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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

MICHAEL ANTHONY ROGERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002116

BRIEF OF PETITIONER

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ISSUES PRESENTED

I. Did the PCR Court err in denying Petitioner relief where trial counsel failed to admit a 911 tape which contained evidence of Petitioner's efforts to save the decedent's life and tended to prove that the stabbing was an accident which would have further supported an involuntary manslaughter jury charge?

II. Did the PCR court err in denying Petitioner relief where trial counsel failed to argue to the trial court and preserve for appellate review whether Petitioner was entitled to the lesser-included jury charge of involuntary manslaughter where evidence in the record indicated a struggle over a weapon and where this Court found that counsel failed to preserve the issue of habitation, and where trial counsel failed to request jury charges for involuntary manslaughter and habitation?

STATEMENT

A Spartanburg County grand jury indicted Petitioner for murder during its March 2011 term of court. App. 597. Prior to trial, a hearing was held on September 2, 2011 before the Honorable J. Derham Cole to dismiss the case pursuant to S.C. Code Ann.§ 16-11-450. App. 1. Danny Fulmer appeared on behalf of the State, and Clay T. Allen represented Petitioner. The motion was denied. App. 153 ll. 2 – 13.

Petitioner's case was called to trial before Judge Cole and a jury on October 4, 2011 with the same attorneys present. App. 119. Following a three-day trial, the jury found Petitioner guilty of voluntary manslaughter. App. 484 ll. 8 – 13. Judge Cole sentenced Petitioner to twenty-one years' imprisonment. App. 489 l. 20 – 490 l. 4.

Petitioner's conviction and sentence were affirmed. State v. Rogers, Op. No. 2014-UP-332 (S.C. Ct. App. filed September 17, 2014).

Petitioner filed a timely application for post-conviction relief. App. 492. His application contained allegations that trial and appellate counsel were ineffective. App. 494; App. 499 – 502. The State made its Return on or about July 1, 2016. App. 504.

An evidentiary hearing was conducted on February 1, 2017 before the Honorable Edward W. Miller. App. 511. Susannah C. Ross represented Petitioner, and Caitlin B. Hastings appeared on behalf of the State. Petitioner and trial counsel testified during the hearing.

In a written order filed on April 6, 2017, Judge Miller dismissed Petitioner's application, finding that Petitioner failed to satisfy Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). App. 573.

Petitioner then filed a motion to alter or amend the judgment on or about April 11, 2017. App. 585. The State filed a return on or about May 1, 2017. App. 590. The PCR Court denied the motion by way of a Form 4 order. App. 595.

A Petition for Writ of Certiorari was filed on April 13, 2018. The state filed a Return on August 23, 2018. On September 10, 2018, this case was transferred to this Court. On January 7, 2020, certiorari was granted. This Brief of Petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue. Appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018); Sellner v. State, 416 606, 787 S.E.2d 525 (2016). Courts review questions of law de novo with no deference to the circuit court and will reverse if the PCR court's decision is controlled by an error of law. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

ARGUMENT

I. The PCR Court erred in denying Petitioner relief where trial counsel failed to admit a 911 tape which contained evidence of Petitioner's efforts to save the decedent's life and tended to prove that the stabbing was an accident which would have further supported an involuntary manslaughter jury charge.

On the night of November 12, 2010, Tonya Lowery and John Ryan were at Petitioner's trailer. App. 8 l. 2 – App. 9 l. 20. Lowery was Petitioner's girlfriend. App. 9 ll. 23 – 25. Ryan approached Lowery from behind and "put his arms around [her] below [her] chest." App. 11 l. 4 – App. 14 l. 11. She asked him to stop. Id.

After noticing Ryan touching his girlfriend against her wishes, Petitioner shoved Ryan. Id. Following a brief scuffle, Lowery asked Petitioner to stop because "[h]e [had] proved his point." Id. Petitioner got off of Ryan who then kicked Petitioner between the legs. Id. The two began fighting again. Id. At some point there was a break in the fight—Petitioner went into the bathroom, had a cigarette, and cleaned up a cut on his lip. App. 522 ll. 1 – 8.

