

Applicant asserts trial counsel was ineffective for failing to seek immunity pursuant to the Protections of Persons and Property Act<sup>1</sup> (the Act) pretrial, when trial counsel sought a jury instruction on immunity under the Act during the charge conference. The Court disagrees.

Subsection 16-11-440(C) of the South Carolina Code provides in pertinent part:

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<sup>1</sup> S.C. Code Ann. §§ 16-11-410 to -450 (2015 & Supp. 2018).

A person who is not engaged in an unlawful activity and *who is attacked in another place where he has a right to be . . .* has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person . . . .

(emphasis added). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard . . . ." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013).

Trial counsel was not deficient for failing to seek immunity pursuant to the Act because Applicant informed trial counsel of his version of the facts, and Applicant's own version of the facts show he did not have a right to be on El Toro's premises. Sawyer testified from Applicant's version of events, Moti, a licensed security guard, ejected him from the premises, and Applicant almost immediately reentered the premises to get into his car. Therefore, from Applicant's own version of events, he did not have a right to be on the premises. As such, trial counsel was not deficient for failing to seek immunity under the Act pretrial.

Applicant was not prejudiced by trial counsels' alleged deficiency because even Applicant's own version of events, which he eventually testified to at trial, did not support immunity under the Act because Applicant was not in a place where he had a right to be. However, Applicant's version of events supported the theory of self-defense, and the jury received a self-defense jury charge.

Because Applicant's version of events did not amount to immunity under the Act, trial counsel was not deficient nor was Applicant prejudiced by trial counsels' alleged failure to seek pretrial immunity under the Act. As such, this allegation is denied and dismissed with prejudice.

#### IV. Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Trial counsel was not deficient for failing to introduce Sterling's entire statement as a statement against interest because only the self-inculpatory portions of the statement were potentially admissible at trial. Trial counsel was not deficient for failing to seek pretrial immunity under the Act because Applicant's version of the facts showed he did not have a right to be on the premises after he was ejected from the premises by Moti. Applicant was not prejudiced by trial counsel's alleged failure to enter Sterling's statement because most of Applicant's testimony was corroborated by the gas station video of the incident, Marquita Mobley's testimony, and Lamar Ray's testimony. Therefore, this PCR action must be denied and dismissed with prejudice.

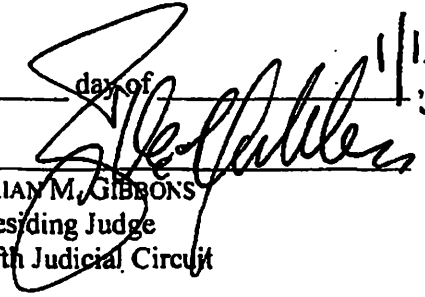
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. *See* Rule 71.1 (g), SCRCP. Refer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.



**IT IS THEREFORE ORDERED THAT:**

1. The PCR action is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

**AND IT IS SO ORDERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

  
BRIAN M. GIBBONS  
Presiding Judge  
Fifth Judicial Circuit

  
\_\_\_\_\_, South Carolina

|                                  |   |                                |
|----------------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA          | ) | IN THE COURT OF COMMON PLEAS   |
| COUNTY OF RICHLAND               | ) | FOR THE FIFTH JUDICIAL CIRCUIT |
|                                  | ) |                                |
|                                  | ) |                                |
| Gerald Bernard Haltiwanger, Jr., | ) | Case No.: 2017-CP-40-1784      |
|                                  | ) |                                |
| Applicant,                       | ) |                                |
|                                  | ) | <b>MEMORANDUM SUPPORTING</b>   |
| v.                               | ) | <b>DENIAL OF PCR</b>           |
|                                  | ) |                                |
| State of South Carolina,         | ) |                                |
|                                  | ) |                                |
| Respondent.                      | ) |                                |
|                                  | ) |                                |

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Gerald Bernard Haltiwanger, Jr., (Applicant) commenced this PCR action on March 24, 2017. The State submitted its return and partial motion to dismiss on October 2, 2017. On October 28, 2019, an evidentiary hearing into the matter convened at the Richland County Courthouse before this Court. Applicant was present and represented by Christopher Leonard, Esquire. Assistant Attorney General Samuel L. Key represented the State.

