

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lee County

William Jeffrey Young, Circuit Court Judge  
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**RECEIVED**

OCT 18 2014

**S.C. Supreme Court**

EUNICE MCCALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213542  
\_\_\_\_\_

BRIEF OF PETITIONER  
\_\_\_\_\_

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ISSUE PRESENTED

The PCR judge erred in denying Petitioner relief from his convictions and sentences where trial counsel failed to request a jury instruction on accident in violation of Petitioner's right to the effective assistance of counsel as provided in the Sixth Amendment to the United States Constitution.

## STATEMENT

Petitioner was indicted by a Lee County grand jury in November 2005 for murder and possession of a firearm during the commission of a violent crime (2005 – GS – 14 – 102). App. 819 – 820. Petitioner and his two codefendants were tried before the Honorable Clifton Newman and a jury on April 4 – 6, 2006. James Saverance represented the state, and W.S. Watts, III and Carl Smith represented Petitioner. App. 1. The jury found Petitioner guilty of possession of a weapon during the commission of a violent crime and of the lesser-included offense of voluntary manslaughter. App. 721, lines 15-18. Judge Newman sentenced Petitioner to eighteen years' imprisonment for voluntary manslaughter and to five years' imprisonment for possession of a weapon during the commission of a violent crime. He ordered the sentences to be served concurrently. App. 746, lines 10-14; App. 821-822. Petitioner filed a timely notice of appeal and brief pursuant to Anders v. California, 386 U.S. 738 (1967) was filed on his behalf. The South Carolina Court of Appeals dismissed the appeal in an unpublished opinion. State v. McCall, 2009 – UP – 77 (SC Ct. App. filed Feb. 11, 2009).

Petitioner filed an application for post-conviction relief (PCR) on June 29, 2009, which he amended on July 12, 2012. App. 748-753; App. 760-763. The matter proceeded to a hearing on September 19, 2012 before the Honorable W. Jeffrey Young. Hemphill Pride represented Petitioner, and Megan Harrigan represented the state. App. 764. On November 19, 2012, Judge Young denied Petitioner relief from his convictions and sentences by written order. App. 809 – 818. Petitioner filed a timely notice of appeal and a petition for writ of certiorari. On September 11, 2014, Chief Justice Toal and Justice Beatty granted the petition.

This brief follows.

## ARGUMENT

The PCR judge erred in denying Petitioner relief from his convictions and sentences where trial counsel failed to request a jury instruction on accident in violation of Petitioner's right to the effective assistance of counsel as provided in the Sixth Amendment to the United States Constitution.

### **Relevant facts**

#### Evidence produced at trial

On the evening of April 7, 2005, the deceased, Efrain Thomas, and Petitioner were walking down the street toward a pool hall. App. 82, lines 6 – 22. The state's witness, Tiffany Hill, claimed she heard Petitioner and the deceased fighting. She then heard two gunshots. Hill began to run away from the area and heard additional gunshots. App. 84, line 15 – App. 85, line 4; App. 89, lines 19 – 22; App. 97, lines 10 – 12. Hill heard a total of six gunshots. App. 85, lines 19 – 20. Petitioner and the deceased were "body to body" when the shots were fired. App. 90, lines 5 – 7. The deceased, who was drunk, was bigger than Petitioner. App. 97, lines 17 – 25. Hill and the entire community were aware that the deceased had cut the throat of Cory McClem shortly before this incident. App. 99, lines 9 – 18. Lucille Wesley testified that on the night of the shooting, Petitioner arrived at her home within ten minutes after she heard gunshots. When she asked Petitioner about the incident, Petitioner said he had shot the deceased in self-defense. App. 145, line 1 – App. 147, lines 6.

Thomas confessed to his girlfriend, Courtney Johnson that he and Petitioner had killed the deceased. App. 126, lines 11 – 23; App. 467, lines 5 – 12. While walking to the pool hall, Thomas saw the deceased hit the back of Petitioner's head. Then, Petitioner and the deceased started fighting. Thomas attempted to break it up. Thomas then heard two gunshots and jumped

back to see if he had been shot. Thomas claimed Petitioner shot the deceased while the deceased was still on the Petitioner. Thomas shot the deceased twice in the back, but the deceased held onto Petitioner. Thomas claimed Petitioner shot the deceased twice more, finally ending the altercation. App. 468, lines 9 – 24.

