

IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

The Honorable Daniel Dewitt Hall, Circuit Court Judge

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Case No. 2019-CP-29-00975  
Appellate Case No. 2023-000404

Michael Brent Gay,

Petitioner,

vs.

The State of South Carolina,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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**RECEIVED**

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**S.C. SUPREME COURT**

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## QUESTIONS PRESENTED

- I. Whether trial counsel's failure to develop and present evidence that the victim's death was the result of an accident constitutes ineffective assistance of counsel depriving petitioner of his Sixth Amendment right to counsel?
- II. Whether trial counsel's failure to offer mitigating evidence regarding Petitioner's opioid addiction during his guilty plea constitutes ineffective assistance of counsel depriving petitioner of his Sixth Amendment right to counsel?
- III. Whether petitioner's plea was involuntary due to his lack of understanding of the elements of voluntary manslaughter and his belief he would receive a 12-year sentence?
- IV. Whether the PCR court erred in barring counsel from introducing evidence regarding Petitioner's fee dispute with trial counsel when evidence contained in the paperwork supported Petitioner's testimony that Petitioner informed trial counsel at the beginning of the case that the shooting was accidental?

## STATEMENT OF THE CASE

Petitioner was indicted for murder and possession of a weapon during the commission of a violent crime. App. 155-156. He entered a guilty plea before the Honorable Brian M. Gibbons on December 13, 2018, on his fourth day of his jury trial, to the lesser included charge of voluntary manslaughter and possession of a weapon during the commission of a violent crime. App. 133-134. He was sentenced to thirty years on the voluntary manslaughter charge and five years on the weapons charge to run concurrently. App. 153.

Petitioner timely filed an application for post-conviction relief (PCR) August 6, 2019, and after retaining counsel, he filed an amended application for PCR through counsel. App. 165- 183. Petitioner proceeded to an evidentiary hearing before the Honorable Daniel Dewitt Hall, who ultimately denied and dismissed the application with prejudice by order dated February 10, 2022. Petitioner now submits this petition for writ of certiorari for the Court's consideration.

## ARGUMENTS

**I. Whether trial counsel's failure to develop and present evidence that the victim's death was the result of an accident constitutes ineffective assistance of counsel depriving petitioner of his Sixth Amendment right to counsel?**

Petitioner was charged with murdering the victim, Flint McManus. Petitioner testified at his PCR hearing that on the day Flint McManus was shot, he, McManus, and Raymond Robinson were at Petitioner's home. App. 191-192. During that day, the three men took pills, smoked marijuana, and used methamphetamines for several hours. App. 191. They were all partying and celebrating Petitioner's birthday. App. 193. Throughout the day no one had any disagreements or arguments with each other. App. 194. At some point in the evening, Petitioner went to talk to

his grandmother, who he calls his mother because she raised him. App. 194. While talking with his grandmother, he left Robinson and McManus in his bedroom alone. App. 194. Petitioner returned to his bedroom and went to his closet to retrieve more pills. App. 195. He checked where he kept his pills and they were missing. App. 195. Beside that spot was a box that Petitioner kept his jewelry in. App. 195. He noticed two of his watches were also gone. App. 195. Initially, Petitioner thought he misplaced these items, so he started looking through the rest of his closet. App. 195. Then he looked out into his bedroom and saw McManus sitting in front of the TV in his bedroom and holding one of Petitioner's knives with the blade out. App. 195.

Petitioner was scared and believed McManus had stolen from him and might hurt him with the knife he had out and in his hand. App. 196. Petitioner testified that he wanted "to remove myself from this situation...but I wanted to do it safely." App. 196. In order to remove himself from the situation, Petitioner had to walk between Robinson and McManus to exit the bedroom and into the hallway. App. 196. Petitioner grabbed his gun for protection, held his gun by his side, and quickly rushed past. App. 196. Petitioner was wearing flip flops and he stumbled on something and tripped and fell. App. 196. As he was falling, the gun accidentally discharged hitting McManus and killing him. App. 196. Petitioner was in complete shock. App. 196. Robinson fled and Stephen Perry arrived at Petitioner's home shortly thereafter. App. 197. Petitioner also testified at PCR that his gun had accidentally discharged before and that was why it stayed in his closet. Petitioner barely used it. App. 199.