Applicant and his brother, Jonathan Sterling, testified at the hearing. Additionally, Mark Sawyer and Patrick Sharpe, Applicant's trial counsel, testified at the hearing. In his PCR application, Applicant alleged ineffective assistance of counsel, alleging: (a) counsel failed to locate, interview, and subpoena crucial defense witnesses; and (b) counsel failed to properly develop a defense in the case, including self-defense. From the evidence presented at the PCR hearing, Applicant's allegations conformed to: (1) whether trial counsel was ineffective for failing to introduce Jonathan Sterling's statement made to law enforcement regarding the incident as a statement against interest pursuant to Rule 804(b)(3), SCRE; and (2) whether trial counsel was ineffective for failing to seek pretrial immunity pursuant to the Protections of Persons and Property Act, when trial counsel sought a jury instruction on immunity under the Act during the charge conference.

At the close of argument on the issues presented to the Court, Applicant provided the Court *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000), and *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), in support of his position on the Rule 804(b)(3) issue. The State requested leave to research and respond to the Rule 804(b)(3) issue because the issue was not specified until the evidentiary hearing. This Court granted the State and Applicant ten days to provide the Court with any additional information supporting each parties' respective position.

### **Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. He presents to this court two different sets of charges and sentences for its consideration.

First, in December 2009, Applicant waived presentment to the grand jury for the charge of assault and battery of a high and aggravated nature (2009-GS-40-8567). Applicant further waived presentment to the grand jury on criminal domestic violence of a high and aggravated nature (2009-GS-40-2678) and criminal domestic violence, first offense (2009-GS-40-11882). Laura Kris Hines, Esquire, represented Applicant. Assistant Solicitor Sasquisha Octavia Tobin prosecuted the case. On January 7, 2010, Applicant pleaded guilty as indicted to assault and battery of a high and aggravated nature and criminal domestic violence, first offense in addition to the lesser included charge of criminal domestic violence, first offense before the Honorable J. Michelle Childs. Judge Childs sentenced Applicant to imprisonment for time served for both criminal domestic violence counts and six years for assault and battery of a high and aggravated nature provided that upon the service of one year, the balance is suspended with probation for two years. Applicant did not appeal his conviction or sentence.

Additionally, in October 2012, the Richland County Grand Jury indicted Applicant for murder (2012-GS-40-05298). Mark Sawyer, Alicia Dyer Goode, and Patrick Sharpe, Esquires, represented Applicant. Luck Campbell, Megan Walker, and Sandra Vriesinga prosecuted the case. On November 12-18, 2013, Applicant proceeded to trial before the Honorable Diane Schafer Goodstein. The jury found Applicant guilty as indicted. Judge Goodstein sentenced Applicant to life imprisonment. Applicant appealed.

Chief Appellate Defender Robert Michael Dudek and Heather Vry Scalzo, Esquire, perfected the appeal. The Court of Appeals affirmed Applicant's conviction on April 13, 2016. *State v. Haltiwanger*, Op. No. 2016-UP-175 (S.C. Ct. App. filed April 13, 2016). The remittitur was returned to the circuit court on May 11, 2016.

#### **Issues Presented at the Evidentiary Hearing**

1. Whether trial counsel was ineffective for failing to introduce Jonathan Sterling's statement made to law enforcement regarding the incident as a statement against interest pursuant to Rule 804(b)(3), SCRE; and
2. Whether trial counsel was ineffective for failing to seek pretrial immunity pursuant to the Protections of Persons and Property Act, when trial counsel sought a jury instruction on immunity under the Act during the charge conference.

#### **Discussion**

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

*Strickland* requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

The State requests the Court to dismiss all allegations not supported by evidence and testimony introduced at the evidentiary hearing. Specifically, Applicant's allegations regarding his 2010 guilty pleas, which are additionally barred by the statute of limitations for PCR actions. As discussed below, Applicant's allegations of ineffective assistance of trial counsel regarding his November 2013 trial should also be denied and dismissed with prejudice because Applicant failed to meet his burden under *Strickland*.

