

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Marlboro County  
Honorable Thomas A. Russo, Circuit Court Judge

VONDELL MALACHI,

RECEIVED  
ORIGINAL  
AUG 08 2016  
S.C. SUPREME COURT

RECEIVED  
AUG 05 2016  
SC Court of Appeals

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002429

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PETITION FOR WRIT OF CERTIORARI

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**INDEX**

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT ..... 8

CONCLUSION ..... 15

### **ISSUE PRESENTED**

The PCR court erred in finding that plea counsels provided effective assistance of counsel where Petitioner stated that he would not have pled guilty and would have insisted on going to trial if he had understood involuntary manslaughter could be a verdict option and where co-counsel admitted that Petitioner told him that he accidentally shot the decedent in a struggle over a gun, but co-counsel deferred advising Petitioner to lead defense counsel, who erroneously concluded that involuntary manslaughter was not a verdict option, and, therefore, did not advise Petitioner of that possibility.

## STATEMENT

On April 27, 2011, Vondell Malachi and his girlfriend, Takeyia Easterling, agreed to meet at a park in Bennettesville to discuss allegations from another woman that Malachi was the father of her unborn child. App. 8, l. 16 - 15, l. 20. Malachi and Easterling had been arguing intensely via text messages and social media in the days leading up to the meeting. *Id.* It was later determined that Malachi was not the child's father. App. 34, ll. 8-15.

The two began arguing during their meeting. App. 8, l. 6 - 15, l. 20. Malachi would testify that Easterling, who had brought their child with her, attempted to grab his gun and a brief struggle ensued. App. 63, l. 8 - 64, l. 13. During the altercation, Malachi shot Easterling in head. Later analysis by SLED confirmed that Easterling was shot at close range. App. 15, ll. 13-20.

Immediately after shooting Easterling, Malachi rushed her and their child to the nearest hospital. App. 10, l. 5 - 11, l. 21. Once they arrived, he quickly summoned help. After Easterling was taken into the hospital for emergency care, Malachi placed their son by the entrance to the hospital and left in his car. *Id.*

Bennettsville Police Deputy Chief Charles Lemon and Police Officer Emily Oxendine were both at the hospital at the time and watched Easterling being admitted and Malachi's subsequent departure. *Id.* The officers followed Malachi, activated their blue lights, and attempted to stop him. *Id.*

Malachi led police on a brief chase through Bennettsville before parking at his mother's house. He refused to leave his car and threatened to kill himself. *Id.* Following a seventeen hour standoff, law enforcement convinced Malachi to step out of the car in order to smoke a cigarette. When he got out of the car, he left his pistol on the front seat. He was then quickly taken into custody without issue. App. 14, ll. 5 - 20.

While being interrogated, Malachi, who has a tenth grade education, admitted he shot Easterling. App. 18, ll. 15-21; App. 93. After his arrest, Malachi underwent a competency evaluation, but was found fit to stand trial. App. App. 12, ll. 18-23; App. 94.

### **Indictment**

On July 19, 2011, the Marlboro County Grand Jury indicted Malachi on one count of murder, one count of failure to stop for a blue light, and one count of unlawful conduct towards a child. Malachi had previously been indicted for assault and battery with intent to kill (ABIK) on August 2, 2007<sup>1</sup> arising out of a separate incident. App. 107 - 114.

### **Guilty Plea**

On July 30, 2012, Malachi pled guilty before the Honorable Edward B. Cottingham to all charges with the exception of murder, which was reduced to voluntary manslaughter. Harry R. Easterling, Jr.<sup>2</sup> and Wade Crowe represented Malachi. Assistant Solicitor Mary Thomas Johnson Lee represented the State.

At the hearing, Counsel Crowe assured the court that “we have gone over everything with” Malachi prior to the guilty plea. App. 19, l. 1 - 20, l. 24, l. 23. After hearing the factual basis for the guilty plea and victim impact statements from two of Easterling’s relatives, Judge Cottingham accepted the guilty plea.