Petitioner asked Ryan to leave three times. App. 13 l. 7 – 24. Because he did not, the two continued brawling. Id. Lowery left through the back door of the trailer because she was upset and "couldn't handle the fact that they were fighting." Id.

After she walked in front of the trailer, Petitioner requested that she dial 911 because he had accidentally stabbed Ryan. App. 13 l. 25 – App. 14 l. 3. Ryan stood up, walked over to the bar and placed his cell phone on the bar before falling over onto the floor. App. 15 ll. 1 – 17. He started coughing and then stopped breathing. App. 17 ll. 1 – 12. In an attempt to save his life, Petitioner attempted mouth-to-mouth resuscitation. Id.; App. 65 ll. 12 – 25.

At the evidentiary hearing, Petitioner introduced the 911 call without objection. App. 518 ll. 12 – 17. After listening to the tape, Petitioner explained that he could be heard yelling in the background:

> I was trying to save the man's life. It was an accident, the way he got stabbed. I never meant to stab the man. I didn't know what else to do. He was just bleeding profusely. And I put the towel on him, he passed out, and gave him mouth-to-mouth resuscitation. He wasn't responding. The ambulance was taking forever to get there, I didn't know what else do to.
>
> Come to find out, though, the ambulance was outside in my driveway, and they didn't - - weren't able to come in because the police hadn't arrived yet. I guess because there was a crime involved, I guess, with the knife and all, and that's why they were waiting in my driveway, I don't know. It just seemed forever for them to come in the house. But I honestly did the best to save his life.

App. 519 l. 14 – App. 520 l. 4.

Trial counsel was appointed to Petitioner's case. App. 544 ll. 2 – 7. He disagreed with the State's characterization of the evidence as overwhelming, calling it "a toss-up." App. 544 ll. 8 – 21. He was unable to state whether he provided Petitioner with discovery materials. App. 545 ll. 12 – 15.

Trial counsel indicated that the 911 tape was helpful "in the sense that you do hear the concern and the panic in [Petitioner's] voice, you know, his concern about, you know, they were saying he's losing him or dying." App. 566 ll. 18 – 21.

A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. See Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Rule 71.1(e), SCRCP. If there is any probative evidence to support the findings of the PCR court, those findings must be upheld. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Likewise, a PCR court's findings should not be upheld if there is no probative evidence to support them. Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996).

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient, and the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 688–89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. 2052; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. 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. Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson, 325 S.C. at 186, 480 S.E.2d at 735.

Petitioner received ineffective assistance of counsel where counsel failed to introduce the 911 tape. It offered additional context, and Petitioner could be heard proclaiming that the injury was an accident. As a contemporaneous record, taken as events were unfolding, it would have clarified Petitioner's actions and served to exonerate him. Petitioner could be heard yelling the decedent's name. Lowery informed the 911 operator that Petitioner was "trying to keep him alive." She advised the operator that it was safe for first responders to come into the house. Further, she indicated that Petitioner and the decedent were friends. All of this information would have changed the context of the evidence presented by the state and likely caused the jury to have reached a different verdict.

The Order of Dismissal addressed this allegation in a rather conclusory fashion. App. 580. Seemingly overlooking the portion of trial counsel's testimony wherein he admitted that the 911 tape was helpful, the PCR court found that counsel articulated a valid strategic reason for failing

to admit the tape. However, the 911 tape would have prevented the state from making the following claim during closing argument:

> I imagine Mike and John were havin' a pretty good time and [lo] and behold Mike walks outta the bathroom, he sees John touching his woman and that set him off and he attacked John, he told ya he attacked John, he admits to that. He was in a fit [of] rage, some fights ensued, Jackie's now gone, Tonya's outside maybe, I don't know where she really may have been, but he's mad, he's mad and he's got a knife, he attacked John. John was drunk, John was no match for him, he'd already beat him up twice, he just, he couldn't get beyond that anger, in that rage he stabbed John, stabbed John in the back, he stabbed John in the chest and John bled to death on the floor of his trailer. After John's laying here, I would imagine the thought occurred to him, Uh-oh, what have I done, **so he does what a guilty person would do, he goes to the bathroom, he washes his hands, he washes that knife and he throws it underneath the dryer**.