### 1. Statement against interest

Trial counsel was not constitutionally ineffective for failing to introduce Sterling's out of court statement because as a matter of law, Sterling's entire statement is not admissible as a statement against interest. The portions of the statement Applicant relies on as exculpatory evidence corroborating his self-defense claim are hearsay and hearsay within hearsay, and those portions do not qualify as an exception to hearsay under Rule 804(b)(3). The potentially admissible portions of Sterling's statement add little, if anything, to corroborate Applicant's version of events and advance his defense.

Rule 804, SCRE, provides exceptions to the rule against hearsay when the declarant is unavailable as a witness. It is undisputed Sterling was unavailable because he invoked his Fifth Amendment right to silence. *See McDonald*, 343 S.C. at 323, 540 S.E.2d at 460 ("A witness who invokes his Fifth Amendment right to silence is unavailable for hearsay purposes."). Therefore, the issue is whether Sterling's out of court statement falls within an exception under Rule 804.

When the declarant is unavailable as a witness, the declarant's prior statement may be admissible as a statement against the declarant's interest. Rule 804(b)(3), SCRE. A statement against interest is:

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. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Rule 804(b)(3), SCRE. However, "[S]uch statements must meet the strict requirements of Rule 804(b)(3)." *State v. Fuller*, 337 S.C. 236, 245, 523 S.E.2d 168, 172 (1999).

In *Fuller*, our Supreme Court was asked, among other things, to determine “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.” 337 S.C. at 243–44, 523 S.E.2d at 172. The *Fuller* court held such statements are inadmissible. *Id.* at 244, 523 S.E.2d at 172. Similarly, in *State v. Holmes*, our Supreme Court reaffirmed *Fuller* and stressed the rule is to be applied “very narrowly *to only those portions of a hearsay statement which are plainly self-inculpatory.*” 342 S.C. 113, 117, 536 S.E.2d 671, 673 (2000) (emphasis added).

Applicant asserts trial counsel should have entered Sterling’s entire statement through the investigator who testified Sterling implicated Applicant as the shooter to put the investigator’s statement into context. Applicant contends Sterling’s entire statement was admissible as a statement against interest under Rule 803(b)(3), and trial counsel should have attempted such strategy rather than moving for a mistrial. Applicant’s reliance on Rule 803(b)(3) in asserting Sterling’s entire statement was admissible as a statement against interest is misplaced. As a matter of law, only the plainly self-inculpatory portions within Sterling’s statement were admissible. *See Holmes*, 342 S.C. at 117, 536 S.E.2d at 673 (stating Rule 803(b)(3) is applied “very narrowly to only those portions of a hearsay statement which are plainly self-inculpatory”). Sterling’s plainly self-inculpatory statements are summarized as follows:

- a) He hit the security guard one time;
- b) He hit the security guard with his fist; and
- c) He followed Tyrobe, who was driving Applicant’s car to Bluff Road to “put the car up because that car was involved in the shooting at El Toro’s on [August 25, 2012].”

The remaining portions of Sterling’s statement are collateral to his self-inculpatory statements; therefore, the remaining statements are inadmissible hearsay. *See Fuller*, 337 S.C. at 244, 523

S.E.2d at 172 (finding non-self-inculpatory statements which are made collateral to self-inculpatory statements are inadmissible).

Sterling's statement he hit Moti, the security guard, in the face because Moti was macing Applicant is not plainly self-inculpatory because the statement offers a defense of others defense for himself. As such, the statement is not plainly self-inculpatory, and it is inadmissible hearsay. *See State v. Young*, 420 S.C. 608, 619–20, 803 S.E.2d 888, 894 (2017) (stating blame-spreading remarks should not be presented to the jury because attempts to absolve blame and other self-serving statements do not qualify as statements against penal interest).