The police found money, a cell phone, and a set of keys on the deceased indicating that no robbery had taken place. App. 193, line 19 – App. 195, line 24. Additionally, the police found a pill bottle containing ten yellowish-white rocks, which the police suspected were crack cocaine, in deceased's pocket. App. 243, line 11 – App. 244, line 3. However, the rocks were never analyzed. App. 244, lines 4 – 9. The deceased hands' tested positive for gunshot residue. App. 245, lines 3 – 13. The police were familiar with deceased having been charged with an assault on Cory McClem in January of 2005. App. 247, lines 1 – 20. Evidence of a struggle appeared at the scene. App. 199, lines 14 – 25; App. 248, lines 15 – 18.

The pathologist testified that the deceased suffered seven gunshot wounds from two different guns. App. 280, line 25 – App. 289, lines 6; App. 286, lines 6 – 8. Additionally, the pathologist testified the deceased had alcohol in his system at the time of death. App. 290, lines 6 – 7.

An expert in gunshot residue and gunpowder testified that the deceased had gunshot residue on the back of his right hand, palm of his right hand, and the back of his left hand. App. 327, line 23 – App. 328, line 2. The expert testified that the presence of gunshot residue did not necessarily mean that the deceased had fired a weapon; however, the presence of gunshot residue indicated his hands were within five feet when a gun fired. App. 328, lines 6 – 22. On cross-examination, the expert admitted the deceased had a “very large quantity” of gunshot residue on

his hands. Based upon the quantity, the expert testified that the deceased was not in a defensive posture at the time the firearm discharged. App. 330, lines 2 – 14.

Thomas testified that while walking to the pool hall, the deceased snatched a hat off Petitioner's head. App. 501, lines 11 – 15. Petitioner and the deceased began to fight. App. 501, lines 16 – 24. The deceased was choking Petitioner. App. 502, lines 4 – 9. Thomas tried to stop the fight, but the deceased said he was going to kill Petitioner. App. 502, lines 10 – 16. Thomas then heard two shots in short succession. App. 502, lines 23 – 25. Thomas determined that Petitioner had fired the shots. App. 503, lines 20 – 24. Despite being shot, the deceased continued to choke Petitioner. App. 503, line 25 – App. 504, line 8. Thomas described the deceased as very intoxicated during the altercation. App. 504, lines 9 – 15. Thomas then shot the deceased because he continued to choke Petitioner, and he feared for Petitioner's life. App. 504, lines 23 – App. 505, line 12. Thomas explained that he shot four times at the deceased. App. 508, lines 9 – 14. Even after shooting the deceased, the struggle between Petitioner and the deceased continued. Although the deceased let go of Petitioner's neck, the deceased grabbed for the gun. Then, a struggle between Petitioner and the deceased for control of the gun ensued. While the 2 were fighting for the gun, another shot rang out. App. 509, lines 9 – 16. Thomas testified that while his own life was not in jeopardy, he believed that Petitioner's life was in jeopardy. App. 528, lines 10 – 22. Thomas "believed" the deceased did not have a gun and did not shoot a gun. App. 533, lines 6 – 14.

Petitioner testified that during the walk to the pool hall, the deceased confronted Petitioner about an altercation between Petitioner and Charles Robinson, the cousin of the deceased. App. 583, lines 2 – 5; App. 585, lines 1 – 8. The deceased threatened Petitioner and knocked the hat off Petitioner's head. App. 585, line 16 – 19. The deceased continued to

advance and the two traded blows. App. 586, lines 12 – 25. The deceased put his hands around Petitioner’s throat and tried to squeeze the breath out of him. App. 587, lines 4 – 10. Petitioner feared that the deceased was trying “to do serious bodily harm” to him and was making an “attempt on his life.” App. 587, line 21 – App. 588, line 1; App. 594, line 19 – App. 595, line 4. The deceased then removed a hand from Petitioner’s throat and reached for something. App. 588, line 17 – 25. Petitioner tried to grab the deceased’s hand. App. 589, lines 3 – 5. Eventually, Petitioner was able to grab the deceased’s hand and the two struggled for control of the gun, which the deceased had pulled from his pants. App. 590, lines 9 – 25. A shot was fired while the two were struggling. Specifically, Petitioner recalled that when the first shot was fired, Petitioner’s hands were on the deceased hands reaching for the gun. App. 591, lines 7 – 25. The two continued to struggle. App. 592, lines 1 – 7; App. 592, lines 19 – 21. Petitioner recalled the deceased say he was going to kill Petitioner. App. 592, lines 8 – 18. Even after the second shot, the two continued to struggle. App. 592, line 24 – App. 593, line 7.