App. 454 ll. 8 – 23 (emphasis added).

Multiple fights occurred throughout the course of the evening. App. 374 l. 3 – App. 377 l. 8. After one of the breaks, when Petitioner went into the bathroom and rinsed blood off himself, John Ryan was still upright, talking, and searching for his keys. Id. Later on, Petitioner and Ryan began fighting again after John "sucker-punched" Petitioner. App. 379 ll. 7 – 20. At this point, Ryan was armed with a knife. App. 379 l. 19 – App. 382 l. 22. Petitioner subdued him and, after noticing a cut on his own arm, again washed himself off. App. 382 l. 23 – App. 384 l. 24. Immediately after leaving the bathroom, he reentered the kitchen and told Lowery to call 911. Id. Petitioner then began applying pressure to the wound with dish towels and eventually began mouth-to-mouth resuscitation. App. 385 ll. 8 – 25.

The 911 call would have mirrored Petitioner's testimony. It would have supported Petitioner's statement to the jury that he attempted to save Ryan's life. App. 386 ll. 1 – 11. Petitioner denied placing the knife anywhere else intentionally. App. 391 ll. 3 – 24. Petitioner testified that the last time he saw the knife, it was on the bathroom sink. App. 392 ll. 8 – 13. The

911 call would have alerted the jury to the fact that Petitioner immediately began trying to administer life-saving efforts to Ryan upon realizing that the wound was serious.

The validity of counsel's strategy is reviewed under "an objective standard of reasonableness." Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002). Counsel's suggestion that the 911 tape would have been duplicative of favorable testimony from witnesses is objectively unreasonable. The tape would have assisted in the defense of Petitioner, and the failure to use it was ineffective assistance of counsel.

Had counsel admitted the tape into evidence, the jury would might have believed his testimony that he did not mean to stab Ryan. Petitioner was prejudiced on this matter, as explained in detail below, because he did not receive an involuntary manslaughter charge. The 911 tape provided an additional point of view and constituted uncontroverted evidence from which Petitioner could have requested a jury charge on involuntary manslaughter.

II. The PCR court erred in denying Petitioner relief where trial counsel failed to argue to the trial court and preserve for appellate review whether Petitioner was entitled to the lesser-included jury charge of involuntary manslaughter where evidence in the record indicated a struggle over a weapon and where this Court found that counsel failed to preserve the issue of habitation, and where trial counsel failed to request jury charges for involuntary manslaughter and habitation.

Petitioner failed to argue habitation and involuntary manslaughter and as a result did not receive a corresponding jury charge. As Petitioner testified:

> [Trial counsel] should have asked for involuntary manslaughter because there was evidence during the trial of a struggle of a weapon. A self-defense charge, which was charged, and involuntary manslaughter are not mutually exclusive. It should have been charged, I believe, because there was testimony in there - - in the transcript and the trial that there was a struggle over the weapon.

App. 530 ll. 3 – 15.

As articulated by Petitioner, the defense of habitation "should be charged when [a] defendant presents evidence with defending himself on an imminent attack on his own premises." App. 530 ll. 16 – 23; App. 536 l. 22 – App. 537 l. 3. As admitted by counsel, there was testimony from Petitioner's trial which indicated that the stabbing was an accident. App. 557 l. 4 – App. 558 l. 6. Counsel admitted that he had "pulled a [habitation] charge" according to his research folder. App. 561 ll. 15 – 24. His reason for not requesting it was that he did not "really view this as [Petitioner] defending his home," rather Petitioner was "defending himself." App. 561 ll. 15 – 24.

When asked about a relevant case from this Court which had come out prior to Petitioner's trial, Petitioner admitted that he did not bring the case to the judge's attention.[1] App. 562 l. 2 – App. 563 l. 22.

[1] State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (Ct. App. 2010).

