

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Oconee County

Honorable Perry H. Gravely, Circuit Court Judge  
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RICHARD ANTHONY DUNSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001746  
—————

PETITION FOR WRIT OF CERTIORARI  
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S.C. SUPREME COURT

**INDEX**

INDEX ..... i

ISSUE PRESENTED ..... 1

STATEMENT ..... 2

ARGUMENT

**Plea counsel was ineffective in failing to move to withdraw  
Petitioner’s guilty plea to voluntary manslaughter to allow  
consultation with and advice to Petitioner when he testified  
during the plea colloquy that the shooting resulted from a  
struggle over possession of a gun that went off by accident and  
without intent to kill.....4**

**A. Standard of Review .....4**

**B. How the matter was raised during the guilty plea .....4**

**C. How the matter was raised during PCR .....6**

**D. How the PCR court ruled.....7**

**E. Plea counsel had an obligation to stop Petitioner’s guilty  
plea to voluntary manslaughter when Petitioner testified that  
he did not commit the crime charged, and plea counsel should  
have moved to withdraw the guilty plea in order to consult and  
advise Petitioner on the impact of involuntary manslaughter  
and accident surrounding the unintentional discharge of the  
firearm that killed M.L.....8**

CONCLUSION.....13

## **ISSUE PRESENTED**

Whether plea counsel was ineffective in failing to move to withdraw Petitioner's guilty plea to voluntary manslaughter to allow consultation with and advice to Petitioner when Petitioner testified during the plea colloquy that the shooting resulted from a struggle over possession of a gun that went off by accident, and without intent to kill, since this was materially inconsistent with the factual basis for a plea to voluntary manslaughter?

## STATEMENT

Petitioner Richard Dunston was indicted for the murder of M.L. on October 29, 2018.<sup>1</sup> App. 94-95. Petitioner appeared before the Honorable Letitia Verdin on October 15, 2020, for a guilty plea hearing. App. 1. Petitioner was represented by David Plowden, and Lindsey Simmons appeared on behalf of the state. App. 2. Simmons informed Judge Verdin that Petitioner had agreed to a plea to voluntary manslaughter with a sentencing cap of twenty-five years. App. 3.

In conducting the guilty plea, Petitioner attempted to explain to Judge Verdin that M.L.'s death was not intentional and was the result of a struggle over the gun M.L. had given Petitioner. App. 16, l. 25 – 17, l. 19.

So, M.L. and me was arguing, she is arguing with me about the gun and stuff, I should give it back to her. I was walking away. M.L. grabbed the gun. The gun was just overloaded. I was trying -- we was struggling for the gun and the gun went off. Everybody trying to say that I just up and shot her, and I did not do that.

App. 17, ll. 13 - 19.

Judge Verdin then noted that she “can't accept his guilty plea” and Petitioner had to admit to killing M.L. App. 17, ll. 20 – 22. Rather than move to withdraw the plea, plea counsel attempted to get Petitioner to admit to pulling the trigger:

MR. PLOWDEN: Your Honor . . . I'm going to ask him [Defendant/Petitioner] a question now. Did you pull the trigger?

THE DEFENDANT: More like the gun went off. Like she arguing -- she was arguing with me about the gun.

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<sup>1</sup> There is no indication “M.L.” was a minor or sexual assault victim that would require redaction of her name pursuant to Rule 41.2, SCRPC or *In re Revised Ord. Concerning Pers. Identifying Info. & Other Sensitive Info. in App. Ct. Filings*, 407 S.C. 607, 607, 757 S.E.2d 421 (2014). In fact, news reports from the incident indicate “M.L.” was 21 years old at the time of her death. See <https://www.independentmail.com/story/news/crime/2018/05/18/police-seneca-woman-fatally-shot-domestic-related-incident/622473002/>. The guilty plea transcript and indictments were received by counsel for Petitioner already redacted and without explanation. Those redactions have been reflected in the Appendix.