Malachi was sentenced to twenty five years for voluntary manslaughter, ten years for ABIK, two years for failure to stop for a blue light, and two years for unlawful conduct towards a

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<sup>1</sup> Malachi, along with two friends, was accused of participating in a drive-by shooting. App. 17, l. 15 - 18, l. 4. The person who pulled the trigger was never identified. All three participants confessed to their involvement, but gave conflicting stories implicating one of the others as the shooter. App. 25, l. 3 - 26, l. 22. Their intended target was not hit. However, a bullet struck Wilhelmina Gregg while she was watching TV in her living room. *Id.*

<sup>2</sup> No relation to the decedent.

child. App. 38, l. 4 - 39, l. 3. All sentences were ordered to be served concurrently. Malachi did not appeal.

### **PCR Application**

On July 24, 2013, Malachi filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 41 - 48. On May 30, 2014, the State filed a Return. App. 49 - 54.

An evidentiary hearing was held before the Honorable Thomas A. Russo on July 27, 2015. Tristan Schaffer represented Malachi and Assistant Attorney General Joshua L. Thomas represented the State. Malachi, Counsel Crowe, and Counsel Easterling all testified.

#### *Testimony of Vondell Malachi*

Malachi testified that the shooting was an accident. App. 63, l. 18 - 64, l. 13. He stated that he and Easterling had been fighting over unfounded allegations that he had impregnated another woman. *Id.* He further testified that he told his attorneys that he shot Easterling after they had “tussled” over the gun that he was carrying. *Id.*

He recalled that his attorneys had summarily dismissed his version of events because no gunshot residue (GSR) was found on Easterling. *Id.* Malachi said that his attorneys refused to go to trial and insisted that he accept a guilty plea or they would move to be relieved. *Id.*

Malachi explained that he wanted to go to trial because he believed that the shooting was an accident, rather than an intentional killing. App. 68, l. 4 - 69, l. 17. He conceded that he had told the plea court that he wanted to plea guilty, but reiterated that had his attorneys explained the lesser included offense of involuntary manslaughter to him, he would not have pled guilty. App. 70, l. 15 - 71, l. 2.

Testimony of Harry Easterling, Jr.

Counsel Easterling stated that he was retained at Crowe's request because Crowe was having a difficult time understanding the text messages and social media communications that Malachi and Easterling exchanged prior to the fatal incident. App. 83, ll. 1-18. Like Crowe, Counsel Easterling recalled that Malachi was slow to open up to his attorneys. *Id.*

Contradicting Crowe, Counsel Easterling testified that Malachi had told them about the struggle over the gun that occurred immediately before the shooting. App. 83, l. 23 - 84, l. 13. Counsel Easterling further testified that Malachi explained to counsels that he had been sitting in the car when Easterling leaned through the front driver's side window and attempted to take his gun. App. 85, ll. 8-25.

When asked whether he ever explained involuntary manslaughter to Malachi, Counsel Easterling demurred, "I would defer to Mr. Crowe on those matters." App. 86, ll. 5-9. Despite deferring to Crowe, Easterling claimed that voluntary manslaughter was the best possible outcome in Malachi's case. App. 84, ll. 4-13.

Testimony of Counsel Wade Crowe

Crowe recollected that Malachi, then age twenty-six, was reluctant to talk about his case, "it took quite a while for him to get to talk to us and discuss things with us." App. 74, ll. 3-19. Crowe claimed that he and Counsel Easterling discussed all possible defenses with Malachi and reviewed all of the State's evidence against him. App. 75, l. 4 - 76, l. 15. Crowe recalled that Malachi's mother was more involved in his case than he was. App. 77, l. 8 - 78, l. 3.

**However, Crowe then admitted that he did not discuss the lesser included offense of involuntary manslaughter with Malachi:**

Q: Did you discuss involuntary manslaughter with him?

A: No. I mean, I told him what involuntary manslaughter was. But I -- I did not -- in my opinion, I did not see this as an involuntary manslaughter type situation . . . .

Q: [D]id you tell him that you did not think it was going to be an involuntary manslaughter situation?

A: I don't recall specifically telling him that, no.

App. 77, l. 17 - 78, l. 1. Crowe denied that Malachi ever told him about the struggle for the gun just prior to the shooting. App. 79, ll. 16-19.

Crowe also discounted the applicability of involuntary manslaughter because the gunshot wound to Easterling suggested that Malachi was sitting in his car when he shot her. App. 80, ll. 2-18.