A trial court is required to charge the current and correct law in South Carolina. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (providing a court must view the facts in the light most favorable to a defendant when determining whether evidence required a charge on the lesser included offense of voluntary manslaughter alongside the charge of murder). A request to charge a lesser included offense is properly refused ***only*** when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241(1996) ("The trial judge is to charge the jury on a lesser included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed.").

An appellate court will only reverse a trial court's decision regarding a jury charge if there is an abuse of discretion. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). If there is any evidence to support a jury charge, the trial judge should give a requested charge on the matter. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 109 (1999). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 114, 167 (2007).

In deciding whether the jury was misled or the appellant prejudiced by allegedly erroneous instructions, the charge must be considered as a whole. State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972); State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954); State v. Chappell, 185 S.C. 111, 193 S.E. 924 (1937).

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21; State v. Belcher, 385 S.C. 597, 602, 685 S.E.2d 802, 804 (2009). It is error to give instructions which are calculated to confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987); see also Wright v. Harris, 228 S.C. 144, 89 S.E.2d 97 (1955) (the giving of conflicting and irrelevant instructions is reversible error). This is so because the purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair and proper verdict can be reached. Leonard, 292 S.C. 133, 355 S.E.2d 270. "The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." State v. Blurton, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002).

> Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and 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. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). For the purposes of an involuntary manslaughter jury charge, " '[a] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.' " State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (quoting State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003)). "[A] self-defense charge and an involuntary manslaughter charge are not mutually exclusive...." State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 470 (2008).

> There is a difference between being armed in self-defense and acting in self-defense.... [In] determining whether one is armed in self-defense, the court is "concerned only with whether the defendant had a right to be armed for purposes of determining whether he was engaged in a lawful act, i.e. was lawfully armed, and not whether he actually acted in self-defense when the shooting occurred."

Brayboy, 387 S.C. at 181, 691 S.E.2d at 486 (quoting Light, 378 S.C. 641, 664 S.E.2d 465). Our appellate courts have held that "evidence of a struggle over a weapon between a defendant and victim supports submission of an involuntary manslaughter charge" when the evidence shows the defendant was lawfully armed in self-defense at the time of the shooting and the defendant recklessly handled the loaded gun. Id. at 180, 691 S.E.2d at 485; see also State v. Rivera, 389 S.C. 399, 404–05, 699 S.E.2d 157, 159–60 (2010); Light, 378 S.C. at 648–49, 664 S.E.2d at 468–69; Tisdale v. State, 378 S.C. 122, 125–26, 662 S.E.2d 410, 412 (2008); State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2008).

As set forth in State v. Bryant:

> The defense of habitation provides that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection. "One defending himself from imminent attack on his own premises is entitled to a charge of defense of habitation." "For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." Unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger of sustaining serious injury or damage. Rather, the defense of habitation provides "where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." "The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was '**defending himself from imminent attack on his own premises**.' " Although self-defense and habitation are analogous, the defenses are not identical.

State v. Bryant, 391 S.C. 225, 233–34, 705 S.E.2d 465, 470 (Ct. App. 2010) (internal citations omitted) (emphasis added).

When asked about Bryant, trial counsel agreed that the following language supported the contention that when Ryan refused to leave, after being asked, he became a trespasser:

> A man who … being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonable necessary to prevent the obtrusion or to accomplish the expulsion.

Bryant at 234, 705 S.E.2d at 470 (citing State v. Bradley, 126 S.C. 528, 533, 120 S.E.240, 242 (1923)). Counsel agreed with the definition of obtrusion as "become noticeable in an unwelcome or intrusive way." App. 563 ll. 4 – 19.

This court found that the habitation issue was unpreserved for appellate review:

> We find Rogers did not preserve the defense of habitation argument for appellate review because he never argued he was immune from prosecution pursuant to defense of habitation in either his pretrial motion to dismiss or at any time during his trial.

State v. Rogers, Op. No. 2014-UP-332 (S.C. Ct. App. filed September 17, 2014).