MR. PLOWDEN: Okay. Well, was your finger on the trigger?

THE DEFENDANT: I couldn't tell you. I don't remember.

App. 19, ll. 4 – 14.

Judge Verdin then had the solicitor recite the basic allegation that Petitioner shot and killed M.L., after which Petitioner plead guilty. App. 19, l. 15 – 20, l. 6. Despite Judge Verdin acknowledging that Petitioner was “kind of going back on his accepted plea, but he's admitting the facts as presented by the State” and *if the state was satisfied* the court would accept the plea. App. 20, ll. 7 – 14.

Petitioner filed a timely application for PCR alleging ineffective assistance of counsel in connection with the guilty plea.<sup>2</sup> App. 26. An evidentiary hearing was held before the Honorable Perry Gravely on February 27, 2023. App. 47. Susannah Ross represented Petitioner, and Taylor Smith appeared on behalf of the state. App. 47. Judge Gravely denied relief by Order of Dismissal dated October 9, 2023. App. 80.

This petition follows.

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<sup>2</sup>Petitioner filed a direct appeal following the guilty plea, but the appeal was dismissed under Rule 203(d)(1)(B)(iv), SCACR, on December 16, 2020.

## ARGUMENT

Plea counsel was ineffective in failing to move to withdraw Petitioner's guilty plea to voluntary manslaughter to allow consultation with and advice to Petitioner when Petitioner testified during the plea colloquy that the shooting resulted from a struggle over possession of a gun that went off by accident, and without intent to kill, since this was materially inconsistent with the factual basis for a plea to voluntary manslaughter.

### **A. Standard of Review.**

Generally, a guilty plea waives non-jurisdictional defects and violations of constitutionally protected rights. State v. Green, 436 S.C. 492, 494, 872 S.E.2d 869, 870 (Ct. App. 2022). “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.” Gustine v. State, 325 S.C. 123, 127, 480 S.E.2d 444, 446 (1997) (quoting Hill v. Lockhart, 474 U.S. 52, 56 (1985)). “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a 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).

### **B. How the matter was raised during the guilty plea.**

During his guilty plea, Petitioner told the court that his relationship with M.L. was close but ending when the shooting occurred:

[M.L. was upset] with me because I didn't want to be with her. I was staying back and forth to my wife [Raven Dunston].

Me and M.L. went outside. M.L. was arguing with me. *M.L. bought the gun that I had. There was nothing that I had that M.L. didn't buy me, clothes, phone, shoes, she bought me.*

App. 16, l. 22 – 17, l. 3 (emphasis added).

The shooting arose out of this argument and was an accident and not intentional:

So, M.L. and me was arguing, she is arguing with me about the gun and stuff, I should give it back to her. I was walking away. M.L. grabbed the gun. The gun was just overloaded. I was trying -- we was struggling for the gun and the gun went off. Everybody trying to say that I just up and shot her, and I did not do that.

App. 16, l. 25 – 17, l. 19.

At this stage, Judge Verdin told Petitioner that the court could not accept the plea and that Petitioner had to admit to the intentionally killing of M.L. App. 17, ll. 20 – 22. Again, Petitioner indicated the shooting was accident and not intentional:

My hand like it went off. The gun was in my hand when it went off. There's nothing -- the gun was in my hand. But it's not like everybody make it.

App. 17, l. 23 – 18, l. 1.

Judge Verdin then asked for input from the solicitor, who admitted there were no eyewitnesses to the shooting, only witnesses who would testify as to an argument going on outside the home on the front porch and to seeing Petitioner fleeing the area *after* hearing shots.

App. 18, ll. 11 – 17.

Rather than move to withdraw the plea, plea counsel attempted to get Petitioner to admit to pulling the trigger:

MR. PLOWDEN: Your Honor . . . I'm going to ask him [Defendant/Petitioner] a question now. Did you pull the trigger?