### **Order of Dismissal**

On October 16, 2015, Judge Russo issued an order of dismissal denying Malachi's application. App. 100 - 106. The PCR court found Counsel Crowe and Counsel Easterling's testimony regarding whether they explained involuntary manslaughter to Malachi "credible". App. 104.

The PCR court also concluded that both attorneys adequately advised Malachi on possible defenses and lesser included offenses. *Id.* The court summarily found that the evidence would not have supported an involuntary manslaughter charge. App. 104, n. 1.

Despite Malachi testifying that he would have stood trial had he been informed about involuntary manslaughter, the PCR court ruled that Malachi "failed to demonstrate that, but plea counsel's advice, he would not have entered a guilty plea. App. 104. The court further concluded that Malachi had been fully advised of all possible defenses. App. 105.

## ARGUMENT

**The PCR court erred in finding that plea counsels provided effective assistance of counsel where Petitioner stated that he would not have pled guilty and would have insisted on going to trial if he had understood involuntary manslaughter could be a verdict option and where co-counsel admitted that Petitioner told him that he accidentally shot the decedent in a struggle over a gun, but co-counsel deferred advising Petitioner to lead defense counsel, who erroneously concluded that involuntary manslaughter was not a verdict option, and, therefore, did not advise Petitioner of that possibility.**

### **Introduction**

Counsels Crowe and Easterling's failure to advise Petitioner of the possibility that involuntary manslaughter was a verdict option, constituted ineffective assistance of counsel. It was undisputed that Easterling was shot once in the head from close range while she was bent over, leaning into Petitioner's car. App. 15, ll. 13-20.

Counsel Easterling admitted that Petitioner told him that he and Takeyia Easterling fought over a gun during their argument and that Easterling was shot during that struggle. App. 83, ll. 2-13. In contrast, Counsel Crowe did not recall being told about the struggle over the gun. Counsel Easterling conceded that he deferred to Counsel Crowe, who had ruled out involuntary manslaughter, self-defense, and accident as possible jury instructions, when the attorneys advised Petitioner to plead guilty to voluntary manslaughter. App. 77, l. 8 - 79, l. 19.

The physical evidence, in conjunction with Petitioner's testimony regarding a "tussle" for the gun, would have supported a jury instruction on the lesser included offense of involuntary manslaughter. *State v. Light*, 378 S.C. 641, 664 S.E.2d 465 (2008) (holding that an involuntary manslaughter charge was appropriate where defendant attempted to take gun from victim, and gun went off immediately after defendant jerked it away from the victim); *see also State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (holding that evidence of an accidental discharge where defendant was lawfully armed in self-defense will support a charge of accident); *see also*

*State v. Mekler*, 368 S.C. 1, 15, 626 S.E.2d 890, 897 (Ct. App. 2005) (holding that defendant in murder trial entitled to instruction on involuntary manslaughter as there was evidence from which jury could “infer that defendant did not intentionally discharge shotgun”).

Petitioner testified at the PCR hearing that had he known that involuntary manslaughter, with a maximum sentence of five years, was a possible verdict, he would not have pled guilty to voluntary manslaughter, but would have stood trial in an effort to mediate his sentence. App. 68, ll. 4-15.

Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 103 - 106; *see Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims: a PCR applicant must show that counsel’s performance was deficient and that the deficiency prejudiced the outcome of the proceedings).

### **Ineffective Assistance of Counsel**

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668. First, a defendant must show that counsel’s performance was deficient. In the context of a guilty plea, this inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); *see also Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (“The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” (quoting *North Carolina v. Alford*, 400 U.S. 25, 31(1970))).

“The second, or ‘prejudice,’ requirement ... focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Hill*, 474 U.S. 52 at 59. In short:

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing

that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

*Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); *see also Hill*, 474 U.S. at 59 (footnote omitted).

### **Deficient Performance**

The record is clear; Petitioner was not advised of the lesser included offense of involuntary manslaughter before he pled. App. 77, l. 17 - 78, l. 1; App. 86, ll. 5-9; *see also Tisdale v. State*, 378 S.C, 122, 125-126, 662 S.E.2d 410, 412 (2008) (holding involuntary manslaughter is a lesser included offense of murder when there is evidence the killing was unintentional). Counsel Crowe acknowledged he did not explain involuntary manslaughter to Malachi. *Id.* The PCR court's findings to the contrary are unsupported by the record.

