THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Robin B. Stilwell, Circuit Court Judge

Case No.: 2011-CP-23-1209
Appellate Case No.: 2013-002652

Marlon Rivera, 311864, ... Petitioner,

v.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Following this Court's reversal of the Court of Appeals' opinion, was appellate counsel ineffective in failing to petition this Court to remand the matter for consideration of the remaining issues on appeal?

STATEMENT OF THE CASE

Petitioner Marlon Rivera was indicted by the Greenville County grand jury at the October 2004 term, for the murder. Susannah C. Ross, Esquire, represented Rivera at trial.

Judge C. Victor Pyle, Jr., presided at the petitioner's trial on October 13, 2005. The petitioner was convicted of murder. Rivera appealed and was represented by appointed appellate counsel Robert Dudek, Esquire. Appellate Counsel briefed four issues:(1) improper admission of his statement to the police, (2) improper admission of hearsay testimony, (3) refusing to allow an unsequestered witness to testify, and (4) failing to charge accident and involuntary manslaughter. The Court of Appeals reversed and remanded on based on the failure of the court to instruct the jury on involuntary manslaughter. (State v. Rivera,Op. No. 2008-UP-187 (Ct. App. 03/18/08).

The Court of Appeals held that "in light of our disposition of the issue pertaining to the trial judge's refusal to charge the jury on involuntary manslaughter, the remaining issues on appeal are not dispositive and need not be addressed. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive)." As a result, the remaining

issues were not ruled on by the court.

The State appealed the Court of Appeals decision. This Court granted certiorari, reversing the Court of Appeals. State v. Rivera, 389 S.C. 299, 699 S.E.2nd 157 (2010). In its review of the case, this Court addressed only the jury charge issue. Agreeing with the trial court's conclusion that there is no evidence in the record indicating that Respondent was acting in self-defense, this Court held that the Rivera was not entitled to a charge on involuntary manslaughter. State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 901 (2006) (finding that, in the absence of self-defense, pointing and presenting a firearm precludes an involuntary manslaughter charge). Rivera's conviction was reinstated without having the merits of his four other appellate issues addressed by any court.

Rivera filed an application for post conviction relief on February 17, 2011. The Respondent filed its return June 28, 2011. J. Falkner Wilkes was appointed to represent Rivera in the PCR action. Karen C. Ratigan, represented the State. An evidentiary hearing was held on August 27, 2013, the Honorable Robin B. Stilwell presiding. An Order of Dismissal was entered on November 7, 2013. Rivera timely appealed. Due to a conflict, the Office of Indigent Defense was relieved and J. Falkner Wilkes was appointed by this Court as counsel to represent Rivera in the filing of his Petition for Writ of Certiorari. A *Johnson* Petition was filed. This

Court issued an Order dated October 9, 2014, denying counsel's request to withdraw and directed the parties to address the issue of whether appellate counsel was ineffective in failing to petition this Court to remand the matter for consideration of the remaining issues on appeal.

ARGUMENT

I. Appellate Counsel was Ineffective for Failing to Petition This Court to Remand the Matter for Consideration of the Remaining Issues on Appeal.

The test for ineffective assistance of counsel is whether counsel's performance was deficient and, if so, whether deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A criminal defendant is entitled to effective assistance of counsel through the appellate process. State v. Thrift, 397 S.E.2d 523 (S.C. 1990); Jones v. Barnes, 463 U.S. 745 (1983).

Petitioner's appellate counsel presented five issues on direct appeal. In the court of appeals the Petitioner prevailed on issue five of his brief. Because the court found issue five dispositive, it declined ruling on the Petitioner's other four issues. The State petitioned this Court for a writ of *certiorari*. The State's petition was granted with this Court reversing the decision of the court of appeals on issue five. Appellate counsel took no further action subsequent to the reversal of the court of appeals. As a result, the Petitioner's conviction was affirmed without ever having four of his five direct appeal issues passed upon by any appellate court. Due to counsel's failure to request a remand from this Court, the Petitioner's right to a direct appeal on four out of five issues was lost.

"A defendant is constitutionally entitled to the effective assistance of appellate counsel." Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). "The PCR applicant has the burden of proving both prongs." Caprood, 338 S.C. at 109, 525 S.E.2d at 517. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

At the PCR hearing Petitioner's appellate counsel testified that after losing the one issue in the Supreme Court he should have moved the Court to remand the case to the Court of Appeals for consideration of the remaining direct appeal issues. 593-594. Appellate counsel testified that his office had done so before to preserve direct appeal issues in a similar situation. 594. Appellate counsel further testified that the four issues that were never considered on direct appeal were

meritorious. 593.

This Court has the inherent power to remand a case to have the Court of Appeals address issues raised but not ruled on by the Court of Appeals. *See* Shatto v. McLeod Regional Medical Center, 406 S.C. 470, 753 S.E.2d 416 (2013). Despite having four remaining meritorious issues that had not been reached, appellate counsel failed to request the case be remanded to the Court of Appeals for further consideration. As a result, the Petitioner's additional four issues were never addressed on direct appeal. Thus, the Petitioner's right to direct appeal on the majority of his appellate issues was lost due to the oversight of counsel. This constitutes error and meets the first prong of the analysis.

The second prong of the analysis requires this Court to review the Petitioner's direct appeal issues. Those issues are set forth in the Petitioner's Final Brief in the Court of Appeals, attached hereto and incorporated herein by reference. (Attachment A). The State's arguments can be found in the State's Final Brief in the Court of Appeals. (App. pg. 703). Although the Petitioner's appellate counsel testified that he believed the remaining issues to be very meritorious, only a ruling by this Court can establish whether they would have ultimately prevailed and therefore establish the requisite prejudice necessary to entitle the Petitioner ultimately to relief in this case.