Petitioner testified at PCR he told his trial counsel everything, was open and honest with him, and told him from the very beginning that he had accidentally shot the victim. App. 199-200. Petitioner also testified that he was never interested in a plea, and from the beginning of

their relationship, he told his lawyer he wanted a trial. App. 200. The defense of accident was never presented at trial during the four days of Petitioner's trial before he ultimately pled guilty to voluntary manslaughter.

Trial counsel testified at PCR that when Petitioner told him the death was an accident, trial counsel called the State's pathologist. App. 224. She told trial counsel that the shot was horizontal and there was nothing that would indicate there was an upward trajectory of the shot. App. 224. He indicated that information to him did not agree with a defense of accident. App. 224. Trial counsel did not attempt to hire an expert to refute the State's forensic pathologist's opinion regarding the trajectory of the bullet. These issues often result in a "battle of the experts" at trial yet trial counsel did not consider retaining one in Petitioner's defense of accidental shooting.

Co-counsel at Petitioner's trial also testified at PCR. He stated that Petitioner did raise a defense of accident prior to trial. App. 260. He also testified that Petitioner also raised a claim of self-defense and "any good defense lawyer knows that you can't go to trial and give a jury two defense theories because there's only one truth and they would know that you're probably lying." App. 260. While that is true, trial counsel did not have any plans to present a defense at trial at all. Trial counsel testified that their defense was to not present a defense and be able to have the last word in closing arguments. App. 229. Furthermore, trial counsel also testified to the many weaknesses he saw to the potential self-defense defense. App. 228. Clearly, trial counsel never intended to present a true self-defense defense and could have pursued a defense of accident without presenting two possible theories to the jury, as co-counsel mentioned at the PCR hearing, but they did not do that.

### **Ineffective Assistance of Trial Counsel**

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). “The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial.” *State v. Sterling*, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). “In the context of a challenge to a guilty plea, a PCR applicant must establish both that his plea counsel’s representation was deficient and that there is a reasonable probability that but for counsel’s deficient representation, the applicant would not have pled guilty.” *James v. State*, 377 S.C. 81, 83-84, 659 S.E.2d 148, 149 (2008). “In determining guilty plea issues, it is proper to consider the guilty plea Tran. as well as evidence at the PCR hearing.” *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

In *Arnette v. State*, this Court ruled that counsel in that case was not ineffective for failing to advise his client on the defense of accident because the client’s actions were unlawful. *Arnette v. State*, 306 S.C.556, 558, 413 S.E.2d 803, 804 (1992). In *Arnette*, the defendant entered the victim’s residence armed with a weapon he intended to use to scare the victim and in firing a shot near the victim to scare him, the victim reached up, grabbed the gun, the gun went off and the victim was killed. *Id.* at 804. The Court relied on *State v. McCaskill*, which ruled that a homicide is not excusable on the ground of accident unless it appears that the defendant was acting lawfully and because the defendant in this case was not acting lawfully, counsel was not ineffective for failing to advise the defendant about the defense of accident. *Id.*

Here, Petitioner was acting lawfully. He was in his own home, he believed he was being robbed and was in danger by McManus holding his knife with the blade out. Petitioner did not seek to scare or attack McManus but rather to get away from him. He grabbed his gun for protection and quickly tried to leave the room but he tripped and fell and the gun discharged. Furthermore, this was not the first time that this particular gun had accidentally discharged. These facts would have supported a defense of accident to the charge of murder. Petitioner told his attorney these facts from the beginning of their relationship and said he wanted to have a trial. Trial counsel did not present this defense as requested by Petitioner and that failure to present a valid defense is a deficient performance, which prejudiced Petitioner.