Further, Sterling's statements regarding Moti's exclamations, "I SHOULD SHO[O]T YOUR MOTHERFUCKIN ASS!" and "I WILL SHOOT YOUR ASS IF YOU COME BACK ON THIS PROPERTY!" are also inadmissible non-self-inculpatory statements. Had Sterling been available to testify, these statements were potentially admissible as excited utterances. However, Sterling was unavailable so Moti's exclamations became hearsay within hearsay, and Rule 804(b) does not provide an exception for this situation; therefore, the statements constitute inadmissible hearsay within hearsay. *See* Rule 805, SCRE ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."). Sterling's statements to law enforcement were not excited utterances but merely statements relaying Moti's excited utterances. Therefore, trial counsel was not deficient for seeking to introduce Sterling's entire statement because the entire statement contained inadmissible hearsay and only Sterling's self-inculpatory statements within the entire statement were potentially admissible.

The potentially admissible portions of Sterling's statement do little, if anything, to aid Applicant's theory of self-defense. Arguably, an attempt to introduce the admissible portions of

Sterling's statement would have been deficient as Sterling admitted he helped hide Applicant's car because the car was involved in the shooting. Therefore, trial counsel was not deficient for failing to introduce even the potentially admissible portions of Sterling's statement.

Applicant's assertion he was prejudiced by trial counsel's alleged failure to introduce Sterling's statement because the jury only had Applicant's testimony to consider in deciding whether Applicant acted in self-defense is without merit. The transcript shows Applicant attempted to corroborate his testimony by explaining what the gas station video portrayed. (Tr. 760–67). Marquita Mobley and Kristina Nuttry both testified “the guy with the dreads” (Sterling) punched Moti. (Tr. 303; 581–82). Nuttry testified Moti pulled his gun out after being punched. (Tr. 582). Mobley and Nuttry also both saw Applicant and Moti arguing. (Tr. 294; 590). Another witness, Lamar Ray, testified Moti maced Applicant; Sterling punched Moti; Moti pulled his gun and then Sterling fell; Moti was telling Applicant to “go on, leave;” and Moti was standing outside El Toro's door when he was shot. (Tr. 320; 323–25; 354; 325). The above-referenced testimony by Mobley, Nuttry, and Ray corroborate most of Applicant's testimony. As such, Applicant's testimony was not the only evidence presented for the jury to consider in deciding Applicant's self-defense claim, as the majority of his version of events was corroborated by other witnesses and the gas station video. Therefore, Applicant was not prejudiced by trial counsel's alleged failure to introduce the admissible portions of Sterling's statement, as those portions were cumulative to other evidence.

Further, trial counsel was not deficient for failing to seek to introduce Sterling's statement to put Investigator Lindler's testimony Sterling implicated Applicant as the shooter, because trial counsel objected to and moved for a mistrial in response to the statement. (Tr. 676–77). As explained above, only the self-inculpatory portions within Sterling's statements were potentially

admissible as statements against interest. Sterling stated he and his brother Tyrobe talked about the shooting, and Tyrobe said “BRUH MUST HAVE SHOT THAT MAN!” This statement by Sterling is not a statement against his interest, and, therefore, is inadmissible under Rule 804(b)(3). The introduction of the entire statement to give context to Lindler’s statement goes beyond the reasoning for Rule 804(b)(3), as our courts have repeatedly held the rule is to be applied “very narrowly to only those portions of a hearsay statement which are plainly self-inculpatory.” *Young*, 420 S.C. at 619, 803 S.E.2d at 894. As with Moti’s exclamation, this statement is hearsay within hearsay, and Tyrobe’s words could be an excited utterance or present sense impression to which Sterling could testify to. However, Sterling’s remarks implicating Applicant as the shooter were inadmissible because they do not constitute a statement against interest. Further, trial counsel objected to Lindler’s statement and moved for a mistrial. Trial counsel’s decision to move for a mistrial rather than seek to introduce inadmissible hearsay was reasonable. *See Whitehead*, 308 S.C. at , 417 S.E.2d at (“Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct will not be deemed ineffective assistance of counsel.”). As such, trial counsel was not ineffective for failing to introduce the portion of Sterling’s statement implicating Applicant as the shooter to put Lindler’s statement into context. Finally, Applicant admitted to being the shooter; therefore, there is no prejudice from Lindler’s statement because who was the shooter was not a disputed fact.