Wherefore, the Petitioner moves this Court to consider the direct appeal issues 1 through 4. Should this Court concur that the additional issues presented in Petitioner's direct appeal are meritorious, then the Applicant is entitled to a finding that appellate counsel's failure to request a remand caused actual prejudice to the Petitioner. Having established both error and prejudice, Petitioner would be entitled to relief accordingly.

CONCLUSION

Based on the foregoing, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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Counsel for Petitioner

November 10, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARLON RIVERA,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the judge erred by admitting appellant's inculpatory statement to the police where it was undisputed that appellant could not read or write Spanish or English, a police investigator acknowledged he physically pulled appellant up by the belt on his shackles during the interrogation while it was also undisputed the police called appellant a liar, and where appellant offered expert testimony of his fear and inability to understand the actions of the police given the cultural differences, language barrier, and the police behavior, since appellant's confession should have been suppressed given these circumstances?

2.

Whether the judge erred by admitting the hearsay testimony of Investigator Wesley Smith that Officer Rivera told him while appellant was being escorted to the detention center after giving his confession that Rivera told Smith appellant had told him the officers had been "too nice about it," and that in his country "they'd put a bag over the head and beat us," since this was hearsay testimony and prejudicial?

3.

Whether the judge abused his discretion by ruling interpreter and defense investigator Carlos Freeman could not testify because he remained in the courtroom with appellant throughout the trial, reasoning this violated the sequestration order, since this ruling was fundamentally unfair given that Freeman was relied upon as an interpreter by the defense during the trial, and that his presence was necessary in the courtroom?

4.

Whether the judge erred by ruling appellant was not entitled to an instruction on involuntary manslaughter where the state elicited testimony that appellant told witness Nelson Castro that he had been wrestling with someone "and that the weapon just went off by itself," where there was also evidence appellant was resisting an attack, since defense counsel correctly argued appellant was armed in self-defense under *State v. Burris* and *State v. Crosby*, and that appellant was entitled an involuntary manslaughter instruction given this evidence?

5.

Whether the judge erred by ruling appellant was not entitled to an instruction on accident where the state elicited testimony that appellant told witness Nelson Castro that he had been wrestling with someone "and that the weapon just went off by itself," where there was also evidence appellant was resisting an attack since defense counsel correctly argued appellant was armed in self-defense under *State v. Burris* and that appellant was entitled an accident instruction given this evidence?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County grand jury for the offense of murder. R. 464. His case came on for trial on October 10, 2005 before the Honorable C. Victor Pyle, Jr. and a jury. Susannah Ross represented appellant. Kris Hodge was the Assistant Solicitor. R. 1.

On October 13, 2005 the jury found appellant guilty of murder. R. 459, ll. 6 – 11. Judge Pyle sentenced appellant to thirty years imprisonment. R. 463, ll. 20 -22.

This appeal follows.

STATEMENT OF FACTS

Prior to trial defense counsel moved for the appointment of a separate court interpreter. Defense counsel Ross noted that her interpreter, Carlos Freeman, had helped her throughout the case. "He's interpreting to my client what's happening, but he's not the state's interpreter for this case." R. 12, ll. 17 – 24. The judge denied the motion. R. 12, l. 25 – 13, l. 2.

The judge then asked Ross how she would be prejudiced by not addressing the confession issue during her opening argument. Ross answered that if the confession was going to come into evidence: "I would like to explain it, and talk about what happened, and the background of it, and the basis of it." Ross said it was important that the jury know the defense was going to "be up-front and bring this out if it's going to come in." The judge disagreed, and ruled Ross would not be prejudiced by not being able to address the confession issue in her opening statement. R. 12, l. 25 – 13, l. 14.

Defense counsel later moved for a mistrial arguing the solicitor exploited the defense's inability to comment on the confession in opening by implying the defense "hid the confession from them," during the state's closing argument. Counsel argued this was purposely unfair since the suppression hearing was not held until the second day of trial. R. 435, ll. 7-13.

Trial Testimony

Greenville County Sheriff's Deputy David Bendig testified that he was dispatched to an assault call on July 17, 2004 at about 12:30 a.m. R. 22, l. 23 – 23, l. 25. Bendig found a

male lying on the ground in the parking lot near the "Spanish Amigo Market in the strip mall." There were about twenty or thirty people scattered outside.[1] R. 24, ll. 2 – 15.

Bendig immediately acknowledged that "a language barrier existed." He remembered talking to Courtney Robles and Delman Arais at the scene. R. 27, ll. 1 - 14. These were the only people Bendig spoke with that morning. R. 27, ll. 8 – 23. As will be seen infra, there would be evidence that Arais attacked appellant and that appellant pulled a gun when attacked. R. 299 - 300.

Castro Testimony

Nelson Castro was the next state's witness. Interpreter Efrain Pineros was sworn in for Castro's testimony. R. 33, ll. 2- 6. Castro said that he spoke Spanish and "a little bit of English." R. 33, ll. 8 – 20.

Castro noted that appellant was his cousin. He recalled appellant coming by his house at 1:30 or 2:00 in the morning on the day in question. R. 34, l. 16 – 36, l. 12.

Castro then attempted to testify regarding what his wife told him that appellant allegedly told her. Defense counsel Ross's hearsay objection was overruled. R. 36, ll. 11 – 16.