On cross-examination, Petitioner testified that he did not shoot the deceased. App. 606, lines 5 – 10. He admitted that he heard two shots when he and the deceased were struggling over the gun and was aware that the shots were found the gun that the two were struggling over. App. 606, lines 13 – 17. Petitioner believed that he never got control of the gun. App. 609, lines 14 – 15. The deceased had the gun the entire time the two were struggling. App. 609, lines 18 – 2. Petitioner believed the deceased had his hand on the trigger when the gun fired. App. 610, line 25 – App. 611, line 3.

At the conclusion of the presentation of evidence, trial counsel requested the judge instruct the jury as to the lesser-included offenses of involuntary manslaughter and voluntary manslaughter and the affirmative defense of self-defense. App. 622, lines 7 – 8; App. 623, line

25 – app. 624, line 1; App. 624, lines 19 – 23; App. 629, lines 12 – 21. The judge agreed to each of Petitioner’s requests. App. 631, lines 13 – 17.

Evidence produced at PCR hearing

Petitioner retained trial counsel to represent him on the criminal charges. App. 768, line 16 – App. 769, line 9. Trial counsel recalled that the testimony was Petitioner and the deceased struggled over a gun. He believed Petitioner testified the gun belonged to the deceased. App. 785, line 19 – App. 786, line 16. Trial counsel further testified that the testimony at trial was that Petitioner and the deceased were going after the gun and it was unknown whether Petitioner or the deceased caused the discharge. App. 787, lines 1 – 7.

When asked if he presented a defense of accident, trial counsel testified that he had made the request for lesser-included offenses of murder. App. 787, lines 12 – 18. On cross-examination, trial counsel finally admitted that he did not request a charge on the defense of accident. He then stated, “I think it was during the testimony that Mr. McCall’s testimony, I think we had it, where there is this an altercation that it was accidental discharge per his testimony.” He then testified,

We had to from my recollection move because it would be hard to get the involuntary. So we went through and made the charges. There was not a specific accident charge requested. However, when we went through the elements that would come up and help towards the jury determining be the involuntary manslaughter, I thought were had it properly covered in the involuntary manslaughter charge, to the extent that went by the testimony.

App. 790, line 13 – App. 791, line 8. When asked if he believed his failure to request a charge of accident prejudiced Petitioner, trial counsel only testified that “some of those issues were covered in the involuntary manslaughter’s charge.” However, the jury returned a verdict of voluntary manslaughter; therefore, trial counsel did not know whether an instruction as to

accident would have impacted the jury's verdict. App. 791, lines 13 – 25. Nevertheless, trial counsel further testified that if the jury “had truthfully considered the testimony regarding accidental discharge, then they may have come back with involuntary.”

Despite his testimony seeming to equate accident and involuntary manslaughter, trial counsel admitted that the elements of involuntary manslaughter and accident are different. App. 792, lines 11 – 14. He never reconciled his testimony that a charge as to accident would not have assisted Petitioner because if the jury believed the death was the result of an accident, then the jury would have returned a verdict as to involuntary manslaughter and his testimony that the elements of accident and involuntary manslaughter are different.

Petitioner testified that he informed trial counsel that he and the deceased got into an altercation and a gun was pulled in the altercation. He further told trial counsel that he and the deceased tussled over the weapon. “We had fired over the gun.” The gun belonged to the deceased and it went off during the altercation. Petitioner had no intent to shoot the gun. App. 798, lines 6 – 20.

#### Order of dismissal

Concerning Petitioner's allegation that trial counsel provided ineffective assistance by failing to request a jury instruction on the defense of accident, Judge Young found that trial counsel's performance was reasonable and effective. Judge Young based this finding upon trial counsel's testimony that “he successfully argued before the trial court that the jury should be instructed as to both voluntary and involuntary manslaughter, as well as self-defense, in regards to his client.” App. 816. Judge Young further found that Petitioner had failed to establish any prejudice resulting from trial counsel's failure to request an instruction regarding accident. Judge Young relied upon trial counsel's testimony that Petitioner had testified to the jury that he

was not in possession of a gun at any time during the struggle, and as a result, the gun was not fired accidentally. Judge Young concluded that there was no evidence presented that would permit the trial court to instruct the jury as to accident. Based upon Petitioner's own testimony, Judge Young also found that the fact that the jury convicted Petitioner of voluntary manslaughter as opposed to involuntary manslaughter or returned a verdict of not guilty indicated to trial counsel that the jury did not believe the shooting was accidental. App. 816.