THE DEFENDANT: More like the gun went off. Like she arguing -- she was arguing with me about the gun.

MR. PLOWDEN: Okay. Well, was your finger on the trigger?

THE DEFENDANT: I couldn't tell you. I don't remember.

App. 19, ll. 4 – 14.

Judge Verdin then had the solicitor recite a truncated version of the factual allegations to which Petitioner indicated he was pleading guilty. App. 19, l. 15 – 20, l. 6. Judge Verdin then deferred to the solicitor as to whether to accept the plea since the Petitioner was “kind of going back on his accepted plea.” App. 20, ll. 7 – 14.

Since plea counsel made no motion to withdraw the plea or attempt to consult with Petitioner during the hearing, Judge Verdin accepted the guilty plea and sentenced Petitioner to twenty-five years in prison for voluntary manslaughter.

### **C. How the matter was raised during PCR.**

During the PCR hearing, Petitioner testified that his plea counsel failed to intervene on his behalf during the plea since his actions would not have supported a voluntary manslaughter charge. Referencing the plea colloquy with Judge Verdin, Petitioner testified that plea counsel should have “come in and talked to me and asked me what I wanted to do from there, and he should have stood down the plea, which he did not.” App. 55, ll. 19 – 25.

Plea counsel admitted that he failed to move to withdrawal or stop the plea:

The transcript indicates that the plea didn't go particularly smoothly. And Judge Verdin had just sort of started over, and -- and I wasn't sure what to do to be honest with you about that.

App. 71, ll. 17 – 21. Plea counsel admitted that he did not discuss involuntary manslaughter as a potential less included offense. App. 69, l. 22 – 70, l. 4.

Plea counsel admitted to not seeking the chance to stop the plea and discuss Petitioner's options when Judge Verdin indicated the plea could not be accepted:

Well, that was difficult. And because -- because due to the pandemic, we were holding this -- this plea in the Magistrate's courtroom in the -- the jail. It's very small. There were a lot of people there because of the interest in this case, so there were press

there. I was -- he was -- he was behind glass speaking through a portal, and I was in the courtroom. So I didn't -- unlike probably most of the pleas I've ever done before in my life, I didn't have the opportunity to pull him aside and whisper in his ear. So I -- I don't -- I didn't have any -- I couldn't have a conversation with him in that circumstance that -- that wouldn't be on the record. And then Judge Verdin started over, and I think the moment passed.

App. 71, l. 11 – 72, l. 1.

Rather than interrupt and confer with Petitioner, plea counsel simply allowed the plea to continue since he felt the negotiated plea was reasonable, regardless of Petitioner's testimony that would not have supported the guilty plea.

Q. So why would you -- I mean, you could've at that point said, "I need stand down or he's not going to plead today." Why did you not make a statement like that?

A. *Well, in the heat of the moment there, I – I thought the plea would go away altogether if I did that, and then we would -- we'd go to trial, that the Solicitor's patience would be at an end and that would be the end of it.* I still thought that I could -- I could convince Judge Verdin to give him less than what she ended up giving him. But it was difficult -- it was a difficult situation because I -- I don't know. But I don't think the outcome would've been any different one way or the other.

App. 72, l. 16 – 73, l. 5 (emphasis added).

#### **D. How the PCR court ruled.**

The PCR court's oral ruling indicated that "very commonly it's kind of a little difference in the facts presented and what the defendant was willing to admit to, but I don't think that that necessarily goes to the voluntariness of the -- the voluntariness of the plea or the basis of the plea. So I believe that the -- I don't believe that there's sufficient information or evidence presented to grant -- to show ineffective assistance of counsel." App. 77, ll. 16 – 25.

In the written Order of Dismissal, the PCR court went further, noting that voluntary manslaughter was not an appropriate consideration since it was "forensically unsupportable."

App. 87. The PCR court's order failed to address plea counsel's lack of action during Judge Verdin's reluctance to accept the plea, other than to note plea counsel's concern that the state's offer would be "taken away." App. 89.