Based on the foregoing, trial counsel was not deficient nor was Applicant prejudiced by Sterling’s statement not being introduced into evidence. As such this allegation should be denied and dismissed with prejudice.

## 2. Immunity

Applicant asserts trial counsel was ineffective for failing to seek immunity pursuant to the Protections of Persons and Property Act<sup>1</sup> (the Act) pretrial, when trial counsel sought a jury instruction on immunity under the Act during the charge conference. However, trial counsel was not deficient for failing to seek immunity under the Act pretrial because Applicant informed trial counsel as to his version of the facts, which he testified to at trial, and Applicant's version of the facts were incompatible with immunity under the Act.

Subsection 16-11-440(C) of the South Carolina Code provides in pertinent part:

A person who is not engaged in an unlawful activity and *who is attacked in another place where he has a right to be* . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person . . . .

(emphasis added). “A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard . . . .” *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013).

Trial counsel was not deficient for failing to seek immunity pursuant to the Act because Applicant informed trial counsel of his version of the facts, and Applicant's own version of the facts show he did not have a right to be on El Toro's premises. Sawyer testified from Applicant's version of events, Moti, a licensed security guard, ejected him from the premises, and Applicant almost immediately reentered the premises to get into his car. Therefore, from Applicant's own version of events, he did not have a right to be on the premises. As such, trial counsel was not deficient for failing to seek immunity under the Act pretrial.

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<sup>1</sup> S.C. Code Ann. §§ 16-11-410 to -450 (2015 & Supp. 2018).

Applicant was not prejudiced by trial counsels' alleged deficiency because even Applicant's own version of events, which he eventually testified to at trial, did not support immunity under the Act because Applicant was not in a place where he had a right to be. However, Applicant's version of events did support the theory of self-defense, and the jury received a self-defense jury charge.

Because Applicant's version of events did not raise to immunity under the Act, trial counsel was not deficient nor was Applicant prejudiced by trial counsels' alleged failure to seek pretrial immunity under the Act. As such, this allegation should be denied and dismissed with prejudice.

### **Conclusion**

Based on the forgoing, trial counsel was not constitutionally ineffective. Trial counsel was not deficient for failing to introduce Sterling's entire statement as a statement against interest because only the self-inculpatory portions of the statement were potentially admissible at trial. Trial counsel was not deficient for failing to seek pretrial immunity under the Act because Applicant's version of the facts showed he did not have a right to be on the premises after he was ejected from the premises by Moti. Applicant was not prejudiced by trial counsel's alleged failure to enter Sterling's statement because most of Applicant's testimony was corroborated by the gas station video of the incident, Marquita Mobley's testimony, and Lamar Ray's testimony. Therefore, the Court should find trial counsel was not ineffective and should deny and dismiss this action with prejudice.

Respectfully submitted,

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Attorney General

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Chief Deputy Attorney General

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By:

  
\_\_\_\_\_  
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11/16, 2019

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

GERALD BERNARD  
HALTIWANGER, #314454  
*Applicant,*

v.

STATE OF SOUTH CAROLINA  
*Respondent.*

IN THE COURT OF COMMON  
PLEAS FOR THE FIFTH  
JUDICIAL CIRCUIT

C/A No: 2017-CP-40-1784

**Proposed Order Granting  
Petition**

Presiding Judge: The Honorable Brian M. Gibbons  
Applicant's Attorney: Christopher S. Leonard  
Respondent's Attorney: Samuel Key  
Trial Counsel: Mark Sawyer and Patrick Sharpe  
Date of Hearing: October 28, 2019

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 24, 2017. The Respondent filed its Return on September 29, 2017. An evidentiary hearing into the matter was convened on October 28, 2019 at the Richland County Courthouse. The Applicant was present at the hearing and represented by Christopher S. Leonard, Esquire. Samuel Key, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