Castro remembered that appellant had a pistol and that he said that he had killed somebody. R. 37, l. 4 – 38, l. 10. The solicitor elicited the following from Castro:

Q. And that he had gotten he pistol the day before?

A. Yes.

Q. Did he say how it was that he came to kill someone?

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[1] There would later be evidence offered that the police at first did not know the victim had been shot in the face, and they only thought he was badly hurt from being beaten.

A. He said that *they were wrestling with somebody else, and that the weapon was loaded, and that the weapon just went off by itself.* That the shot didn't' hit the person that he was wrestling with, but it hit somebody else that was watching.

Q. Did he say the he knew the person that got shot?

A. No, he didn't say that he knew that person.

Q. How was he acting that night?

A. He looked like sad for what had happened.

R. 38, ll. 11 – 22. (emphasis added).

On cross-examination Castro acknowledged appellant told him the gun "went off accidentally when the other man grabbed the pistol and they were fighting over it." R. 43, ll. 23 -25.

Carlos Estradeo was from Columbia. He was the owner of a small club near the club where the shooting occurred. Supp. R. 1, ll. 12 – 3, l. 19. Estradeo testified that people were "patted down" for weapons before they came into his club. Estradeo remembered that when appellant was patted down, seemingly after the shooting that Estradeo felt what he thought was a weapon. Appellant then left the club and returned ten or fifteen minutes later "and he didn't have anything." Supp. R. 4, l. 9 – 5, l. 16.

Investigator Brian Garrett testified there were about fifteen to twenty people outside the Hispanic club where the shooting occurred when he arrived at 3:00 a.m. Garrett said he tried to interview witnesses but none of them had any information that was useful. Supp. R. 12, ll. 15 – 23.

However, Garrett said that one alleged eyewitness, Elvaro Fernandez, returned about fifteen minutes later and was "kinda excited." Over defense hearsay objection, Garrett

testified that Fernandez told him he had seen the person who shot the victim and that he was in a nearby bar, the Mexiclia, down the street. Supp. R. 13, l. 12 – 16, l. 16.

Fernandez allegedly described the shooter as wearing a red shirt and blue jeans. Garrett went into the club and he told appellant "to put his hands behind his back in Spanish, and I placed him under arrest." Supp. R. 16, l. 21 – 18, l. 12.

There was evidence that Garrett located the weapon the following morning in a tree outside the club. Supp. R. 48, l. 19 – 51, l. 14.

The pathologist, Dr. Eric Christensen testified that the decedent died on July 21, 2004, several days after he was shot. He died from a gunshot wound to the face. The decedent was taken off life support. Supp. R. 65, ll. 21 – 24; Supp. R. 67, ll. 6 – 21.

There were at least three theories of what occurred into this case. Each theory was backed by some evidence. As seen, Castro testified, on direct examination by the solicitor, that appellant told him the gun went off accidentally during the struggle. As will be seen infra, there was also evidence appellant was attacked by a Hispanic man because he was socializing with black people.

The state called Greenville County Crime Lab worker Mark Stephan to apparently attempt to dispel the gun went off by accident evidence. Supp. R. 71, l. 12 – 72, l. 16. Stephan testified that when he test fired the gun "it misfired several times. It did not fire when I pulled the trigger." Supp. R. 78, ll. 15 – 24.

However, Stephan maintained that someone would have to pull the trigger for this particular gun to discharge. Stephan claimed the gun would not go off accidentally. Supp. Supp. R. 19, ll. 3 – 19.

As will also be seen infra, there was also evidence that appellant shot the gun into the concrete or ground to scare his attacker. Stephan discounted that theory saying the condition of the bullet taken from the decedent was consistent with the bullet being fired from the gun and then going directly into the bone, and not hitting something else first. Supp. R. 88, ll. 1 – 23.

There was another theory that the decedent was the unintended victim, but that the gun was intentionally. There was also evidence two or three men actually handled the gun in the confusion outside the club, and a third man may have fired the shot that hit the decedent. R. 98, ll. 2-11.

Suppression Hearing

A suppression hearing was held in the middle of the trial. Investigator Brian Garrett was the first witness called by the state. R. 69, ll. 1 – 25.

Prior to Garrett's testimony defense counsel Ross renewed her objection about holding the Jackson v. Denno hearing today "rather than yesterday." Counsel again noted that defense was adversely affected by having to do its opening statement without a ruling on the confession. R. 68, ll. 11 – 24.

Garrett testified he did a waiver of rights and took a statement from appellant with Investigator Wes Smith and Deputy Rivera present. R. 69, ll. 14 – 17. Garrett testified the waiver of rights was done at 6:30 in the morning on July 18, 2004. R. 71, ll. 19 – 21.

Garrett readily admitted appellant could not speak English. R. 71, ll. 6 – 7. Garrett said the waiver of rights was in Spanish since appellant could not speak English. R. 80, ll. 2 – 8. There was also evidence in this case that appellant could not only not read English, he could not read Spanish. See Waiver form; R. 467.

Garrett said after appellant gave his statement it was "typed in English." R. 75, ll. 16 – 22; See Appellant's statement; R. 466. Garrett claimed the statement was read back to appellant in Spanish and he did not have any changes. R. 75, l. 21 - 76, l. 3. As will be seen very shortly, this would be highly contested.

Garrett admitted in his report that he wrote when he arrived the other investigators were already interviewing appellant. R. 78, l. 13 – 79, l. 3. Garrett admitted, "I will Mirandize them as I am speaking to them." R. 79, ll. 2 – 24. "We'll discuss exactly what happened and then will Mirandize them in written form and get their signature and then do the actual interview and transfer it on to paper." R. 80, ll. 8 – 13. As will be seen infra, this would be defense counsel's secondary objection to appellant's confession being admitted.

