

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Oconee County

Honorable Perry H. Gravely, Circuit Court Judge

RICHARD ANTHONY DUNSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001746

APPENDIX

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1 In the Court of General Sessions for the
2 State of South Carolina, County of Oconee

3

4 Case No.: 2018GS3701238

5 State of South Carolina,

6 Plaintiff(s),

7 vs.

Transcript of Record

8 Richard Anthony Dunston,

9 Defendant(s).

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15 October 15, 2020

16 Walhalla, South Carolina

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21 BEFORE:

22 The Honorable Letitia H. Verdin

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APPEARANCES

REPRESENTING THE STATE:

Lindsey Simmons, Assistant Solicitor
Tenth Circuit Solicitor's Office
415 S. Pine Street
Walhalla, South Carolina 29691

REPRESENTING THE DEFENDANT:

David W. Plowden, Esquire
316 N. Church St.
Walhalla, SC 29691-1906

PROCEEDINGS

1
2 MS. SIMMONS: Judge, this is Richard
3 Dunston, Junior, he is here on 2018GS3701238. He is
4 pleaing guilty to voluntary manslaughter, which is --
5 as being a lesser included of the original offense of
6 murder. We are -- the sentencing negotiations in
7 this case, we are at a point where the cap in this
8 case, we have agreed, is 25 years, Your Honor. The
9 State's recommendation, or we were requesting a
10 25-year sentence.

11 Casey Bowling, the interim Chief at the City
12 of Seneca, is here and present and would like to
13 speak. The victim's family is here. Her brother,
14 Jared Goforth, is here. He will have some prepared
15 remarks that he will be giving to the Court on behalf
16 of the family. Judge, there are some crime scene
17 photos and some photographs from a Facebook post from
18 the -- still shots of a Facebook post from the
19 Defendant prior to the incident that we are passing
20 up. Mr. Plowden has seen those, they were provided in
21 discovery.

22 And we are just going to go ahead and pass
23 up his rap sheet. And, Judge, obviously, after you
24 accept the plea, we would like to have some input as
25 to sentencing.

1 THE COURT: Absolutely. All right. Mr.
2 Dunston, you are here today to plea to voluntary
3 manslaughter. That carries two years up to 30 years;
4 is that your understanding?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: Have you discussed this charge
7 -- and, excuse me, I need to advise you, that is a
8 violent offense and a most serious offense. So, you
9 know that that is two of your three strikes for life
10 without the possibility of parole. You know that?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: Have you discussed this charge
13 with your lawyer?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: Are you happy with what your
16 lawyer has done for you?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Are you under the influence of
19 drugs or alcohol here today?

20 THE DEFENDANT: No, ma'am.

21 THE COURT: Has anyone forced you to plead
22 guilty?

23 THE DEFENDANT: No, ma'am.

24 THE COURT: Has anyone promised you
25 anything to get you to plead guilty?

1 THE DEFENDANT: No, ma'am.

2 THE COURT: Have you ever had any substance
3 abuse treatment or mental health treatment?

4 THE DEFENDANT: No, ma'am.

5 THE COURT: Do you take any medications?

6 THE DEFENDANT: No, ma'am.

7 THE COURT: All right. You feel
8 clear-headed here today?

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: All right. You know that when
11 you plead guilty you give up certain Constitutional
12 rights. One is your right to remain silent about
13 this charge. Do you know that?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: You also give up your right to
16 a jury trial. At that trial your attorney could call
17 witnesses for you, could cross-examine witnesses
18 against you. And the State would have to prove your
19 guilt beyond a reasonable doubt. But when you plead
20 guilty you give up your right to a jury trial. Do
21 you know that?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: And how do you plea to this
24 charge, guilty or not guilty?

25 THE DEFENDANT: Guilty.

1 THE COURT: You have ten days from today's
2 date to appeal this plea, if you so choose. But you
3 must do so in writing to this Court. I want you to
4 listen to the facts as stated by the solicitor. I'm
5 going to have a question or two more for you about
6 that. Okay?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: All right. Yes, ma'am.

9 MS. SIMMONS: Judge, on May -- on or about
10 May 17th, 2018 here in Oconee County, without malice
11 aforethought, the defendant did unlawfully kill M.L.
12 [REDACTED] by means of striking her in the head -- fired a
13 handgun striking her in the head and causing her
14 death.

15 THE COURT: All right. You heard the facts
16 as stated by the solicitor. How do you plea, guilty
17 or not guilty?

18 THE DEFENDANT: Guilty.

19 THE COURT: All right. I'll accept your
20 plea as being freely and voluntarily made with the
21 advice of extremely competent counsel with whom you
22 say you are well satisfied. And the plea does have a
23 substantial factual basis. All right. Yes, ma'am?

24 MS. SIMMONS: Judge, for sentencing
25 purposes from our office, you have the defendant's

1 prior record. You have the photographs from the
2 scene. The defendant -- I have been in this office
3 for a while now, we have dealt with Mr. Dunston for
4 years with domestic violence against women. It's
5 been an escalating pattern of violence against women.
6 Not just Ms. **M.L.**. This was actually the first time
7 she had been a reported victim of any domestic
8 violence from him.

9 They were in an on-again/off-again
10 relationship at the time. Judge, he was on probation
11 for domestic violence at the time of this offense.
12 You can see the still shots from the video posted to
13 Facebook prior to this. He certainly was engaging in
14 reckless behavior on the day in question that was in
15 violation of his probation, hanging out with folks
16 that he shouldn't have, and it escalated to the point
17 of this confrontation with **M.L.** that resulted in her
18 death.

19 We just believe, Your Honor, based on his
20 prior record, we think that a 25-year sentence is
21 appropriate in this case. And we feel very strongly
22 that he is a danger to women. We met with the family
23 and they are concerned that they would like to see
24 him, while in the Department of Corrections, perhaps
25 get some anger management or some domestic abuse

1 counseling during the time that he's there. And I'll
2 let interim Chief Bowling speak now.

3 THE COURT: Yes, sir, Chief.

4 CHIEF BOWLING: Thank you, ma'am. I would
5 just like to speak on behalf of the police department
6 and the citizens of the City of Seneca. M.L.
7 didn't deserve this. All that she was doing was
8 going to help a friend that evening and she was
9 confronted by her on-again/off-again boyfriend, Mr.
10 Dunston.