Applicant's trial counsel, Mark Sawyer, Esquire, and Patrick Sharpe, Esquire, testified at the PCR hearing. Applicant and Applicant's brother, Johnathan Sterling, also testified. This Court had before it the records of the Richland County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Records on Appeal, the Brief of the Appellant, the Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction, the Remittitur dated May 11, 2016, the PCR application, and the State's Return.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Clerk of Court for Richland County. The Applicant was indicted at the October 2012 term of the Richland County Grand Jury for murder. The Applicant proceeded to trial on November 12-18, 2013. After which a jury found him guilty as indicted. The Honorable Diane Goodstein sentenced the Applicant to a life sentence.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Following full briefing by both sides, the Court of Appeals affirmed the trial judge's evidentiary rulings.

### **FINDING OF FACTS**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Applicant was arrested after a shooting outside a nightclub in Richland County. The bouncer of the club had refused entry to Applicant. The bouncer then escorted Applicant to the parking lot where an altercation took place. Applicant was eventually arrested for the fatal shooting of the bouncer.

### **ALLEGATIONS**

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel failed to locate, interview and subpoena crucial defense witnesses
2. Ineffective assistance of trial counsel in that counsel failed to properly

develop a defense in the case, including self-defense.

### **STANDARD OF REVIEW**

To establish a claim of ineffective assistance of counsel, Petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Gallman v. State*, 307 S.C. 273 (1992). When the defendant claims that counsel's failure to articulate a due process violation was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been admitted. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). For the reasons set forth below, this Court finds the claim is meritorious, therefore satisfying the first prong of *Strickland*.

### **Statement of Co-Defendant**

The testimony of both trial counsels was clear that the facts of the matter were not in dispute. Counsel made the decision to concede Applicant was the shooter who killed the bouncer. They were also clear that the entire defense rested on establishing a claim of self-defense or presenting evidence of voluntary manslaughter.

The only evidence presented by defense counsel was the testimony of Applicant. In his direct examination, Applicant testified how the bouncer maced him, pulled a gun on him and threatened to shoot him and his brothers. This was the first and only time such testimony was presented in the trial. Applicant testified he told the investigators these details, however the information was not included in the typed statement Applicant signed. *See State v. Haltiwanger*, 2016-UP-175 (Ct. App. 2016).

Applicant claims any other evidence establishing the defense could have supplied the jury with the information needed to find Applicant was acting in self-defense or get a manslaughter instruction from the trial court. No other evidence was presented. Lead counsel, Mark Sawyer, testified at the PCR hearing that if any other evidence existed, he would have used it to establish the defense.

When counsel was asked about a statement Applicant's co-defendant gave to the police, counsel testified he believed the statement would not be admissible due to its hearsay nature.

Applicant's co-defendant, Jonathan Sterling, gave a statement to the investigators noting the same events Applicant testified to at trial. Particularly, the bouncer maced Applicant, pulled a gun and aggressively threatened their lives. This statement corroborated Applicant's trial testimony.

Sterling was listed as a potential witness at trial by both the defense and prosecutors. However, at the start of the trial it was noted by the State that Sterling would be asserting his 5<sup>th</sup> Amendment right against self-incrimination as he had pending charges of accessory to Applicant's charge. Based on this, defense counsel believed Sterling's statement would be inadmissible and never sought to introduce the statement.

The statement was brought up at one point during Investigator Lindler's testimony. The investigator noted that all three brothers "implicated their brother, Gerald Haltiwanger, as the shooter" Transcript p. 676, line 11-12. Defense counsel sought a mistrial on the grounds that this testimony violated Applicant's confrontation clause rights because that statement could not be put in context since Sterling was under 5<sup>th</sup> Amendment protections.

The trial court was very concerned with the testimony. The trial judge noted the statement would likely be admissible under an exception to the rule against hearsay. Transcript p. 683 lines 11-22. The next day, the motion for mistrial was denied and the defense never attempted to introduce Sterling's statement.

"A witness who invokes his Fifth Amendment right to silence is unavailable for hearsay purposes." *State v. McDonald*, 343 S.C. 319, 323. Rule 804(a)(1), SCRE. Several exceptions exist to introduce hearsay from an unavailable witness. Rule 804(B)(3) Statement Against Interest is one of the most commonly used exceptions to the hearsay rule. "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.”