Traffic Officer Raymond Rivera was used as an interpreter by the police department. R. 82, ll. 2 – 14. Rivera noted that there were different dialects of the Spanish language, and that that someone from Columbia would be different from someone from Puerto Rico or Spain. R. 82, l. 23 – 84, l. 21. The importance of this was that the defense would strongly maintain the police threatened appellant and took advantage him through coercive police conduct to obtain a confession.

Rivera remembered he was called into appellant's interview to translate for the other investigators. R. 84, ll. 14 – 23. Rivera also admitted he learned appellant could not read or write. R. 86, l. 21 – 88, l. 10.

Rivera recalled appellant had handcuffs "on a belt in the front." R. 95, ll. 17 – 23. Rivera said he did not write out appellant's statement in Spanish. "I translated it to English, and then I had them write in English." R. 97, ll. 2 – 3.

Immediately before translating or interviewing appellant Rivera interviewed alleged eyewitness Hernandez. Rivera admitted he was told that "one person had the gun and other person took it away from him and shot and then gave the gun back to one person." R. 98, ll. 2 – 11.

The next witness was Investigator Wesley Smith. Smith was the lead investigator on the case. He said he spoke "very very little Spanish." Smith distinctly remembered that "everything I ask him [appellant], his answer was, 'no problem.'" "No matter what I ask him." R. 100, l. 8 – 101, l. 9. Smith also said his ability to comprehend conversations in Spanish "is nil." R. 102, ll. 13 – 15.

On cross-examination, Garrett said he did not contact the foreign consulate for appellant upon his arrest because "I'm not required to do that." R. 109, l. 22 – 110, l. 4. Smith also admitted that the officers "confronted him [appellant]" and told him that he was lying to them." R. 112, ll. 5 – 6. Investigator Smith also acknowledged that he "picked him [appellant] up by the belt and pulled his belt back up, it is very loose . . . " Smith claimed he did this so appellant could move his arms around: "I picked him up by the belt, I stood him up, moved it back up, and just told him to sit back down in a chair." R. 111, ll. 10 – 25.

Appellant then testified that he did not speak English and that he only went to first and second grade while living in Honduras. R. 114, l. 12 – 115, l. 8. Appellant said he only understood "a little bit" of Rivera's Spanish. Appellant testified that he "didn't understand anything about the statement before he was told to sign the paperwork." R. 115, ll. 9 – 22. The following occurred with appellant:

> Q. Now when you made these signatures what did you understand that you were doing?

A. When I signed there I was nervous and I didn't know what was going on, what he was telling me, nothing what he was telling me *because he had me in a hold like this. And one of them said that I was lying. He grabbed me from the front and hold me up like this. And then they read the papers and I just didn't know what was going on.*

Q. All right.

A. I didn't understood anything. I didn't understand anything and they told me to sign. And they told to sign. And I told them that I didn't - - I didn't know how to sign. So they - - Mr. Rivera came. He said that he got my name there. And based on that, since my name was there that I would go ahead and sign down there.

I was handcuffed. And I said, I can't sign. And he said, just write down a name, write you. And this next page, he read that to me. I didn't understand anything. I was just kind of lost. I didn't know what was going on because when they got me - - when they got hold of me I was nervous.

And Mr. Rivera told me to sign. And he said - - and I asked him where. And I was very nervous. And I signed up there on the top. I signed on the other side too. And I signed down there. And he said, no, it's not there. It's not there. It's not down there. And then he said, what you need to do is sign down here.

And I said, well, I don't know how to sign. He came, he got his pen, and he put two of the first letters. I remember more or less a year ago. And the first letter he wrote - - there's a name. And there's the next letter that I don't know what it is. And then the next one. And he told me, do this, do that, but I didn't know how to copy my name. And I put - - I wrote down and "R" and other letters that I don't know what they are, what are their names.

R. 116, l. 4 – 117, l. 13. (emphasis added).

Appellant also said while Rivera was asking him questions another officer grabbed him and "raised me up and got me like that. And he told me that I was lying . . . he grabbed me from the belt up. He told me that I was lying. I asked Officer Rivera, what is he saying and he said that the officer was saying that I was lying." Appellant said he told Rivera he was not lying and that he was telling the truth. "If you don't believe me there's God in heaven that is a witness." Appellant said Rivera answered, "there is no God here." R. 118, l. 17 – 119, l. 8.

Appellant said he signed the document as instructed after he was "grabbed up" and called a liar. Appellant testified he was nervous because he did not know what the authorities were going to do with him after he was physically handled. R. 119, l. 19 – 120, l. 3.

Appellant stated after he was in jail he asked to speak to his attorney and the interpreter "because I didn't know what was written in the paper. I didn't know what the paper said." Appellant testified that when he was told what the police had written down he told them that was not what he had told them. "[T]here are things in that paper that Officer Rivera put them there. And that information I didn't give to him." R. 120, l. 18 – 23.

On cross-examination appellant said he was from Honduras and that he was able to get into the country and work with some people from Costa Rica. R. 121, l. 23 – 124, l. 6.

The defense then presented the expert testimony of Dr. Robert Taylor. Taylor spoke four languages and read in seven. R. 127, l. 21 – 129, l. 22. Dr. Taylor received his doctorate in theology from Gregorian University in Rome. He also had a master's degree in psychology and a master's in social work. R. 129, ll. 8 – 22.