**E. Plea counsel had an obligation to stop Petitioner's guilty plea to voluntary manslaughter when Petitioner testified that he did not commit the crime charged, and plea counsel should have moved to withdraw the guilty plea in order to consult and advise Petitioner on the impact of involuntary manslaughter and accident surrounding the unintentional discharge of the firearm that killed M.L.**

In Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) this Court noted the appropriate response of plea counsel when the client, during the plea colloquy, indicates that they are not in fact guilty of the crime charged. In Rolen, after family members of the victim addressed the court, the defendant told the court "All right, this has went on far enough, I didn't kill this man." Id., 384 S.C. at 411, 683 S.E.2d at 473. Rather than step in and move to withdraw the plea, plea counsel did nothing since he believed "once the plea was accepted, it was final and could not be withdrawn." Id., 384 S.C. at 412, 683 S.E.2d at 473.

This Court in Rolen found counsel was deficient for failing to move to withdraw the plea, and ultimately remanded the matter to the trial court for a hearing on whether the plea court would have allowed a withdrawal of the guilty plea had the proper motion been made:

The plea judge had formally accepted the guilty plea prior to Petitioner's protestation of his innocence. Therefore, even if counsel had moved to withdraw the guilty plea, the plea judge may have denied this request, and Petitioner could not have proceeded to trial. *See State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982) (holding that the withdrawal of a guilty plea is generally within the sound discretion of the trial court). In this way, the prejudice analysis in this case does not fit squarely within the traditional guilty plea prejudice framework as set forth in *Hill*. Nonetheless, we hold that Petitioner was prejudiced by counsel's

deficient performance because due to counsel's failure to make such a motion, the plea judge was not able to exercise his discretion.

Id., 384 S.C. at 413–14, 683 S.E.2d at 474.

In the present case, Petitioner initially indicated a willingness to plead guilty, and his rejection of guilt occurred after victim impact statements. This placed Judge Verdin in the same position as the lower court in Rolen, with the ability to allow a withdrawal of the plea *had plea counsel made the appropriate motion*. Plea counsel's failure to make the appropriate motion, in light of the Petitioner's multiple rejection of an intentional killing of M.L., was ineffective assistance of counsel as found in Rolen.

While counsel in Rolen wrongly assumed the plea could not be withdrawn at that stage, Petitioner's plea counsel was influenced by the unusual nature of the plea setting in part due to COVID restrictions and his belief the plea offer would be withdrawn if the court stopped the plea. As to the impact of COVID restrictions and the plea environment, plea counsel indicated this prevented any private conversations with Petitioner during the plea:

Q. Do you have any sort of sidebar with Mr. Dunston in there?

A. Well, that was difficult. And because -- because due to the pandemic, we were holding this -- this plea in the Magistrate's courtroom in the -- the jail. It's very small. There were a lot of people there because of the interest in this case, so there were press there. I was -- he was -- he was behind glass speaking through a portal, and I was in the courtroom. So I didn't -- *unlike probably most of the pleas I've ever done before in my life*, I didn't have the opportunity to pull him aside and whisper in his ear. So I -- I don't -- I didn't have any -- I couldn't have a conversation with him in that circumstance that -- that wouldn't be on the record. And then Judge Verdin started over, *and I think the moment passed*.

App. 71, l. 9 – 72, l. 1 (emphasis added).

After the “moment passed” counsel was concerned the plea offer would be withdrawn as motivation not to intercede and move to withdraw the plea pursuant to Rolen.

Well, in the heat of the moment there, I – I thought the plea would go away altogether if I did that, and then we would -- we'd go to trial, that the Solicitor's patience would be at an end and that would be the end of it. I still thought that I could -- I could convince Judge Verdin to give him less than what she ended up giving him. But it was difficult -- it was a difficult situation because I -- I don't know. But I don't think the outcome would've been any different one way or the other.