### **Discussion**

The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (requiring the trial court to view facts in the light most favorable to a defendant when determining whether to charge involuntary manslaughter). A trial court's refusal to grant a jury instruction based upon a sound principle of law applicable to the case before the trial court is an error of law. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). If there is any evidence to support a jury charge, the trial judge should give the charge in question. State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008)

Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110,

112 (2003); Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999). Evidence of a struggle over a weapon between a defendant and victim supports submission of an involuntary manslaughter charge. Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

On the other hand, “[i]n South Carolina, the defense of accident requires a showing that the harm caused was unintentional, that the defendant was acting lawfully at the time of the incident, and due care was exercised in handling the weapon.” State v. Harris, 382 S.C. 107, 116, 674 S.E.2d 532, 537 (Ct. App. 2010); see also State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)(citing Burriss, 334 S.C. at 259, 513 S.E.2d at 106); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994); State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945). Further, homicide is excusable as an accident when the evidence shows the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun. Goodson, 312 S.C. at 281, 440 S.E.2d at 372 (citing State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990)).

The South Carolina Supreme Court held defense counsel provided ineffective assistance by failing to request an instruction as to accident. At the trial, the defendant testified that when he refused to drive the alleged victim where he wanted to go, the alleged victim began yelling and punched him in the face. Then, the alleged victim pulled a gun. The two struggled over the gun. The gun went off while it was still in the alleged victim’s hand. The defendant testified that he gun was never in his hand. Tisdale v. State, 378 S.C. 122, 124, 662 S.E.2d 410, 412 (2008). The Court held that evidence indicated the alleged victim was the aggressor as shown by him punching the defendant in the face and presenting a gun. This evidence along with evidence

that the gun discharged accidentally supported the charge of accident. Id. at 126, 662 S.E.2d at 412-413.

Petitioner presented evidence at trial that the gun discharged accidentally or through no fault of Petitioner. Multiple witnesses, including the police officers, testified the deceased had a reputation for violence in the community, including his recent assault on McClem, which involved him cutting McClem's throat. Tiffany Hill testified the first shots rang out while Petitioner and the deceased were "body to body." Thomas testified the deceased was the initial aggressor and as Petitioner and the deceased struggled for control of the gun, the shots were fired. Petitioner testified that the gun fired while he and the deceased were struggling over the gun, which was introduced into the fight by the deceased.

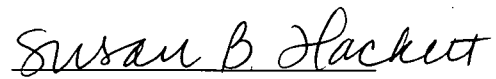
The evidence presented during the PCR hearing demonstrated trial counsel's fundamental misunderstanding of the elements of involuntary manslaughter and accident. Trial counsel attempted to reason that because the jury rejected involuntary manslaughter, then the jury implicitly rejected accident. This illogical reasoning must fail. As illustrated, the elements of the two are different. Additionally, involuntary manslaughter is an offense exposing Petitioner to incarceration whereas accident is an affirmative defense excusing Petitioner's conduct.

Had the jury been instructed by the trial court that it could have found Petitioner was not guilty under an accident defense, the jury could have reached a different verdict and as a result, Petitioner was prejudiced by his trial counsel's failure to request a jury charge on the defense of accident. See State v. Harrison, 343 S.C. 165, 175, 539 S.E.2d 71, 76 (Ct. App. 2000).

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR court and grant him a new trial based upon the ineffective assistance of trial counsel in failing to request a jury instruction concerning the defense of accident.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of October, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lee County

William Jeffrey Young, Circuit Court Judge

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EUNICE MCCALL,

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STATE OF SOUTH CAROLINA,

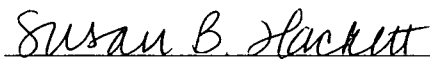
RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the brief of petitioner, in this case has been served on Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Eunice McCall #314833, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of October, 2014.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day  
of October, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.