Dr. Taylor was recognized as an expert in social work, and psychology with an emphasis on bi-cultural and bilingual interaction. R. 131, ll. 3 – 5.

Dr. Taylor explained that appellant was illiterate and could not read English or Spanish. He had never been to school. Both the signatures on the waiver were orchestrated for him, Dr. Taylor testified. Appellant knew how to sign the first letter of his name, but on the rest of it he had to be coached. Dr. Taylor explained, "it's as if I were arrested in China and given the characters of Chinese to sign my name in Chinese, a brush and an ink dispenser and was asked to sign it. That would be quite a task. He was given that to concentrate on. I don't believe he knows what a lawyer is." R. 132, ll. 6 – 10.

Dr. Taylor opined that appellant signed the waiver form and statement under duress. "He doesn't understand written Spanish." The waiver form was in Spanish. R. 132, l. 11 – 133, l. 6; See Waiver of rights. R. 467. Dr. Taylor also said appellant tried to comply with the officer's demands, and he noted that appellant was grabbed by the belt, raised up and called a liar. R. 133, l. 7 – 134, l. 5.

Dr. Taylor stated that appellant would not have known what a lawyer was the process the police employed in this case, and "we know from the interview he has no questions." R. 135, l. 13 – 136, l. 21.

The judge then ruled that the state had proved by preponderance of the evidence that appellant's statement was voluntarily tendered. He found there were no "coercive police tactics" employed. R. 139, l. 22 – 140, l. 17.

Defense counsel also added voluntariness was questionable where Garrett admitted he came in during an interview process, and then the waiver was signed. R. 140, l. 19 – 141, l. 3.

Garrett, Rivera and Smith then testified in the presence of the jury. R. 144, l. 1 – 154, l. 25.

Rivera's Testimony

Rivera testified, over objection that when appellant was being escorted to the jail he said "this is taking to long. In my country they would have put a bag on my head and beat me down or beat me up is what he said." R. 181, ll. 1 – 25.

Smith's Testimony

Investigator Wesley Smith testified, and repeated, that appellant kept saying "no problem no problem" to him that evening no matter what he was asked. R. 210, l. 20 – 211, l. 10.

Smith also testified if a bullet had hit the ground or concrete before hitting the decedent that the police would have been able to notice the damage. R. 207, ll. 1 – 23; R. 257, ll. 7- 12. Smith acknowledged he was told by another witness, Alvaro Fernando Portugez, that he saw two men arguing that night and he saw another man walking around and that third men bent down as if he was grabbing something from his leg. A witness told Smith he did not see who did the shooting. R. 143, ll. 12 – 25; R. 144, ll. 12 – 17.

Appellant allegedly told the police that he was at a restaurant that night with some black friends. He told them he was carrying a gun that he had gotten from a friend, Antonio Mendoza, who had been arrested the day before. It was a .22 caliber gun. R. 179, ll. 10 – 21. In appellant's statement he said a man approached him and asked "why was he hanging around those black guys or those black people." The statement said the man grabbed appellant and started pushing appellant around. There was a struggle and the man let go of appellant. The statement said appellant was mad because the man hit him and he went to

grab his gun and it fell on the ground. Appellant's statement read: "I grabbed it [the gun]. I pointed it at him and shot two times." R. 180, ll. 1 – 7. Appellant's statement also said appellant put the gun in a tree after he went to the Mexicali. R. 180, ll. 8 – 23; Appellant's statement; R. 466.

Hearsay Objection

Over defense counsel's hearsay objection Smith was allowed to testify that while he and Rivera were escorting appellant to the detention center after his statement that Officer Rivera laughed and said appellant told him the police had been "too nice." "And then I [Smith] asked Rivera what he meant. He said, well, he [appellant] said [in] my country they put a bag over the head and beat us." R. 235, ll. 5 – 22.

The interpreter and sequestration

During the waiver of appellant's right to testify, or his decision to testify, Freeman interpreted appellant's words to the judge and vice versa. Freeman told the judge appellant told him "I wish to defend myself. The shoots the police said I did, I did not do. So I wish to defend myself." R. 259, l. 20 – 261, l. 25.

The solicitor then stated that she knew the defense was going to call interpreter Freeman as a witness. The solicitor said: "He [Freeman] obviously has been in here the entire time translating and he's been outside talking to the potential witnesses as well. So I would say that would exclude his testimony in this case." Defense counsel Ross countered that Smith was the defense translator and his presence was needed, and as investigator he was only substantiating things that were said. Ross argued Freeman was her interpreter and investigator and that there was on reason he should not have been in the courtroom particularly since Investigator Smith also sat in court the entire time. The judge ruled since

there was a motion to sequester he *had "to* grant [the solicitor] motion" to exclude Freeman's testimony. R. 262, l. 8 – 263, l. 13. (emphasis added).

The proffer

Ross then proffered Freeman's testimony. Freeman testified in camera that during his investigation he tried to find people who witnessed the incident and he provided their names to Investigator Smith. R. 264, ll. 10 – 23. Freeman testified that Smith told him there was no other person involved and that he was not interested in investigating any further. R. 265, l. 7 – 266, l. 9. The Freeman testimony would have countered Investigator Smith's, and other police testimony, that the police attempted to find and interview other witnesses, but they could not be located, were not cooperative, or had no information. See, e.g. R. 237, l. 21 – 254, l. 17.

Freeman also testified that when he later interpreted appellant's confession to him in the jail that appellant became very upset. Freeman testified he had to continue to calm appellant down because he "greatly surprised," and appellant said that he did not tell the police the things that were written down. R. 267, ll. 11 – 20.