App. 72, l. 16 – 73, l. 5 (emphasis added).

In an effort to excuse plea counsel’s failure, the PCR court’s order asserted that voluntary manslaughter was not an appropriate consideration since it was “forensically unsupportable.” App. 87. This finding lacks any support in the record. Plea counsel indicated several different versions of the shooting were discussed with Petitioner; a situation plea counsel indicated was common among his clients as they work out their understanding of the law. App. 66, ll. 22 – 25.

In testifying about these various scenarios, plea counsel indicated that one of the scenarios discussed with Petitioner was “forensically unsupportable,” but that statement had nothing to do with the facts surrounding the actual shooting. App. 66, ll. 15 – 21. In contrast, the solicitor, during the plea hearing, *acknowledged the state lacked any direct evidence concerning the shooting*.

Witnesses would put him going on the porch, [M.L.] -- them both being on the porch, the witnesses hearing gun shots. Immediately when the door is opened, [M.L.] has the gun shot wound to the head. [Petitioner] leaves the scene on foot. We do have witnesses after the fact that would put him fleeing the scene.

He -- there was an extensive search to find [Petitioner]. He had -- he fled after the offense. *We don't have an eye witness of the actual shooting*, Judge, but we have certainly behavior before and after consistent with the attempt to avoid guilt.

App. 18, ll. 11 – 22 (emphasis added). The Petitioner’s testimony that the gun discharged during a struggle over its possession with M.L. was not “forensically unsupportable” as found by the PCR court’s order.

Petitioner testified that had counsel informed him about the law surrounding involuntary manslaughter, he would not have plead guilty.

Q. Now, did he ever talk to you about accident or involuntary manslaughter?

A. No, ma'am.

Q. And had he talked to you about that, what do you think you would've done?

A. I would've took a manslaughter plea.

Q. You would've taken the manslaughter ---

A. I wouldn't have taken [sic] the manslaughter plea.

Q. So you would've turn down the plea offer, and what would you have done instead?

A. I would've went to trial.

Q. Okay. And what -- how do you think the outcome of a trial would be different from your guilty plea?

A. I feel like they wouldn't have convicted me of manslaughter.

Q. You don't think they would've convicted you?

A. No, ma'am.

Q. How about involuntary manslaughter?

A. Yes, ma'am.

Q. So you think you have -- a jury would've come back with involuntary?

A. Yes, ma'am.

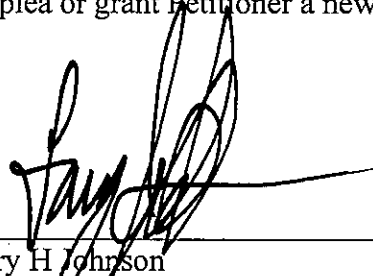
App. 57, l. 4 – 58, l. 1.

Plea counsel did not recall ever discussing involuntary manslaughter or accident with Petitioner. App. 69, l. 22 – 70, l. 12. In the present case, plea counsel had an obligation under Rolen to move to withdraw the plea to afford Petitioner legal advice regarding the application of involuntary manslaughter and accident to the facts surrounding the death of M.L. rather than allowing Petitioner to continue to plead guilty to voluntary manslaughter.

Due to plea counsel's failure to move to withdraw Petitioner's guilty plea, Petitioner's plea was not "a voluntary and intelligent choice among the alternative courses of action open to [him]." Gustine v. State, 325 S.C. 123, 127, 480 S.E.2d 444, 446 (1997) (quoting Hill v. Lockhart, 474 U.S. 52, 56 (1985)). In the present case, "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). The PCR court erred in failing to find counsel was ineffective in handling the guilty plea.

**CONCLUSION**

Under Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009), this Court should reverse the PCR court's order finding plea counsel was effective and remand this matter for a hearing on the appropriateness of the withdraw of Petitioner's guilty plea or grant Petitioner a new trial.



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Gary H. Johnson  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of March, 2024.