Involuntary manslaughter is defined as, "the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others." *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996); *see also* S.C.Code Ann. § 16-3-60 (2003) (stating a person charged with involuntary manslaughter may be convicted only upon a showing of criminal negligence, "defined as the reckless disregard of the safety of others").

Involuntary manslaughter is punishable by up to five years imprisonment. *Id.* Petitioner is serving a twenty-five year sentence as a result of pleading guilty to voluntary manslaughter. Again, Petitioner's attorneys conceded that they never discussed the lesser-included offense of involuntary manslaughter with him. App. 77, l. 8 - 79, l. 19.

Counsel's failure to do so constitutes deficient performance as there was sufficient evidence to support jury instructions on involuntary manslaughter. Petitioner and Easterling had been engaged in a prolonged, heated argument. App. 8, l. 16 - 15, l. 20. During the guilty plea and PCR hearing, it was established that Petitioner was seated in his car while Easterling was bent over, leaning into his car. App. 84, l. 4 - 85, l. 23. The shooting occurred at close range. App. 15, ll. 13-20.

Immediately after the shooting, Petitioner drove Easterling to the hospital in an unsuccessful attempt to save her life. App. 10, l. 5 - 11, 23. During the seventeen hour standoff, he was suicidal. App. 34, l. 8 - 35, l. 8. Finally, the State allowed him to plead guilty to voluntary manslaughter; recognizing that there was no evidence of malice.

Crucially, none of the physical evidence in Petitioner's case was inconsistent with an unintentional or accidental shooting during the course of an argument. *State v. Sams*, 410 S.C. 303, 311, 764 S.E.2d 511, 515 (2014) (holding that the fact that the defendant denies intending to kill the victim is not sufficient reason for a lesser included charge where the defendant's denial is inconsistent with physical evidence and his own testimony).

Petitioner explained to his plea counsels that he had shot Easterling following a "tussle" over a gun. App. 64, ll. 2-13. Counsel Easterling recalled this discussion. App. 83, ll. 16-25. Counsel Crowe did not. App. 77, l. 8 - 79, l. 19. Contrary to the conclusion of the PCR court, on this critical issue, the two attorneys cannot both be credible. App. 104.

With respect to the first definition of involuntary manslaughter, Petitioner's argument with Easterling at a public park, during which Petitioner testified the pistol went off accidentally following a struggle, could have constituted an "unlawful act not amounting to a felony" such as disorderly conduct or misdemeanor criminal domestic violence. *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391

(1991) (evidence of a struggle between defendant and victim over a weapon is sufficient for an involuntary manslaughter jury instruction). Prior to pleading guilty Petitioner had no criminal record and was, therefore, legally permitted to carry a pistol in his car. App. 36, ll. 5-15

Petitioner would also have been entitled to a jury instruction on involuntary manslaughter under the second definition as there was evidence that Petitioner was engaged in a lawful activity - i.e. self-defense - while potentially acting with a “reckless disregard for the safety of others.” *v. Light*, 378 S.C. at 648, 664 S.E.2d at 468-46.

In short, a jury could conclude that Petitioner acted in self-defense by shooting Easterling after “tussling” for the gun, but that - under the circumstances - arming himself before the argument and storing the gun within reach of Easterling showed “a conscious failure to exercise due care.” *Burriss*, 334 S.C. at 265, 513 S.E.2d at 109; *see also Mekler*, 368 S.C. at 15, 626 S.E.2d at 897.

Accordingly, counsels’ admitted failure to explain the elements of involuntary manslaughter as a lesser included offense to murder before recommending that Petitioner plead guilty, constituted deficient performance. App. 103 - 104; *Anderson*, 342 S.C. at 57, 535 S.E.2d at 651; *see also Hill*, 474 U.S. at 56.

### **Prejudice**

Petitioner testified at the PCR hearing that, had plea counsels’ advised him as to availability of involuntary manslaughter as a lesser included offense to murder, he would not have pled guilty and would have insisted on standing trial. App. 68, ll. 4-15. By contrast, the PCR court concluded that Petitioner had never expressed to his counsels a desire to stand trial. App. 102 - 104.