11 I honestly fear for all women in Seneca,
12 Oconee County, and in the state if Mr. Dunston is to
13 continue this behavior. We have had a huge pattern.
14 In law enforcement training we talk about patterns
15 with domestic violence. We talk about just starting
16 with arguments and then escalating from there. This
17 is the perfect example of someone who is starting with
18 arguments, getting, as you see on the record, domestic
19 violence, and now all the way up to manslaughter now.

20 This is the example that we all here about
21 the horror stories of domestic violence. This is the
22 poster child for that. And, ma'am, I strongly agree
23 with the State's recommendation of 25 years because I
24 am in fear for other women in this state.

25 THE COURT: Thank you so much, Chief. And

1 I appreciate the outstanding work that the Seneca
2 Police does.

3 CHIEF BOWLING: Thank you, ma'am.

4 THE COURT: Is there anything else, ma'am?
5 Anyone else?

6 MS. SIMMONS: Yes, Your Honor, Jared
7 Goforth is the victim's brother and he will be
8 speaking on behalf of the entire family in this case.

9 MR. GOFORTH: Good afternoon, Your Honor.
10 I'm Jared Goforth, M.L. oldest sibling. First of
11 all, I would like to thank you for coming here today
12 to provide for M.L. M.L. was a beautiful
13 person with a contagious laugh and smile that could
14 light up a room. She was precious and valuable to
15 her family, her friends. She left behind a mother, a
16 father, brothers and sisters. Many friends have
17 suffered for almost two and a half years for this
18 thing.

19 While we remember the many great times we
20 had, we will always question what happened her last
21 day, her last hour, her last minutes. Although today
22 will not provide us with any of those answers, and we
23 are aware of that, we are hopeful that today can begin
24 a new chapter in a grieving process for M.L.

25 We come before you today as a family seeking

1 justice for **M.L.** for her life. I do not think that
2 anything that happens here today will be the complete
3 justice we seek, but hopefully it'll be enough that we
4 will be content in the future.

5 It is our understanding that the person
6 pleaing guilty here today has a long history of
7 violent crimes against women in Oconee County. Our
8 hope, our prayer is, as a family, is that **M.L.** will be
9 the last to suffer under his hand. We are asking as a
10 family that the Court, at a minimum, follow the
11 sentencing recommendation that was presented of 25
12 years in prison. We also ask that that sentence be
13 one day for one day, with no parole or early release,
14 if possible.

15 We feel that as a family we should not have
16 to revisit this situation with the guilty for parole
17 for the next 25 years. But rest assured, if that day
18 ever comes, we will be there and we will be present.
19 I would like thank Casey Bowling of the Seneca Police,
20 as well as Lindsey Simmons and her staff, for the
21 countless hours, manhunt hours that were provided, as
22 well as multiple trips out of the state to find
23 witnesses.

24 But finally, we implore you to deliver the
25 justice that is within your power today and give a

1 sentence that is appropriate. We thank you.

2 THE COURT: I'm so sorry. Thank you for
3 being here. And I'm just so sorry for your loss. As
4 you said, I don't think today can be the justice and
5 the peace that you -- that you-all are hoping. I
6 wish that I could do that. But at least maybe this
7 is some small part of this complete nightmare, that
8 maybe some small part that you can at least have
9 behind you.

10 MR. GOFORTH: Yes, ma'am.

11 THE COURT: Sir, there is a man here who
12 would like to speak.

13 MR. LEE: I just want to speak.

14 THE COURT: Could you take your mask down?

15 MR. LEE: I am sorry.

16 THE COURT: That is okay, I just want to be
17 able to hear you.

18 MR. LEE: I just want to speak --

19 THE COURT: Are you able to stand?

20 MR. LEE: Yes. My name is William Darnell
21 Lee. **ML** is my baby girl. I don't know what about
22 COVID changed what happened to her. I'm praying
23 already, God give me strength to accept whatsoever,
24 but ma'am . . .

25 THE COURT: And your silence there at the

1 end speaks everything. I appreciate your being here.
2 And, again, I am just so sorry for your loss, your
3 whole family's loss. I can't even imagine what you
4 have been through.

5 All right. Mr. Plowden.

6 MR. PLOWDEN: Your Honor, Richard is 27
7 years old. He grew up in Seneca. He went to Seneca
8 High School. He didn't finish, but he did go into
9 job corps where he got qualifications as a welder and
10 a forklift driver.

11 He has six kids under the age of ten. I
12 have a couple of witnesses, I believe. One of them I
13 know is here. And I would like for you to hear from
14 them first and then hear from Mr. Dunston, and then I
15 will finish. And just for the court reporter's
16 convenience, I will hand up the names.

17 THE COURT: And I think that I should go
18 ahead and put on the record, because you said that
19 Mr. Dunston did attend Seneca High School, as many of
20 you know my sister is principal of Seneca High
21 School. I don't think that she would have been the
22 principal at the time, but she would have been the
23 assistant principal. I know nothing about this case.
24 This is the first that I have heard it, and the first
25 I have heard of his name. So, I just want to assure

1 everyone that I know nothing about this case in
2 advance.

3 MR. PLOWDEN: I appreciate that, Your
4 Honor. And the Defense has no objection to your
5 continuing.

6 THE COURT: Thank you.

7 MR. PLOWDEN: Let me see if my witnesses
8 are ready.

9 (Pause.)

10 MS. SIMMONS: I'll let them stand where I
11 am and I'll go back here.

12 MR. PLOWDEN: All right. We need to the
13 rearrange this.

14 MS. SIMMONS: That will be fine.

15 MR. PLOWDEN: Your Honor, this is Ms. Ada
16 Dunston, Richey's grandmother. And she wishes to
17 address the Court.

18 THE COURT: Yes, ma'am. Could I ask you,
19 if you are comfortable, to please pull down your
20 mask? Could you pull down your mask?