**II. Whether trial counsel's failure to offer mitigating evidence regarding Petitioner's opioid addiction during his guilty plea constitutes ineffective assistance of counsel depriving petitioner of his Sixth Amendment right to counsel?**

"Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because 'any amount of [additional] jail time has Sixth Amendment significance.'" *Lafler v. Cooper*, 566 U.S. 156, 166 (2012) citing *Glover v. United States*, 531 U.S. 198, 203-204 (2001). When Petitioner entered into his guilty plea to voluntary manslaughter, trial counsel failed to present mitigation regarding Petitioner's extensive opioid addiction. Petitioner pleaded guilty to voluntary manslaughter, an extremely serious charge subject to up to 30 years' imprisonment, and the entire plea transcript is only 21 pages long with trial counsel's presentation only using a mere five and a half of those pages. App. 133-154. Trial counsel did mention the Petitioner's prior drug use and the experts he retained to evaluate Petitioner. However, he did not secure those evaluators to address the Court on Petitioner's behalf, he did not hand those reports up to the trial judge to

review in full prior to handing down his sentence, and he did not have anyone address the Court on his behalf, even his grandmother who was in the courtroom and could have certainly provided some insight into Petitioner's extensive drug problem.

This failure to present the mitigation evidence available to trial counsel at the time of Defendant's guilty plea was a deficient performance by trial counsel. That deficient performance prejudiced Petitioner. Petitioner received the maximum sentence on this charge during his guilty plea. The limited mitigation presented by trial counsel during the guilty plea did not lessen his sentence in the slightest. Trial counsel had access to much more mitigation he could have presented and failed to do so. This deficient performance prejudiced Petitioner.

**III. Whether petitioner's plea was involuntary due to his lack of understanding of the elements of voluntary manslaughter and his belief he would receive a 12-year sentence?**

An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 383–84, 629 S.E.2d 353, 356 (2006); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

"[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the

time of the entry of the guilty plea and the record of the post-conviction hearing.” *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). “When determining issues relating to guilty pleas, this Court will consider the entire record, including the Tran. of the guilty pleas and the evidence presented at the PCR hearing.” *Roddy v. State*, 339 S.C. at 33, 528 S.E.2d at 420 (2000).

Petitioner testified at PCR that by day four of the trial he thought the trial was going well and in his favor. He also testified that he believed his trial counsel was doing an excellent job at cross examining the State’s witnesses. App. 149-150. During the recess on day four of trial, trial counsel tells Petitioner, “Brent, if I was you, listen to me, I would plea. I have everything worked out for 12 years.” App. 202. Petitioner further testified he did not know he could have received the maximum sentence because “there’s no way that I would have ever entered an open plea and possibly run the risk of receiving a 30-year sentence...if that would have been something I had intended on doing, why would I have paid Mr. Delgado \$100,000 to represent me? I could have gotten those same results with a public defender for free.” App. 204. Petitioner trusted his trial counsel he had hired, paid, and had a three-year relationship with when he entered his guilty plea.

Further, Petitioner was not familiar with the process of pleading guilty when he entered the plea. Petitioner testified at PCR that he was not told by trial counsel that the victim’s family would be addressing the Court at all and he certainly did not know that they, the Solicitor, and the investigator would be asking for the maximum sentence. App. 204-205. Petitioner also testified that trial counsel told him the charge he was pleading guilty to was a parole-eligible offense, and it was only after he was sentenced that he learned it was not. App. 206.

Furthermore, trial counsel did not explain the elements of voluntary manslaughter to Petitioner prior to the plea.

During the PCR hearing, trial counsel testified he met with Petitioner twelve to fifteen times over the course of his representation. App. 223. While that may be true, during those meetings, they were discussing trial strategy in his murder trial. Petitioner clearly testified from the very beginning that he wanted a trial and they were always preparing for trial, not a plea. There was no evidence that during these meetings trial counsel discussed the elements of voluntary manslaughter to Petitioner. Rather, on the fourth day of trial, during a recess from the trial, counsel meets with Petitioner to discuss a plea to voluntary manslaughter. Petitioner did not understand the elements of the charge he pled guilty to after meeting with his lawyers on the day of his guilty plea.