Other testimony

Courtney Robles testified that she saw two men fighting that night. Robles was not sure how the physical action started. Robles thought the decedent may have been "one of the guys that had been fighting and somebody had just punched him in the eye because by the time they [the police] got there his eye was so swollen that you couldn't see the entry wound." R. 286, l. 23 – 287, l. 6.

Robles gave the police a statement, and she also said the police were "very rude. Very rude" to everyone that "was out there" that night at the Spanish club. R. 287, ll. 10-14.

Robles described how a man in a striped shirt was fighting with a man in a white shirt, and another man separated them, and a man in a black shirt took the gun from the man in the striped shirt and pointed straight ahead and shot. R. 283, l. 7 – 287, l.14.

Norberto Ortiz testified that appellant had problem with Delman Maricio Arias, "and the guy that had some problems with a guy inside the place. And the guy that had the problems with Marlon and started just saying some bad words and insulting him. . . . Mauricio attacked Marlon." Ortiz also noted that another unknown man got the pistol from appellant after appellant had shot the gun twice to scare the aggressor. The other person said "give me the pistol, I'll shoot him." Ortiz said he did not know which of the three shots hit the decedent. R. 297, l. 16 – 307, l. 15.

Lesser-Included Offense and accident

During the charge conference defense counsel Ross brought to the judge's attention the cases of State v. Burris and State v. Crosby. The cases were made a court's exhibit. See R.2. Ross argued that there was evidence appellant was armed in self-defense and a jury could find the gun accidentally when off and it was involuntary manslaughter or accident since there was no heat of passion. R. 378, ll. 9 – 22.

Defense counsel reminded the judge that a witness (Castro) had testified early in the trial that the gun went off accidentally and that given the entire evidence offered in this case that appellant was entitled to an instruction on involuntary manslaughter, and accident. R. 378, l. 9 – 379, l. 11. Counsel also requested a charge on self-defense. The solicitor argued there was testimony "as to every type of thing. There's nothing consistent in that." R. 379, l. 13 – 380, l. 13. The judge stated he was not going to charge involuntary manslaughter or accident, and the only jury options would be murder or not guilty. R. 381, ll. 7 – 22.

ARGUMENT

1.

The judge erred by admitting appellant's inculpatory statement to the police where it was undisputed that appellant could not read or write Spanish or English, a police investigator acknowledged he physically pulled appellant up by the belt on his shackles to his feet during the interrogation while it was also undisputed the police called appellant a liar. Appellant also offered expert testimony of his fear and inability to understand the interrogation given the cultural differences, the language barrier, and the physical and verbal abuse and intimidation. Appellant's confession should have been suppressed given all of these circumstances.

As seen, appellant could not speak English. He also could not read Spanish or English. He had gone to the second grade in Honduras before coming to America.

Appellant's statement was typed in English. This was obviously for the convenience of the police, and not to assure its reliability as coming from appellant. Further, defense counsel correctly argued that the Miranda warnings in this case were further suspect because Investigator Garrett openly admitted that he discussed what happens with the suspect "and then will Mirandize[2] them in written form and get their signature and do the actual interview and transfer it on paper." R. 79, l. 2–80, l. 13.

In State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (Ct. App. 2006) this Court noted that the purpose of Miranda warnings is to apprise a defendant of his constitutional privilege not to incriminate himself while in the custody of law enforcement. State v. Evans, 354 S.C.

579, 582 S.E.2d 407 (2003). This Court, *citing* Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135 (1986), noted that Miranda warnings inserted during interrogation are likely to deprive a defendant of the knowledge essential to his ability to understand the nature of his rights and the consequence of abandoning them. Navy, of course, was an American and did not have any language or cultural problem. There was also not any allegation of physical abuse in State v. Navy. Appellant strongly submits this factor should also be considered when determining the voluntariness of the confession from a totality of the circumstances, and whether appellant's will was overborne, and police coercion employed.

The police brought in Traffic Officer Raymond Rivera to interpret the interrogation of appellant. Rivera, as seen, noted the different dialects in the Spanish language from people from various Spanish speaking countries. Rivera was from Puerto Rico. Appellant was from Honduras. R. 82, l. 2 – 84, l. 21. This was significant since the smallest interpretation or sentence structure can be important given the obvious importance of a defendant's statement.

Investigator Smith readily admitted that at one point he picked appellant up by his belt: "I picked him up by the belt, I stood him up, moved it back up, and just told him to sit back down in a chair." R. 111, ll. 10 – 25. Even given Smith malevolent explanation of his physical conduct with a suspect during an interrogation – literally jerking him out of his seat at the nicest -- it is easy to understand how this physical aggression would be interpreted by appellant who could not speak any English, and could not read any Spanish or English.

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Appellant testified, and it was undisputed, that appellant was also told that he was lying. Dr. Taylor testified the liar allegation was also culturally much more traumatic to appellant, and an additional reason for appellant to fear given the physical encounter. R. 133, l. 7 – 137, l. 1; R. 316, l. 15 – 318, l. 18.

Appellant and Dr. Taylor both said appellant was coached and led into signing a statement where he didn't "understand anything and they told me to sign." R. 116, l. 4 – 117, l. 13. Again, appellant testified he was grabbed up and raised up and told he was lying. This is not a claim, it is undisputed. R. 118, l. 17 – 119, l. 8.