21 MS. ADA DUNSTON: Sure.

22 THE COURT: Only if you are comfortable.

23 MS. ADA DUNSTON: Oh, I'm fine with that.

24 THE COURT: Okay.

25 MS. ADA DUNSTON: I just have a hearing

1 aid.

2 THE COURT: That is okay. The court
3 reporter is taking down what you say, and so if you
4 don't mind, just try to speak up.

5 MS. ADA DUNSTON: I will.

6 THE COURT: Thank you.

7 MS. ADA DUNSTON: I have notes if I could
8 read it.

9 THE COURT: Of course.

10 MS. ADA DUNSTON: That will be fine.

11 THE COURT: Yes, ma'am.

12 MS. ADA DUNSTON: Okay. It may be better.

13 Richard Anthony Dunston, Junior, age 27, is my oldest
14 grandson. And he has always been kind, loving,
15 funny, and respectful. He stayed with me and his
16 grandpa for a while and never gave us any trouble.
17 He visited us on occasion once or twice every six
18 months. We visited him weekly here at the jail when
19 he was in -- well, prior to this Corona virus.

20 I think drugs and being a crowd pleaser
21 influenced him. I pray that he's given a chance to
22 redeem himself and prove mentally that he is better
23 than what he is accused of.

24 THE COURT: Well, that he's pled to now,
25 just to be --

1 MS. ADA DUNSTON: Yeah.

2 THE COURT: -- admitted to. Go ahead.

3 MS. ADA DUNSTON: Sometimes there are no
4 word, just lots of caring and love and trust in God.
5 That is all that I have to say.

6 THE COURT: Thank you so much. It tells
7 how much you love your grandson. Thank you.

8 MR. PLOWDEN: Your Honor, this is Ms. Lona
9 Dunston, and she had -- she is his mother and she
10 would also like to address the Court.

11 THE COURT: Could I ask you, please, if you
12 are comfortable, to please remove your mask? Yes,
13 ma'am.

14 MS. LONA DUNSTON: I am Rickey's mom and he
15 is one of the most loving children out of four, very
16 passionate. My mom had cancer twice, he was there to
17 help her. With her knee replacement, he was also
18 there. I have another son that was born with a heart
19 disease that -- he's had 11 heart surgeries and
20 Rickey was always at the hospital there with him.
21 And he would call when he could not make it to
22 Charleston.

23 He is a very loving person. He played
24 basketball. He went to AAU every summer. He worked
25 for EPI. He cut down trees. He went to job corps,

1 and to welding, and got his forklift license. He is
2 just one of the very passionate, loving, never meets a
3 stranger person. So . . .

4 THE COURT: Thank you so much.

5 MR. PLOWDEN: All right. Your Honor, I
6 believe that Rickey would like to address the Court.

7 THE COURT: Yes, sir.

8 THE DEFENDANT: Yes, ma'am, I wanted
9 everybody to know --

10 THE COURT: I need you to speak up as much
11 as you can.

12 THE DEFENDANT: Talk in here?

13 THE COURT: Yeah, you talk in there as loud
14 as you can.

15 THE DEFENDANT: Okay. Everybody just
16 making it seem just like an (inaudible). It was none
17 of that. Me and **M.L.** was arguing. **M.L.** was not my
18 girlfriend as stated. I have a wife. My wife's name
19 is Raven Simone (phonetic) Dunston. **M.L.** was not my
20 girlfriend. **M.L.** was upset with me that day because
21 **M.L.** took care of them when I was in prison. I was up
22 here in prison and I got home. Upset with me because
23 I didn't want to be with her. I was staying back and
24 forth to my wife.

25 Me and **M.L.** went outside. **M.L.** was arguing

1 with me. **M.L.** bought the gun that I had. There was
2 nothing that I had that **M.L.** didn't buy me, clothes,
3 phone, shoes, she bought me.

4 So why we were arguing, she was arguing with
5 me and I was trying to walk away. My cousin from New
6 York came down here. He stay with Chad Lawson
7 (phonetic), which is my cousin at (inaudible). He was
8 down here having a cookout with a girl that stayed in
9 251, Tyisha. Summer Brown, (phonetic) that is where I
10 basically lived and that is the only reason that **M.L.**
11 was up there, **M.L.** went up there, **M.L.** told Summer on
12 me.

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

20 THE COURT: Well, then I can't accept his
21 guilty plea. Either you had it and either you are
22 admitting that you killed this girl --

23 THE DEFENDANT: My hand like it went off.
24 The gun was in my hand when it went off. There's
25 nothing -- the gun was in my hand. But it's not like

1 everybody make it. It was not like it was at the
2 body. Everybody talking about he had this, he had
3 that, but every time I get a CDV it's been
4 non-violent, it's just been verbal. I have never --

5 THE COURT: What is the State's position on
6 this?

7 MS. SIMMONS: Judge, at trial we would
8 present evidence that obviously he was in possession
9 of a firearm prior to this incident. We have video
10 evidence of that from social media.

11 Witnesses would put him going on the porch,
12 **M.L.** -- them both being on the porch, the witnesses
13 hearing gun shots. Immediately when the door is
14 opened, **M.L.** has the gun shot wound to the head. Mr.
15 Dunston leaves the scene on foot. We do have
16 witnesses after the fact that would put him fleeing
17 the scene.

18 He -- there was an extensive search to find
19 Mr. Dunston. He had -- he fled after the offense. We
20 don't have an eye witness of the actual shooting,
21 Judge, but we have certainly behavior before and after
22 consistent with the attempt to avoid guilt. And
23 having further --

24 THE COURT: Please, go ahead.

25 MS. SIMMONS: And the witnesses inside the

1 house while all of this is going on, the small stoop
2 of the apartment, can hear him yelling at her.

3 THE COURT: Okay.

4 MR. PLOWDEN: Your Honor, I think that if
5 there were some sort of altercation and Rickey, I'm
6 going to ask him a question now. Did you pull the
7 trigger?

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

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

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

15 THE COURT: Here is what we are going to
16 do. I want you to read the facts again. And I want
17 to apologize to the family that we are having to go
18 through this again. And if you need, if you need to
19 step outside, I'll understand that too. I'm going to
20 have you read the facts one more time. I'm going to
21 have you listen to them one more time. And I'm going
22 to decide whether or not I accept your plea.