Petitioner pleaded guilty and received the maximum sentence on the voluntary manslaughter charge. Petitioner testified at PCR that the only reason he pleaded guilty was because he trusted his lawyer, he relied on what he told him regarding the sentencing being worked out already to 12 years and that the offense was parole eligible, and he did not know that the victim's family, Solicitor, and investigator would all be asking for the maximum sentence. Trial counsel's deficient performance regarding advising Petitioner prior to his guilty plea prejudiced Petitioner as well. Petitioner clearly testified at PCR that he thought the trial was going well at the point in time that his attorney talked to him about the guilty plea and his lawyer's assurances about things that were not true were the only reason he pleaded guilty. Otherwise, he would have continued with his trial, which was already in progress. Trial counsel was

ineffective because his deficient performance prejudiced Petitioner under *Lockhart* and *Suber*, *supra*.

**IV. The PCR court erred in not allowing counsel to introduce evidence of the fee dispute when evidence contained within it would have supported Petitioner's claim that he informed his lawyers about his accident defense.**

During the PCR evidentiary hearing, PCR counsel cross examined trial counsel, John Delgado. App. 241. During the cross examination, PCR counsel questioned trial counsel about the fee dispute between Petitioner and trial counsel. App. 241. The PCR court sustained an objection to relevance and would not allow PCR counsel to continue to question the witness regarding the fee dispute. App. 241. The PCR court also would not allow PCR counsel to admit in evidence anything regarding the fee dispute. App. 241.

This decision of the PCR court was erroneous. The evidence PCR counsel attempted to introduce and question the witness about demonstrated that Petitioner told his trial counsel about the defense of accident from the beginning of their attorney client relationship. This is in contrast to what trial counsel testified about regarding the accident defense and supported what Petitioner testified to regarding this defense and the timing of when this defense was communicated to trial counsel. The PCR court erred in preventing PCR counsel from introducing this evidence and cross examining the witness regarding the evidence as it was clearly relevant to the issue of whether Petitioner told trial counsel that he wanted to pursue a defense of accident from the beginning of their attorney client relationship. The documents are letters written from trial counsel to Petitioner during the fee dispute where trial counsel explained the work he did to prepare for trial. It includes actions which clearly demonstrate Petitioner had

expressed his desire to pursue an accident defense in trial and trial counsel knew about Petitioner's defense.

In *Sanders v. State*, the Petitioner agreed to a consent order to waive rights to a jury trial and waive any right to further judicial review, including direct appeal, PCR, or habeas corpus proceedings if the State would not seek the death penalty. *Sanders v. State*, 412 S.C. 611, 612; 773 S.E. 2d 580 (2015). Petitioner proceeded to a bench trial and was convicted. *Id.* at 581. Petitioner then filed a PCR action alleging ineffective assistance of trial counsel alleging his attorneys misled him and made his signing of this agreement involuntary. *Id.* During the PCR hearing, the PCR court did not allow Petitioner to present evidence regarding this issue of ineffective assistance of counsel, only reviewed the colloquy between the trial court and Petitioner and dismissed the PCR application based on that alone. *Id.* This Court ruled the PCR court erred in not allowing the Petitioner to present evidence of ineffective assistance of counsel on the limited issue of his counsel's advice in connection with entering said agreement. *Id.* at 583.

Here, Petitioner also attempted to present evidence regarding ineffective assistance of trial counsel which was denied by the PCR court. Petitioner attempted specifically to introduce evidence of a letter written from trial counsel to Petitioner regarding the work that trial counsel had done which demonstrated trial counsel knew that Petitioner wanted to pursue a defense of accidental shooting, contrary to trial counsel's testimony at PCR that Petitioner had not told him that until right before trial. The PCR court sustained an objection to relevance, would not allow PCR counsel to question the witness regarding the letter, or enter it into evidence because the letter was written as part of a fee dispute between Petitioner and trial counsel. However, this

letter was extremely relevant to the issue of whether trial counsel was told by Petitioner that the shooting was accidental and he wanted to pursue that defense at trial toward the beginning of his representation of Petitioner, contrary to trial counsel's testimony at PCR. The PCR court erred in not allowing Petitioner to present this evidence of ineffective assistance of trial counsel. The evidence and questioning could have been appropriately limited to address just that issue and not discuss the irrelevant issue of the fee dispute between Petitioner and trial counsel but the PCR court wholly rejected the evidence and questioning.

Petitioner respectfully asks this Court to allow these documents to be made part of the record.

#### **CONCLUSION**

Petitioner therefore requests the Court grant the writ.

Respectfully submitted,

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