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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 2021-UP-247 (S.C. Ct. App. Filed June 30, 2021)

Lower Court Case No. 2015-CP-42-3862

MICHAEL ANTHONY ROGERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002116

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 20, 2021.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the PCR court, where trial counsel failed to request jury charges for involuntary manslaughter and habitation, where evidence was elicited at trial to support each of the jury instructions, and where the PCR court's boilerplate language denying relief was unsupported by the testimony from the PCR evidentiary hearing?

STATEMENT OF THE CASE

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 the South Carolina Court of Appeals. On January 7, 2020, certiorari was granted. The Brief of Petitioner was filed on May 29, 2020. The Brief of Respondent was filed on September 18, 2020.

The Court of Appeals issued its opinion on June 30, 2021. A Petition for Rehearing was filed on July 15, 2021. Rehearing was denied on July 20, 2021. This Petition now follows.

ARGUMENT

The Court of Appeals erred in affirming the PCR court, where trial counsel failed to request jury charges for involuntary manslaughter and habitation, where evidence was elicited at trial to support each of the jury instructions, and where the PCR court's boilerplate language denying relief was unsupported by the testimony from the PCR evidentiary hearing.

Relevant facts

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.

Petitioner contended that trial counsel was ineffective for failing to request the defense of habitation. App. 501. At trial, counsel for 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 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 also "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.

Discussion

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

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

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. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). "One defending himself from imminent attack on his own premises is entitled to a charge of defense of habitation." State v. Lee, 293 S.C. 536, 537, 362 S.E.2d 24, 25 (1987). "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." Rye, 375 S.C. at 124, 651 S.E.2d at 323. 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. *Id.* 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." Id. "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.**' " State v. Sullivan, 345 S.C. 169, 173, 547 S.E.2d 183, 185 (2001) (quoting Lee, 293 S.C. at 537, 362 S.E.2d at 25). Although self-defense and habitation are analogous, the defenses are not identical. Rye, 375 S.C. at 124, 651 S.E.2d at 323.

State v. Bryant, 391 S.C. 225, 233–34, 705 S.E.2d 465, 470 (Ct. App. 2010) (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 reasonably 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.

In its unpublished opinion on direct appeal, the South Carolina Court of Appeals 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) (citations omitted).

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 give, 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. It he did not attack me the second time, we wouldn't be standing here today.

App. 537 ll. 12 – 24.

The PCR court dealt with these two potential jury instructions in a rather conclusory fashion. App. 581. Under a section entitled "Failure to Request a Jury Instruction of Defense of Habitation, Accident, Withdrawal, and Involuntary Manslaughter," the PCR court cherrypicked testimony from trial counsel and suggested that because counsel's research led to the conclusion that habitation was inapplicable, his decision should not be second-guessed. Id. That conclusion belies the remainder of trial counsel's testimony at the PCR evidentiary hearing, particularly the

cross-examination and the references to Bryant, supra. As noted by PCR counsel in the Rule 59(e) motion, "[v]alid trial strategy cannot be based upon a misunderstanding of the law." App. 588.

The Court of Appeals held "Petitioner did not produce evidence that would have entitled him to a jury charge on the defense of habitation and cited State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). Rogers v. State, Op. No. 2021-UP-247 (S.C. Ct. App. filed June 30, 2021) at 3.

In Rye, this Court reversed Rye's murder conviction based on the trial court's incorrect jury charge regarding habitation. Id. Rye cited State v. Bradley, 126 S.C. 528, 533, 120 S.E.2d, 242 (1923) for the underlying test for habitation as well as four scenarios involving the law of habitation:

> (1) When the occupant is the slayer and stands upon habitation apart from self-defense; (2) When the occupant is the slayer, stands upon the right of self-defense, but claims immunity from his duty to retreat; (3) When the occupant is the slain and the homicide occurred while he sought to protect his habitation; (4) When the occupant is the slain and the homicide occurred while he was attempting to eject a trespasser but was outside of his habitation.

Bradley at 233-37; 120 S.E. at 242-243.

In the matter at bar, the Court of Appeals held that "[a]lthough the evidence shows Petitioner asked Victim to leave his home, Petitioner admitted at trial that he was not attempting to eject Victim from his home during the fight between the pair." Rogers v. State, Op. No. 2021-UP-247 (S.C. Ct. App. filed June 30, 2021).

Petitioner asked the decedent to leave at least three times. App. 13 ll. 7 – 24. As a result, trial counsel researched a habitation charge. App. 561 ll. 15 – 24. His reason for not proceeding with a request for habitation language illustrated a misunderstanding of the law wherein he did

not "really view this as [Petitioner] defending his home," but rather Petitioner was defending himself. App. 561 ll. 15 – 24.

Counsel for Petitioner proved at the PCR evidentiary hearing that State v. Bryant, 391 S.C. 225, 705 S.E.2d 465, 470 (Ct. App. 2010) provided favorable language and would have supported his defense of Petitioner at trial. App. 562 l. 2 – 563 l. 22.

For practical purposes, there was no difference between Petitioner's repeated requests for the decedent to leave the home and his admission that he was not attempting to eject the man from his home during the fight. App. 227 ll. 23 – 25. Lowery's testimony shows how Petitioner met the elements for habitation:

> It wasn't long after [Jackie Lance] left [Petitioner] asked John to leave. **He told him to leave, he told him three times** and ... I told him, I said, [h]e can't go, she took his truck, and I'm tryin' - - I wanted like, John, you sit here and, Mike, you sit here and then John swung and then he hit [Petitioner] in the face and ... they were fightin'.