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: Yes, ma'am.

25 MS. SIMMONS: Judge, on or about May 17th

1 2018, here in Oconee County, without malice
2 aforethought, the defendant did cause the death of
3 M.L. by shooting her with a handgun in the head.

4 THE COURT: All right. And how do you plea
5 to that charge, guilty or not guilty?

6 THE DEFENDANT: Guilty.

7 THE COURT: All right. Well I'm going to
8 accept his plea. I think a lot of what he's doing is
9 just trying to -- he's kind of going back on his
10 accepted plea, but he's admitting the facts as
11 presented by the State. And if you are -- if the
12 State is satisfied, then I will accept -- then I'll
13 continue to accept his plea. Mr. Plowden, anything
14 else that you would like to add?

15 MR. PLOWDEN: Yes, Your Honor. This
16 offense, as Your Honor previously noted, carries two
17 to 30 years, which means that there's a wide latitude
18 for judges to decide based on the facts and
19 circumstances of not only the offense, but of the
20 offender, as to what sentence to impose.

21 The State has asked for 25 years. That is a
22 long time. The -- I did some modeling of that and a
23 15-year sentence. The 25 years, the earliest possible
24 day, if he gets every credit that he can get, the
25 earliest possible day that he can get out is August

1 15, 2039. He would be 46 years old. A sentence of 15
2 years, he would get out February 15, 2031. He would
3 be 37 years old.

4 We don't know -- we really don't know what
5 happened. This was, in a sense, a circumstantial
6 evidence. But I will say that some of the evidence
7 that would have been presented was evidence
8 essentially quoting Mr. Dunston from communication
9 with other people about how he had killed the person
10 he loved, or a person he loved, and how he had done a
11 terrible thing.

12 Mr. Dunston conferred with his family and
13 turned himself in the next day, which is what we would
14 hope somebody would do in this situation. I think
15 that in terms of deterring his criminal conduct, a
16 15-year sentence would do that.

17 He still, he still has -- if he gets out --
18 15-year sentence, if he gets out at 37 he still has an
19 opportunity to build a life. And I understand, really
20 do understand the family's position. They have had
21 this young vibrant woman ripped away from them. I
22 never met her, and sadly I'll never get that chance.
23 I understand that. It is not about -- it is not about
24 her.

25 It is not about -- we don't -- we don't vary

1 sentences because the victim is a really great person,
2 and we don't give lesser sentences because they are
3 really not a great person. That is not the
4 consideration.

5 But here Rickey is going to have to do a
6 bunch of time. I don't think that there's any
7 question about that. But the question is going to be,
8 how is he going to use that time and what is his
9 motivation to do that. I think serving a prison
10 sentence is psychologically crushing. And I think
11 that he would have to have some hope of being able to
12 resurrect himself in order to survive that. And I
13 think that putting him in prison for 15 years means
14 that he does not get out until February 15, 2031, and
15 we would ask you to consider that.

16 But we rest, obviously, we rest our pleas on
17 your good conscious and your consideration of -- I
18 guess this is tragic all the way around. Now, I'm
19 arguing for Richey's life essentially. And I know
20 that that is not -- that is not a popular argument in
21 this courtroom today. And I get that. I do think
22 that he is smart. Some of the vagaries of this case
23 we had to talk about and some of them were a little
24 unusual, but he got it and he asked good questions.

25 And I think with everything that we have

1 heard before, I think that he has got a chance to turn
2 his life around. It struck me, and I'm sure that Your
3 Honor has had this experience, that we have had -- we
4 have had witnesses talk about both sides of this
5 equation, and those descriptions are irreconcilable.
6 And that puts, I think, a tremendous burden on Your
7 Honor.

8 But I trust Your Honor to consider all of
9 this and set out a just verdict. Thank you.

10 THE COURT: Thank you, Mr. Plowden. And I
11 certainly appreciate the fine presentation that you
12 have made on your client's behalf. And certainly his
13 mother and grandmother were certainly moving as well.
14 I take into consideration a number of things when I
15 sentence someone.

16 I take into consideration, first of all, the
17 seriousness of the crime. And it couldn't have been
18 more serious. I take into consideration the harm that
19 he's caused, and again, could not be -- could not have
20 caused more harm. I take into consideration
21 somebody's prior record. And I have had the
22 opportunity to review your prior record sitting here.
23 It is atrocious. It is atrocious.

24 The domestic violence charges that you had
25 against you and the fact that you were on probation

1 for a domestic violence charge at the time that you
2 did certainly do not weigh in your favor, Mr. Dunston.

3 And I take into account the aim of
4 sentencing. And it is a twin aim. One is
5 rehabilitation and the opportunity to rehabilitate
6 someone while they are in prison. I certainly take
7 that into consideration. And Mr. Dunston seems like
8 an intelligent man and I think that he probably can
9 have some opportunity, at least we hope, for
10 rehabilitation. But the other is retribution. He has
11 to pay his debt. Rehabilitation and retribution, and
12 he has to pay his debt for what he had.

13 I cannot make this, to the victim's brother
14 in this case, I cannot make this a day for day, but I
15 think that Mr. Plowden laid out the sentencing, the
16 sentencing release dates very accurately from what I
17 would expect. But all of those things taken into
18 consideration, Mr. Dunston, the sentence of the Court
19 is 25 years. And what -- how much time does he have
20 credit for, do you know?

21 MR. PLOWDEN: 882 days.

22 THE COURT: I wish you all the best of
23 luck. Thank you.

24 (Proceeding adjourned.)

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CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF OCONEE:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 6th day of January, 2022.

Mona L. Manley /s/

MONA L. MANLEY
Official South Carolina Court Reporter
Circuit Reporter for the 10th Circuit
(850) 893-6662
mmanley@scccourts.org

FORM 3

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
JAN 15 10 11 25

STATE OF SOUTH CAROLINA)

COUNTY OF Oconee)

IN THE COURT OF COMMON PLEAS

Richard Anthony Dunston
Full name and prison number (if any) of Applicant)

2021 CP 3700775

v.)