Sterling was facing criminal charges for his role in this incident and the statement confesses to Sterling striking the bouncer. It is likely Sterling statement to police would have been admissible under South Carolina case law.

Trial counsel, to his credit, testified he was unaware of this legal issue. His testimony at the PCR hearing was he believed the statement to be inadmissible due to Sterling refusal to testify. This is not accurate. Finally, when questioned if he would have used the statement if he could have, counsel was positive that he would. *See Freiburger v. State*, 413 S.C. 243 (Ct. App. 2015) (trial counsel’s failure to introduce beneficial evidence grounds for post-conviction relief where no reason given for such failure).

### **Prejudice**

The prejudice component requires Applicant to show “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. He “need not show that counsel's deficient performance ‘more likely than not altered the outcome in the case’-rather, he must show only ‘a probability sufficient to undermine confidence in the outcome.’ ” *Jacobs v. Horn*, 395 F.3d at 105 (citing *Strickland*, 466 U.S. at 693-94). “This standard is not a stringent one.” *Id.*

Absent the Applicant’s testimony, the defense presented no other evidence of self-defense. Defense counsel Sharp testified he did not bring up self-defense in his opening statement. The jury had no evidence to back up the claim that Applicant was acting in self-defense. If other evidence existed and was not introduced to the jury due to an inaccurate legal assumption, then error is clear. If they jury could have used that evidence to accept the self-defense theory, then outcome of the trial could have been different. This Court finds the Applicant has met this burden and satisfies the second *Strickland* prong.

This Court agrees the record reflects trial counsel provided ineffective assistance of counsel in not introducing Sterling's statement. Counsel admits he would have admitted the evidence if he had known he could have introduced it. In a case hinging on the mental state of the Defendant, such evidence is critical.

THEREFORE, it is ordered Applicant's request for post-conviction relief be GRANTED and the verdicts against him be VACATED and these charges remanded to Richland Court of General Session for new trial.

IT IS ORDERED.

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Brian M. Gibbons  
Presiding Judge

November \_\_\_\_\_, 2019

**WITNESSES**

(S) Christopher Lindler – Richland County  
Sheriff

**ARREST WARRANT NUMBER**

2012A4010400065

**ACTION OF GRAND JURY**

**TRUE BILL**

*Jill R. Koenig*  
Foreperson of Grand Jury

Date: **OCT 10 2012**

**VERDICT**

Foreperson of Petit Jury  
Date:

**DOCKET NO. 2012GS4005298**

**The State of South Carolina**

**County of**

**Richland**

**COURT OF GENERAL SESSIONS**

**OCTOBER TERM 2012**

42

**THE STATE  
vs.**

**Gerald Bernard Haltiwanger Jr**

**Indictment for  
MURDER**

SC Code: 16-03-0010  
CDR Code: 0116

After being fully advised as to my  
legal rights, I hereby waive presentment  
to the Grand Jury.

Defendant

I  
hereby appear in my own proper person and plead  
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

**CERTIFIED TRUE COPY  
OF ORIGINAL FILED,  
*Jeanette W. H. H. H.*  
C.C.C.P.&G.S.  
RICHLAND COUNTY  
SOUTH CAROLINA**

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

**INDICTMENT**

At a Court of General Sessions, convened on OCTOBER 10, 2012,  
the Grand Jurors of Richland County present upon their oath:

**MURDER**

*MAs* That Gerald Bernard Haltiwanger Jr <sup>*see*</sup> ~~and/or another co-defendant and/or~~ *G14*  
~~other co-defendants~~ did in Richland County, on or about August 25, 2012,  
willfully, feloniously, and intentionally kill the victim, Jimmy Moti, with  
malice aforethought, either express or implied, by means of gun shot  
wound, and the victim did die as a proximate result thereof, in violation of  
Section 16-03-0010, S. C. Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the  
statute in such case made and provided.



DAN JOHNSON, SOLICITOR