As seen, Dr. Taylor testified appellant was coached and the waivers were orchestrated for him. Dr. Taylor used the analogy of himself being arrested in China and given the characters of Chinese to sign his name in Chinese. Dr. Taylor opined appellant did not understand what was happening, that he did not understand his right to a lawyer given the nature of the waiver process, and particularly since appellant was only attempting to comply where the authorities were physically grabbing him by his belt, and calling him a liar.

A Court must consider totality of the circumstances, including the background, experience, and conduct of the accused when determining if the suspect's will was overborne or his capacity for self-determination compromised. See Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001).

The physical grabbing and jerking up of appellant would have been improper in any case. However, when coupled with the indisputable fact that the police knew they were dealing with a very vulnerable defendant who could not speak English, and who could not

read or write English or Spanish, the physical conduct greatly exacerbated the situation. See State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001).

In State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001), this Court found under the totality of the circumstances that the conduct of law enforcement was egregious enough to render any statement Hook made to the probation officers involuntary. Although Hook was not advised of his Miranda warnings by the probation officer, however, there was no evidence in Hook of any physical misconduct by law enforcement. See Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963).

It is elementary that a confession induced by force, psychological or physical, or by direct or indirect threats is inadmissible. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). Here, two pieces of evidences are not in conflict. Appellant was physically handled by Investigator Smith, and he was called a liar. While calling appellant a liar may be acceptable under certain circumstances -- as a combination with physical aggression when it pertained to the very vulnerable appellant -- it was unacceptable. The police knew appellant could not understand English as he had replied "no problem, no problem" to whatever question or statement was given to him.

There was also evidence that appellant was very upset when his statement was later explained to him at the jail. Appellant testified he had not said the things that were attributed to him by the police. Interpreter Freeman's testimony on this subject, as argued infra was wrongfully excluded, but there was still evidence appellant reacted graphically when he learned what the police attributed to him. The problem is the testimony of a

defendant is never given great credence unless it is corroborated. Here, unless corroborated by Freeman.

Given the totality of the circumstances, the judge erred by refusing to suppress appellant's statement.

2.

The judge erred by admitting the hearsay testimony of Investigator Wesley Smith that Officer Rivera told him while appellant was being escorted to the detention center after giving his confession that Rivera told Smith appellant had told him the officers had been "too nice about it," and that in his country "they'd put a bag over the head and beat us." since this was hearsay testimony and prejudicial.

The import of the hearsay testimony at issue here was obvious. The state wanted to place before the jury that appellant said the police were "too nice" to him, and thereby admitted he had not been mistreated. The hearsay testimony also planted in the mind of the jury that appellant was treated better than he would have been in a Spanish speaking country.

Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE; State v. Davis, Op. No.26229 (November 20, 2006) Statement is hearsay if it does not fall into a hearsay exception).

The Supreme Court has held that improper admission of hearsay evidence constitutes reversible error where its admission is prejudicial to the defendant. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Holmes, 342 S.C. 113, 536 S.E.2d 671. Here, it is clear the hearsay testimony from Investigator Smith that Deputy Rivera allegedly told him appellant said the police were too nice to him and that he would have been beaten in his own country was prejudicial and it was calculated. It was meant to

counteract the defense that appellant was mistreated by the police. Appellant should be granted a new trial.

3.

The court abused his discretion by ruling interpreter and defense investigator Carlos Freeman could not testify because he remained in the courtroom with appellant throughout the trial, reasoning this violated the sequestration order. This ruling was fundamentally unfair. Freeman was relied upon as an interpreter by the defense during the trial, and therefore his presence was necessary in the courtroom.

The judge abused his discretion by ruling interpreter Freeman would not be allowed to testify because the judge found him in violation of the sequestration order. Defense counsel noted that the state's lead investigator was allowed to remain in the courtroom and that Freeman was needed throughout the trial as an interpreter for appellant and the defense. It was undisputed appellant could not speak English. Although the record is confusing and dense on interpreters – there appears to be another on at least one witness – it is clear the judge initially denied the defense's request for a "state interpreter" thereby leaving appellant to rely on Freeman. It should be beyond any argument that Freeman's presence as an interpreter was much more necessary than just leaving the state's lead investigator in the courtroom as a courtesy.

Appellant understands that whether a witness should be exempted from a sequestration order is within the trial court's discretion. See State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (2000). However, it is clear solicitor was not entitled to have Freeman sequestered as a matter of right. It is clear the judge thought he "had to" exclude Freeman's testimony. That was an error of law by the trial judge requiring reversal. See State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Harris, 275 S.C. 463, 272 S.E.2d 635 (1980).

Further, in State v. Fulton, 333 S.C. 359, 509 S.E.2d 819 (Ct. App. 1998) this Court held that the trial judge did not err by allowing two state witnesses to testify in reply even though they remained in the courtroom after their initial testimony although they were under the sequestration order previously. Here, the state clearly sought to gain an unfair advantage by excluding Freeman's testimony as the defense interpreter and investigator. Freeman's testimony was important to the defense which maintained that once the police had appellant's disputed confession, it, Smith in particular, showed no interest in investigating the case or any suspects any further. R. 264 – 267. The state in this case spent a huge amount of time offering testimony on why other evidence was not offered. Freeman's testimony also would have corroborated Robles' testimony on the arrogance or rudeness of the police regarding this case.

Freeman also would have testified that appellant was very surprised when he learned in jail the content of his statement, which, as seen was in English. Appellant maintained the police took advantage of him, and inserted things he never said into the statement. R. 267. Freeman's testimony was important to corroborate appellant's, a criminal defendants, assertion in this regard.