\$30.75/18)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Liebor Corr.
2. Name and location of Court which imposed sentence Oconee County
3. Name(s) of co-defendant(s) (if any) NA
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

- (a) _____
- (b) _____
- (c) _____

5. The date upon which sentence was imposed and the terms of the sentence: Oct 15, 2020

- (1) _____
- (2) _____

Dunston meadows
Solicitor Office *DM*

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. _____ court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. _____

ii. _____ DENIED

iii. _____

(c) the date of each such result:

i. _____

ii. _____ N/A

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____ N/A

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

My attorney denied me due process of not giving me sufficient advice, and giving me erroneous advice.

- (a) _____
- (b) _____
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) _____ He never counsel me about my plea
- (b) _____ negotiations
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

N/A

(b) the name and location of the Court in which each was filed:

- i. _____
- ii. _____
- iii. _____
- iv. _____

N/A

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____

N/A

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

N/A

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

N/A

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? _____
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. _____ Attorney DAVID Plowden
 - ii. _____ 315 North Church St.
 - iii. _____ Wahalla, S.C. 29691
- (b) the proceedings at which each such attorney represented you:
 - i. _____ Plea
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application:
Sentence vacated + granted A new trial

20. Are you now under sentence from any other court that you have not challenged?
NO

CLERK OF DISTRICT COURT
SOUTH CAROLINA
DISTRICT COURT

2021CP3700775

STATE OF SOUTH CAROLINA


2021 NOV 15 PM 1:27

County of

)
)
)

VERIFICATION

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 8th
day of Nov., 2021.

Lind K. B (L.S.)
Notary Public

My Commission Expires: 6-20-26

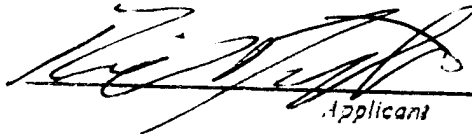
CLERK OF DISTRICT COURT
BOSTON
2021 NOV 15 P 1:27

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

2021CP3700775

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
8th day of NOV, 2021.


Notary Public

My Commission Expires: 6-20-26

CASE NO. 2021-CP-37-00775

2023 OCT 18 A 9:40

Richard A. Dunston, Jr., #367578)
 Applicant,)
 vs)
 STATE OF SOUTH CAROLINA,)
 Respondent,)

ORDER OF DISMISSAL

This matter comes before this Court by way of Richard A. Dunston, Jr., (Applicant) application for post-conviction relief (PCR) commenced November 15, 2021. The State made its return and motion for more definite statement on May 18, 2021 requesting an evidentiary hearing to resolve the issues set forth in the application. This Court convened an evidentiary hearing on February 27, 2023, at the Anderson County Courthouse. Applicant was present at the hearing and represented by Susannah C. Ross, Esquire. Taylor Smith of the South Carolina Attorney General's Office, appeared on behalf of the State (Respondent). Applicant testified on his own behalf at the evidentiary hearing. Applicant's Plea Counsel, David W. Plowden, Esquire, also testified. Also before the Court were a copy of records of Anderson County Clerk of Court, the Applicant records from the South Carolina Department of Corrections, the transcript from Applicant's guilty plea hearing, Applicant records from the South Carolina Court of Appeals, and the records from the current proceedings, including the PCR hearing transcript.

After observing the testimony presented and a full review of the record before the Court, this Court finds, for the reasons discussed below, Counsel was not constitutionally ineffective, and Applicant knowingly, voluntarily, and intelligently pleaded guilty. Therefore, the Court DENIES relief and DISMISSES the action with prejudice.

Copies to:
 Atty (P) ✓ (D) ✓
 DSS other Sp1
 Mailed ✓ Boxed ✓ handed

Applicant filed a timely notice of appeal. On December 16, 2020, the Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR,¹ for failure to provide a sufficient explanation as to why an appeal from his guilty plea should proceed. *Dunston v. State*, S.C. Ct. App. Order dated Dec. 16, 2021. The case was remitted back to the circuit court on January 11, 2021.

II. CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

1. "My attorney denied me due process of not giving me sufficient advice, and giving me erroneous advice."
 - a. "He never counsel[sic] me about my plea negotiation."

Applicant requests relief in the form of a new trial.

Attached to this return and incorporated by reference are the Oconee County Clerk of Court records regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the records of the current PCR action. The State reserves the right to amend this return upon receipt of any relevant materials.

III. MOTION FOR A MORE DEFINITE STATEMENT

The State submits Applicant's allegations of ineffective assistance of counsel are without merit. However, it is impossible for the State to adequately respond to these claims because Applicant has failed to adequately set forth facts to "support each ground" or to explain with any specificity what plea counsel advised him that was purportedly insufficient or erroneous. Accordingly, the State moves for Applicant, through counsel, to amend his application to provide

¹ Rule 203(d)(1)(B)(iv) requires "a written explanation showing that there is an issue(s) which can be reviewed on appeal[,] . . . including how the issue(s) was raised below and the ruling of the lower court on that issue(s)."

a more definite statement of his allegations pursuant to Rule 12(e), SCRCP, and the Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-50 (requiring an applicant to “specifically set forth the grounds upon which the application is based”); see *Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (stating it is incumbent upon an applicant to make at least a prima facie showing entitling him to relief before an evidentiary hearing will be scheduled and held); *Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”); Rule 8(a)(2), SCRCP (requiring all civil pleadings to include “a short and plain statement of the facts showing that the pleader is entitled to relief”); Rule 71.1(d), SCRCP (“Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.”).

IV. RESPONSE TO ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

A. Ineffective Assistance of Plea Counsel, Generally

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant—like all other defendants—the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC. The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

As aforementioned, the applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of “were outside the wide range of competence” demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.*

However, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696.