App. 227 l. 22 – 228 l. 7. (emphasis added).

This exchange was reiterated on cross-examination with trial counsel questioning Lowery:

> Q: After she left [Petitioner] told John to leave?
>
> A: Yes.
>
> Q: Wanted him out, I mean he said he wanted him outta the house?
>
> A: Yes.
>
> Q: You told [Petitioner] he can't go right now because his truck or that Jackie's gone with his truck, is that correct?
>
> A: Yes.
>
> Q: Mike told you, or said, Well he can still get outta the house and leave, is that correct?

A: He just said, he kept tellin' John he wanted him out of his house. He told him like three times, I mean, right after each other and then that's like I say, that's when John swung, I mean, it was just, there wasn't no reaction, there was no time to call nobody, I mean, it was just, it just happened. I mean, they started fightin' again.

Q: What I'm tryin' to get at is even after you told [Petitioner] that he couldn't leave because his truck was gone [Petitioner] still told John that I want you outta the house?

A: Yes.

App. 250 l. 12 – 251 l. 6.

This exchange corroborated Petitioner's testimony that he told John to leave. App. 378 ll. 17 – 22. Additionally, Petitioner testified at trial that he never "changed his mind and [told] him that he could stay for a while." App. 395 ll. 5 – 8.

The admission referenced by the Court of Appeals regarding ejectment occurred during cross-examination. Although Petitioner testified that he did not try to eject John, this statement did not undo his previous testimony:

Q: - - - it was your home but you weren't trying to eject John at this time, were ya, - - -

A: I was tryin' to eje - - I didn't try to eject John, I told him to leave before he attacked me. I did not try to eject him. If I wanted - - if I'da tried to eject him, I woulda accomplished just that and got him outta my home.

App. 417 ll. 7 – 12.

Petitioner's actions in repeatedly requesting that John leave his home were reasonable under the circumstances. This conversation occurred after the two had already fought at least once. App. 404 ll. 21 – 25. Petitioner is not required to use the legal terms of art, nor does his statement that he was not trying to eject John physically negate or dilute in any way his prior testimony. PCR counsel advanced this argument in the Rule 59(e) motion. App. 585 – 586. Petitioner was entitled to the defense of habitation based on the testimony he provided at the trial

level. The evidence elicited at trial would have been sufficient to receive a habitation jury instruction had counsel requested it.

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. 13, ll. 7 – 14; App. 25 l. 16 – App. 26 l. 14; App. 39 ll. 4 – 21; App. 41 ll. 1 – 9; App. 57 ll. 11 – 22; App. 227 l. 22 – App. 228 l. 21; App. 250 ll. 6 – 23; App. 378 ll. 17 – 22; App. 404 ll. 21 – 25; App. 417 ll. 5 – 12; App. 530 l. 24 – 21. Petitioner answered in the negative when asked if he ever "changed [his] mind ... that [the decedent] could stay." App. 45 l. 23 – App. 46 l. 3; App. 395 ll. 5 – 8.

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, Petitioner was entitled to a jury charge on involuntary manslaughter, and counsel was ineffective for failing to request it. Petitioner and Ryan were struggling over the knife, as evidenced by Petitioner's testimony. Therefore, a charge on involuntary manslaughter was applicable to the case at hand.

"Evidence 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, 212 (2008). This case is distinguishable from State v. Sams wherein the defendant was convicted of voluntary manslaughter after choking a victim. 410 S.C. 303, 764 S.E.2d 511 (2014).

Petitioner testified pretrial that he did not remember stabbing the decedent and that his actions were unintentional. Tr. 47, ll. 19 – 24. His testimony at trial mirrors the language from

Tisdale. Tr. 382 l. 14 – 382 l. 22. Petitioner's actions were unintentional and he was not acting with malice. He was lawfully defending himself from an attack from his friend who was armed with a knife. App. 380 l. 2 – 382 l. 22. In Sams, the death was caused by strangulation. By comparison, the decedent in the matter *sub judice* died following a struggle with a weapon which supports an involuntary manslaughter charge under Tisdale.

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. 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.

The Court of Appeals 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, the Court of Appeals affirmed his convictions. See 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 been properly preserved, Petitioner was entitled to a new trial and a jury charge on involuntary manslaughter and habitation because the facts would have been viewed in the light most favorable to Petitioner and there is evidence tending to reduce the crime to involuntary manslaughter. Specifically, Petitioner was in his own home and had been previously threatened by Ryan. There was also evidence that the stabbing was an accident.

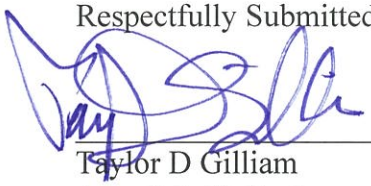
The Order of Dismissal contained a finding that counsel did not request these jury instructions based on a "valid strategic reason," App. 581. Citing the same two sentences and four cases as in the "Failure to Introduce the 911 Tape into Evidence" section a page earlier, and notably omitting a discussion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

Petitioner was aware that the ineffective assistance he received changed the outcome of his trial. App. 538 ll. 2 – 25. Had trial counsel properly raised this issue to the trial court, Petitioner would have been entitled to an involuntary manslaughter charge.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing on the issues raised herein.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of August, 2021.