Defense counsel correctly argued that Freeman's presence was necessary in the courtroom because it was essential to appellant's ability to understand the testimony and to communicate. The judge clearly abused his discretion by excluding Freeman's testimony. See Rule 615(3), SCRE "a person whose presence is shown by a party to be essential to the presentation of the party's cause" should not excluded as a witness. Appellant should be granted a new trial for all of the above reasons.

4 & 5.

The court erred by ruling appellant was not entitled to an instruction on involuntary manslaughter or accident where the state elicited testimony that appellant told witness Nelson Castro that he had been wrestling with someone "and that the weapon just went off by itself." There was also evidence appellant was resisting an attack. Defense counsel correctly argued appellant was armed in self-defense under *State v. Burriss* and *State v. Crosby*, and that appellant was entitled an involuntary manslaughter instruction given this evidence. The same argument applies under *Burriss* on an accident instruction. Both issues were jury questions and the judge erred as a matter of law by reasoning inconsistent testimony meant appellant was not entitled to the other instructions.(Issues four and five).

As seen, the state elicited from Nelson Castro that appellant admitted he had been wrestling with another man and that the gun went off accidentally. There was clearly evidence that appellant was attacked by another man who was apparently angry that appellant was with his black friends. There was evidence appellant was hit and knocked to the ground. Appellant had armed himself in self-defense within the meaning of State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003), and State v. Burriss 334 S.C. 256, 513 S.E.2d 104 (1999).

Involuntary manslaughter

In Crosby the Supreme Court held that an involuntary manslaughter instruction was warranted even though at one point appellant admitted he intentionally pulled the trigger. In Crosby although there was conflicting evidence, there also was evidence the decedent was charging at Crosby when he pulled his pistol in self-defense and it discharged.

Similarly in State v. Burriss 334 S.C. 256, 513 S.E.2d 104 (1999) the Supreme Court held that a person can be acting lawfully, even where he is unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. In Burriss, the defendant was threatened and attacked by the victim with another male. There was evidence one attacker backed away but urged his accomplished to attack Burriss again. Burriss grabbed his gun and it fired. Burriss stated it was an accident. However, at another point Burriss said "the trigger was pulled or whatever," implying for the state that the trigger was pulled intentionally.

Regardless, it is elementary that where there is conflicting evidence, any evidence of the lesser-included offense, here involuntary manslaughter, entitles the defendant to an instruction on that lesser-included offense. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). The trial court is only justified in refusing to charge a lesser-included offense when there is no evidence the defendant committed the lesser crime. State v. Chapman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999); State v. Crosby; State v. Burriss, supra.

Accident

"A homicide is excused when caused by the discharge of a gun . . . where the accused is lawfully acting in self-defense and the victim meets death by accident, through the unintentional discharge of the gun or the like." State v. Burriss, 334 S.C. 256, 260, 513 S.E.2d 104, 107 (1999).

For accident, it must be shown that the killing was (1) unintentional; (2) that the defendant was acting lawfully, and (3) due care was exercised in the handling of the gun. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). "When the defense of excusable

homicide by misadventure is relied on, the principles of self-defense may be involved, *not for the purpose of establishing defense of self.* but for the purpose of determining whether accused was or was not at the time engaged in a lawful act, and it has been held that in such case the right, but not the law, of self-defense is involved." State v. Burriss, 334 S.C. 256, 260, 513 S.E.2d 104, 107 (1999) *citing* State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990); 40 C.J.S. Homicide §111(C) (1991).

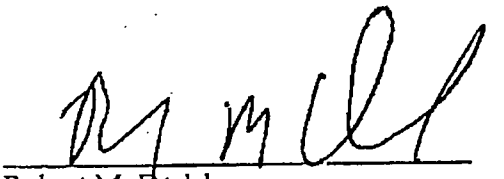
Appellant strongly submits it was a jury question on both involuntary manslaughter and accident. However, the solicitor and the judge made the same error here. They both could not understand how appellant could be entitled to any other instruction where "there's testimony from people at the scene of every type of thing. There's nothing consistent in that." R. 379, ll. 3-25. The judge also noted the inconsistent testimony and made the same mistake of thinking the defense had to put forth a totally coherent defense or the jury was not entitled to consider any other possibility than murder or not guilty. State v. Knoten, supra. That was error. It should not be surprising such a disorganized environment on the night of the shooting produced different perceptions and memories. That is why we have juries.

Appellant should be granted a new trial since he was entitled to have the jury consider the options of involuntary manslaughter and accident.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT.

August 17, 2007

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Robin B. Stilwell, Circuit Court Judge

Case No.: 2011-CP-23-1209
Appellate Case No.: 2013-002652

CERTIFICATE OF SERVICE

Marlon Rivera, 311864, ... Petitioner,

v.

State of South Carolina, ... Respondent.

I certify that I have served a copy of the Petition for Writ of Certiorari on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 10th day of November, 2014, addressed as follows:

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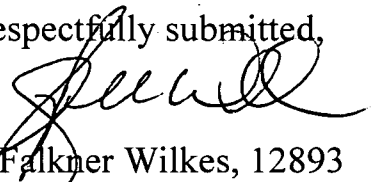
Respectfully submitted,



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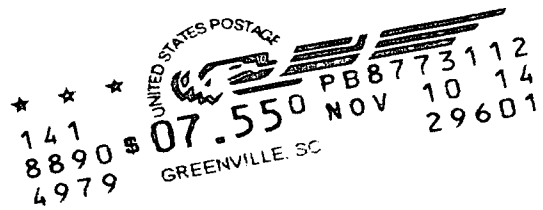

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