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonably professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. “The burden of rebutting this presumption ‘rests squarely on the defendant,’ and ‘[i]t should go without saying that the absence of evidence cannot overcome [i]t.’ ” *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, “even if there is reason to think that counsel’s conduct ‘was far from exemplary,’ a court still may not grant relief if ‘[t]he record does not reveal’ that counsel took an approach that *no competent lawyer would have chosen.*” *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24). Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; see *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the “benchmark” of the right to counsel is the “fairness of the adversary proceeding”).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart*, 474 U.S. 52 (1985), extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. See *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a “critical phase of litigation” for purposes of the Sixth Amendment right to effective assistance of counsel). When reviewing a guilty plea, the analysis of counsel’s performance under the first prong of *Strickland* remains unchanged—the applicant must show that counsel’s representation fell below an objective standard of reasonableness

demanding of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; accord *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel’s advice to plead guilty was not “within the competence demanded of attorneys in criminal cases.” *Hill*, 474 U.S. at 56. The second, or “prejudice” prong, however, “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Id.* at 58–59. Specifically, when an applicant claims counsel’s deficient performance caused him to accept a plea, the applicant “must show that there is a reasonable probability that, but for [plea] counsel’s [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59.

This inquiry “focuses on a defendant’s decision-making” and does not turn on the outcome of a defendant’s actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S. ___, ___, 137 S. Ct. 1958, 1966 (2017). However, the applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. Judges must “look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” *Lee*, 582 U.S. at ___, 137 S. Ct. at 1967. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Surmounting *Strickland*’s high bar is never an easy task, and the strong societal interest in finality has “special force with respect to convictions based on guilty pleas.” *Lee*, 582 U.S. at ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. *Hill*, 474 U.S. at 58 (“[R]equiring a ‘prejudice’ showing from defendants who seek to challenge the validity of their

guilty pleas on the ground of ineffective assistance of counsel ‘will serve the fundamental interest in the finality of guilty pleas.’ ”). Reviewing “[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies.” *Lee*, 582 U.S. at ____, 137 S. Ct. at 1967. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

B. Involuntary Guilty Plea

“[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced.” *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999). To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant’s choice. *Id.* at 755; *see also United States v. Smith*, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one’s accusers, and the

privilege against self-incrimination. *Boykin*, 395 U.S. at 243. Additionally, the defendant “must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Pittman*, 337 S.C. at 599, 524 S.E.2d at 624. The defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between court and defendant, between court and defendant’s counsel, or both.” *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); *see generally Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his guilty plea, the plea judge “usually questions the defendant about the facts surrounding the crime and punishment that could be imposed.” *Dover v. State*, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the plea judge “does not have to direct the defendant’s attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea.” *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The 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.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). It is “well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment.” *United States v. Cox*, 464 F.2d 937, 942 (6th Cir. 1972) (citing *Brady*, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, *Brady*, 397 U.S. at 750–53, or by increasing the risks of punishment on those who do not. *Alford*, 400 U.S. at 37.

An applicant who enters a plea on the advice of counsel may “only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the [applicant] would not have pled guilty, but would have insisted on going to trial.” *Roscoe*, 345 S.C. at 20, 546 S.E.2d at 419. In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe*, 326 S.C. at 165, 458 S.E.2d at 370; *cf. Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant’s claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant’s claim his lawyer misadvised him). The 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*, 282 S.C. at 133, 318 S.E.2d at 361.

Nonetheless, because “[a] guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . . , a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)); *see McMann v. Richardson*, 397 U.S. 759, 774 (1970) (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements.” *Dalton*, 376 S.C. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); *cf. Blackledge*, 431 U.S. at 73–74 (pointing out that

representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a “formidable barrier in any subsequent collateral proceedings”); *United States v. Broce*, 488 U.S. 563, 569 (1989) (“A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.”).

Guilty pleas “must be treated as final in the vast majority of cases. Indeed, ‘[w]hat is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof.’ ” *Jamison v. State*, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (2014) (quoting *McMann*, 397 U.S. at 773. “Furthermore, there must be some consequence attached to the decision to plead guilty.” *People v. Schneider*, 25 P.3d 755, 761 (Colo. 2001) (*cited with approval in Jamison*, 410 S.C. at 469, 765 S.E.2d at 129).

Here, the plea transcript reflects Applicant understood the proceedings, the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty in accordance with the requirements of *Boykin* and *Pittman*. See *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975), *overruled on other grounds by United States v. Whitley*, 759 F.2d 327 (4th Cir. 1985) (finding that the accuracy and truth of an accused’s statements at a guilty plea

proceeding are “conclusively” established unless he makes some reasonable allegation why this should not be so).

In *Brady*, the United States Supreme Court explained:

Often the decision to plead guilty is heavily influenced by the defendant’s appraisal of the prosecution’s case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State’s case or the likely penalties attached to alternative courses of action.

Id. at 756–57.

Here, Applicant’s knowing, voluntary, and intelligent guilty plea constituted a waiver of nonjurisdictional defects and claims of violations of constitutional rights prior to the plea. *See Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999) (“A defendant who pleads guilty usually may not later raise independent claims of constitutional violations.”); *Vogel v. City of Myrtle Beach*, 291 S.C. 229, 231, 353 S.E.2d 137, 138 (1987) (“A plea of guilty constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea. It conclusively disposes of all prior issues including independent claims of deprivations of constitutional rights.” (citations omitted)); *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (explaining that a plea waives all non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence and claims of a violation of a constitutional right prior to the plea) (citing *Rivers v. Strickland*, 264 S.C. 121, 213 S.E.2d 97 (1975)); *State v. Green*, Op. No. 5907 (S.C. Ct. App. filed May 4, 2022) (Howard Adv. Sh. No. 16

at 54) (“Few principles of South Carolina criminal law are as ingrained as the notion that a knowing, voluntary, and intelligent guilty plea ‘constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.’ ” (quoting *State v. Sims*, 423 S.C. 397, 400, 814 S.E.2d 632, 633 (Ct. App. 2018)).

C. Conclusion and Action Requested

The State submits Applicant can satisfy neither requirement of the *Hill* test based on his allegation that plea counsel was ineffective for giving him insufficient or erroneous advice to plead guilty. However, as discussed above, it is impossible for the State to adequately respond to Applicant’s allegations of ineffective assistance of counsel because Applicant does not indicate with any specificity what plea counsel advised him that was purportedly insufficient or erroneous. However, the record likely does not refute or disprove Applicant’s allegations of ineffective assistance of plea counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. *See Sharper*, 279 S.C. at 265, 305 S.E.2d at 248 (providing an evidentiary hearing shall be held when a PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the [PCR] court”).

V. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRPC. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. *Id.* at

245, 834 S.E.2d at 203 (Kittredge, J., dissenting) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C. Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRPC. *See also* Rules 15(a)–(b), SCRPC. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRPC.

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. The State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

VI. GENERAL DENIAL

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

[Conclusion and signature on following page]

VII. CONCLUSION

WHEREFORE, the State respectfully requests this Court grant its motion for a more definite statement as set forth in section III, and thereafter convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

Respectfully submitted,

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May 18, 2022

State of South Carolina
County of Oconee

Court of Common Pleas

Richard A. Dunston, Jr.)
)
 Plaintiff,)
 v.)
 State of South Carolina)
)
 Defendant.)

Transcript of Record
2021-CP-37-00775

February 27, 2023
Anderson, South Carolina

B E F O R E:

The Honorable Perry H. Gravely, Judge.

A P P E A R A N C E S:

Susannah C. Ross, Esquire
Attorney for the Plaintiff

Taylor Smith, Attorney General
Attorney for the State

Lisa Scott
Circuit Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No Exhibits.

P R O C E E D I N G S

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1
2
3 MS. ROSS: Just before calling the case,
4 Mr. Dunston asked me to request a continuance on his
5 behalf.

6 THE COURT: Now, are you Mr. Dunston? Is this
7 Mr. Dunston?

8 THE APPLICANT: Yes, sir.

9 MS. ROSS: Yes, Your Honor.

10 THE COURT: Okay.

11 MS. ROSS: And simply said, that he wanted --
12 had not been able to review his discovery. I had a
13 little bit of discovery and the transcript. I sent
14 him a copy earlier, but he -- that had been taken
15 away from him, so he wanted more time to review
16 those materials and wanted me to request a
17 continuance on his behalf.

18 THE COURT: All right. What -- what's the
19 State's position?

20 MR. SMITH: I believe, Your Honor, that this
21 may be the first time this has been on a docket.
22 That being said, Mr. Plowden is here and he has been
23 waiting -- waiting since at least 9:30 this morning.
24 And, I mean, I think the issue in this case is
25 pretty simple, at least the one that's been put

1 forward so far. I mean, so unless there's something
2 new they're looking at, I think we can go forward,
3 but...

4 THE COURT: Let -- let's do this, Ross --
5 Ms. Ross. How about if we proceeded with testimony.
6 And then if it looks like after review of discovery,
7 give you sufficient time maybe to do something like
8 review discovery. And if some other issue is raised
9 by that, I mean, but you've had a chance to review
10 it, then the -- then I'm not sure on a PCR...

11 MS. ROSS: I've reviewed all the indictments.
12 And, again, I reviewed the initial full State
13 discovery since it was a plea ---

14 THE COURT: Right.

15 MS. ROSS: --- and so -- but I have reviewed the
16 transcript and all materials fully myself.

17 THE COURT: How about we have the -- let's at
18 least let the State present at as much as you can.
19 And then at the conclusion, we can determine if
20 there is a need for additional time to present
21 anything.

22 MR. SMITH: All right.

23 THE COURT: Do you want to do that? You know,
24 that -- that way, I don't think you're prejudiced by
25 that, Mr. Dunston. By the way, if it's an issue

1 that may or may not be related to discovery or the
2 discovery or the packet basically I guess what
3 you're talking about. So let's do that. Is that
4 alright with you?

5 THE APPLICANT: Yes, sir.

6 THE COURT: Okay. All right. Then we'll
7 proceed.

8 MR. SMITH: Okay. This is the case of *Dunston*
9 *v. State*, Case No. 2021-CP-37-775. Mr. Dunston was
10 indicted in October of 2018 for murder and
11 possession of a weapon during the commission of a
12 violent crime, and he appeared before Judge Verdin
13 in October of 2020 and pled to the lesser included
14 offense of voluntary manslaughter for the negotiated
15 sentence and cap of 25 years. As part of the plea
16 agreement, the State also dismissed the weapons
17 charge, and Judge Verdin followed that -- that
18 recommendation.

19 And then on appeal, the Court -- the Court of
20 Appeals reviewed his and Mr. Plowden's guilty plea
21 and explanations and then dismissed it finding that
22 there was an insufficient explanation for why he
23 should be able to appeal the guilty plea.

24 And he then filed his application. It's my
25 understanding that the only issue will be whether

1 Mr. Plowden was ineffective for advising him to
2 plead guilty to voluntary manslaughter and --
3 instead of involuntary manslaughter. And, you know,
4 that's -- that's all we're looking at. I'm ready to
5 move forward.

6 THE COURT: All right.

7 MS. ROSS: And, Judge, that basically is -- the
8 argument is that you can see on the guilty plea
9 transcript, and I gave Mr. Dunston my copy, but I
10 believe it's page 17 or 18. He brings out some
11 facts as he states that they happened and argued
12 that Judge Verdin then says, "Well, I can't accept
13 that plea." And he's arguing that at that point,
14 the plea should've stood down because the facts did
15 not support voluntary manslaughter. Instead, they
16 support involuntary manslaughter, so his allegations
17 is his lawyer was ineffective.

18 THE COURT: Do you have an extra copy of the
19 transcript that you could ---

20 MS. ROSS: I do.

21 THE COURT: Not for me. I've got a packet.

22 MS. ROSS: I've got my notes on it, but I
23 believe it was 17 and 18. And then on 19, they hear
24 the facts one more time.

25 So his argument is his lawyer was ineffective

1 for not pulling the plea at that time and
2 encouraging him to plea to voluntary rather than
3 plea fir involuntary; is that correct?

4 THE APPLICANT: Yes, ma'am.

5 THE COURT: All right. I'll be glad to hear
6 from you.

7 MS. ROSS: Thank you. We'll call Mr. Dunston.

8 THE COURT: Mr. Dunston, if you'll come around
9 to be sworn.

10 THE APPLICANT: (Complying.)

11 RICHARD A. DUNSTON, JR.,
12 having been produced and first duly sworn as a
13 witness on behalf of the Applicant, then testified
14 as follows:

15 DIRECT EXAMINATION

16 BY MS. ROSS:

17 Q. Okay. Mr. Dunston, we've talked a little bit.
18 Do you understand what your remedy, what you get if
19 you win this post-conviction relief, what your
20 relief is?