As stated by Petitioner near the conclusion of his direct examination at the evidentiary hearing:

> I believe, Your Honor, about the withdrawal and abandonment after the first fight, Your Honor, I really believe if [trial counsel] would have had additional charges brought to the jury, it would have shown that my right to self-defense would have … [come] back into play, and I had the right to protect myself with [Ryan] had attacked me after the confrontation was over with. A good five, ten minutes went by. It was clear to him that it was over, just leave my home, leave, and it would have been the end of it. If he did not attack me the second time, we wouldn't be standing here today.

App. 537 ll. 12 – 24.

There was evidence in the record to support a jury charge of the defense of habitation. Petitioner ordered Ryan to leave the home on numerous occasions. App. 530 l. 24 – 21. Counsel should have requested the charge on habitation due to the transformation of Ryan's status from guest to trespasser. The Bryant case would have provided binding authority from which counsel could have crafted his argument and convinced the judge to either grant Petitioner's motion to dismiss or offer a jury charge on the defense of habitation.

Similarly, trial counsel failed to request a charge of involuntary manslaughter. Petitioner and Ryan were struggling over the knife, as supported by Petitioner's testimony. Therefore, a charge on involuntary manslaughter was applicable to the case at hand.

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. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009).

"To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others." State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

Furthermore, "[t]he negligent handling of a loaded gun will support a charge of involuntary manslaughter." State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). Additionally, **"[e]vidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge**." Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008) (emphasis added); Casey, 305 S.C. at 447, 409 S.E.2d at 392; see also State v. Battle, 408 S.C. 109, 757 S.E.2d 737, 742 (Ct. App. 2014) (confirming that evidence of a struggle over the murder weapon supports submission of an involuntary manslaughter charge to the jury).

Petitioner's matter is similar to Wigington v. State, 413 S.C. 578, 776 S.E.2d 407 (Ct. App. 2015). In Wigington, there was a claim of ineffective assistance of counsel regarding an

unpreserved issue. Wigington had gotten into an argument with his son while at home, who threatened Wigington's life. Wigington at 581-2, 776 S.E.2d 407-9. After Wigington retrieved a pistol from his car, his son "grabbed his hand holding the gun." Id. The two men struggled over the weapon and Wigington "was surprised when the gun discharged because he thought the safety was on." Id.

This Court found Wigington's argument regarding self-defense and accident to be unpreserved because "Petitioner did not raise this argument to the trial court." Id. at 583, 776 S.E.2d 407, 409. Therefore, this Court affirmed his convictions. State v. Wigington, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007).

As was the case in Wigington, the incident in the matter *sub judice* was an accident. In this case, had the involuntary manslaughter charge and habitation charge been requested and denied, Petitioner would have been entitled to a new trial on direct appeal, because the facts in the light most favorable to Petitioner support the charges. Specifically, Petitioner was in his own home and had been previously threatened by Ryan. There was also evidence that the stabbing was an accident. If the charges had been requested and given, it is likely that the jury would have reached a different conclusion. Petitioner was aware that the ineffective assistance he received changed the outcome of his trial. App. 538 ll. 2 – 25.

The Order of Dismissal contained a finding that counsel did not request these jury instructions based on a "valid strategic reason," App. 581. Citing the same two sentences and four cases as in the "Failure to Introduce the 911 Tape into Evidence" section a page earlier, and notably omitting a discussion of prejudice, the PCR court concluded Petitioner failed to satisfy his burden. Id.

Trial counsel was ineffective for failing to introduce the 911 tape at Petitioner's trial. In addition to providing context to the facts as described by witnesses approximately one year following the incident giving rise to Petitioner's arrest, it would have provided additional evidence and context which would have further supported a request for involuntary manslaughter and habitation jury instruction. Even without that evidence, however, the testimony offered at trial supported those instructions. Trial counsel's failure to request either prejudiced Petitioner. Petitioner received ineffective assistance of counsel on multiple fronts, and he is entitled to a new trial.

CONCLUSION

Based on the above, Petitioner's conviction and sentence should be vacated, and the case remanded for a new trial.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of May, 2020.