Respectfully, the PCR court’s determination ignores the circumstances of Petitioner’s case and misconstrues *Strickland’s* prejudice prong analysis for the ineffective assistance of counsel in cases resolved by guilty pleas. *See Hill*, 474 U.S. at 56 (validity of a guilty plea is ‘whether the plea

represents a voluntary and intelligent choice among the alternative courses of action open to the defendant”).

Counsel Crowe and Counsel Easterling recalled that Petitioner, who has a tenth grade education, was a difficult client to communicate with and that he was largely unable to explain his version of events to them. App. 84, ll. 9-18. Both the State and the defense were concerned enough about Petitioner’s competency that he was taken to Columbia for evaluation. App. 72, ll. 2-17. Counsels also had Petitioner’s mother attend their meetings and recollected that she was more involved in his defense than their then twenty-six year old client was. App. 74, l. 3 - 78, l. 7.

Under these circumstances, it should not be surprising that neither defense attorney recall Petitioner demanding a trial. App. 76, ll. 1-15; App. 84, l. 24 - 85, l. 5. Regardless, the test for prejudice resulting from the deficient performance of counsel in a guilty plea is whether “there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” *Holden*, 393 S.C. at 572, 713 S.E.2d at 615 (*internal citations omitted*).

For example, in *Kerrigan v. State*, 304 S.C. 561, 561-63, 406 S.E.2d 160, 161-62 (1991), this Court held that counsel was ineffective for advising the petitioner to plead guilty to grand larceny where counsel failed to inform the petitioner that he could have requested a charge on the lesser offense of use of a vehicle without permission and might have been convicted of that offense and received a lesser sentence. *Id.* This Court found the defendant satisfied the prejudice prong of the ineffective assistance of counsel test because but for counsel’s errors, the petitioner would not have pled guilty and would have insisted on going to trial **in an effort to mitigate his sentence.** *Id.* at 564, 406 S.E.2d at 162.

Likewise, Petitioner's plea counsels failed to inform him that he could have requested the lesser included offense of involuntary manslaughter and might have been convicted of that lesser offense which carried only a maximum of five years instead of the twenty-five years Petitioner received because he pled guilty to voluntary manslaughter.

Petitioner testified at the PCR hearing that had he known that involuntary manslaughter was a possible verdict, he would have stood trial. App. 70, ll. 15-20. That Petitioner did not expressly insist on standing trial when he was, by defense counsels' own admission, not advised of the possibility of a jury instruction on involuntary manslaughter is immaterial to the prejudice analysis. App. 77, l. 17 - 78, l. 4. If Petitioner had known that involuntary manslaughter, with a maximum sentence of five years was available as possible verdict, there is a reasonable possibility that he would not have pled guilty to voluntary manslaughter and have been sentenced to twenty-five years.

Ultimately, counsels' failure to advise Petitioner as to the availability of the lesser-included offense of involuntary manslaughter as a possible verdict deprived Petitioner of the ability to make "a voluntary and intelligent choice among the alternative courses of action." *Hill*, 474 U.S. at 56 (internal citations omitted).

Therefore, where Petitioner testified that this information would have influenced his decision to plead guilty or not and where he received a harsher punishment for voluntary manslaughter than he would have received had he been convicted of involuntary manslaughter, Petitioner has established that he was prejudiced by his plea counsel's ineffective assistance of counsel and is entitled to the relief of a new trial.

**CONCLUSION**

For the reason set forth herein, the PCR Court erred in denying Petitioner Vondell Malachi's Application for Post-Conviction Relief. This Court should grant Petitioner's writ of certiorari to allow for further briefing with the ultimate relief of granting Petitioner a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 5<sup>th</sup> day of August 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marlboro County

Honorable Thomas A. Russo, Circuit Court Judge

VONDELL MALACHI,

V.

STATE OF SOUTH CAROLINA,

PETITIONER  
S.C. SUPREME COURT

RESPONDENT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Caitlin Hastings, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Vondell Malachi, #351776, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 5<sup>th</sup> day of August, 2016.



John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 5<sup>th</sup> day of August, 2016.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025