21 A. Yes, ma'am.

22 Q. And what would that be?

23 A. Life.

24 Q. Or you would be start the whole ---

25 A. I would start the whole process over.

1 Q. And what have I told you you could possibly
2 get?

3 A. Charged with murder all over again.

4 Q. Right. And that's what you mean by when you
5 said "life"?

6 A. Yes, ma'am.

7 Q. Okay. And knowing that, how do you want -- do
8 you want do proceed?

9 A. Yes, ma'am.

10 Q. Now, you heard me state the allegation. Is
11 that your allegation of ineffective assistance of
12 counsel?

13 A. Yes, ma'am.

14 Q. Can you restate it for the judge in your own
15 words?

16 A. What -- telling what happened or tell him,
17 like, how my lawyer was ineffective?

18 Q. How your lawyer ---

19 A. I feel like my lawyer was ineffective because
20 the judge told me that when I -- when she told me
21 what happened -- when I told her what happened, she
22 told me she couldn't accept the plea. And my lawyer
23 should've come in and talked to me and asked me what
24 I wanted to do from there, and he should've stood
25 down on the plea, which he did not.

1 Q. And when you said what happened during the plea
2 transcript, do you recall what you said?

3 A. Ma'am?

4 Q. Do you recall what you said during the plea?

5 A. What -- what about the plea?

6 Q. About what happened?

7 A. Oh, yes, ma'am.

8 Q. Now, was that the truth?

9 A. Yes, ma'am. We was arguing over the gun and I
10 told her I didn't know whose hand was on the gun and
11 when the gun went off.

12 Q. Okay. And I'm going to just show your
13 transcript. That's on page 17 that I'm showing you
14 that you're saying all of this, right?

15 A. Yes, ma'am.

16 Q. And was that what happened?

17 A. Yes, ma'am.

18 Q. And do you think that supports the charge that
19 you pled guilty to?

20 A. No, ma'am.

21 Q. Now, did you talk to your lawyer about that
22 ahead of time?

23 A. About what?

24 Q. About the facts not supporting voluntary
25 manslaughter?

1 A. No, ma'am. He never gave me a chance.

2 Q. Did he ever ask you about what happened?

3 A. No, ma'am.

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

6 A. No, ma'am.

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

9 A. I would've took a manslaughter plea.

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

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

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

15 A. I would've went to trial.

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

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

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

21 A. No, ma'am.

22 Q. How about involuntary manslaughter?

23 A. Yes, ma'am.

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

1 A. Yes, ma'am.

2 Q. And not murder?

3 A. No, ma'am.

4 Q. Or voluntary?

5 A. Yes, ma'am.

6 Q. Now, are there any other allegations of
7 ineffective assistance of counsel that you have?

8 A. No, ma'am.

9 MS. ROSS: All right. Please answer any
10 questions the Attorney General may have for you.

11 CROSS-EXAMINATION

12 BY MR. SMITH:

13 Q. Mr. Dunston, didn't you tell Judge Verdin that
14 you wanted to waive your trial rights?

15 A. Yes, sir.

16 Q. And that you understood that that included
17 raising your -- waiving your right to cross-examine
18 witnesses at trial?

19 A. Yes, sir.

20 Q. And waiving your right to be silent, in other
21 words not to have to testify?

22 A. Yes, sir.

23 Q. Okay. And you told Judge Verdin you wanted to
24 waive your right to a jury trial?

25 A. Yes, sir.

1 Q. Okay. And didn't you tell Judge Verdin that
2 you had discussed the charge of voluntary
3 manslaughter with Mr. Plowden?

4 A. That I do not recall.

5 Q. Okay. And didn't you agree with Judge Verdin
6 that you were aware you could get up to 30 years of
7 prison for voluntary?

8 A. Yes, sir.

9 Q. Okay. And knowing all of these things, and
10 then didn't you say after hearing the Solicitor
11 prevent -- present the facts at least the first time
12 that you told Judge Verdin you wanted to plead
13 guilty?

14 A. Repeat that again.

15 Q. After hearing the Solicitor present the facts
16 that the State would try to prove if you went to
17 trial, didn't you then say you wanted to plead
18 guilty?

19 A. No.

20 Q. Okay. You didn't listen to the facts?

21 A. No.

22 Q. You didn't -- what were you doing then?

23 A. Well, I guess my head wasn't there.

24 Q. Okay. Didn't you tell Judge Verdin you wanted
25 to waive -- waive your rights and plead guilty?

1 A. Yes, sir. You asked me that once before.

2 MR. SMITH: Okay. All right. No more
3 questions. Thank you.

4 THE COURT: Redirect?

5 REDIRECT EXAMINATION

6 BY MS. ROSS:

7 Q. Just real quick. On page 19, your attorney,
8 Mr. Plowden, does ask you some questions. He asked
9 you whether you pulled the trigger at line 7?

10 A. Yes, ma'am.

11 Q. And what do you say?

12 A. "More -- more like the gun went off. Like she
13 was arguing -- she was arguing with me about the
14 gun."

15 Q. Okay. Now, at this point, we -- they -- they
16 recite the facts again on page 20?

17 A. Yes, ma'am.

18 Q. And then -- then what do you say then at line
19 6 -- 6 and 7?

20 A. Six and seven?

21 Q. But you then say that you're guilty, but why
22 did you say that then? How did you distinguish ---

23 A. Because I didn't know the difference between
24 manslaughter, involuntary, or accidental homicide.
25 I don't know in my head it was -- it was an option.

1 Q. Do you think the facts of the case supported
2 the charge, that there was a factual basis for the
3 charge ---

4 A. No, ma'am.

5 Q. --- of voluntary manslaughter?

6 A. No, ma'am.

7 MS. ROSS: All right. Got no further
8 questions.

9 THE COURT: Thank you. You may step down.

10 THE APPLICANT: (Complying.)

11 THE COURT: All right. Anything else from the
12 Petitioner?

13 MS. ROSS: No, Your Honor.

14 THE COURT: State?

15 MR. SMITH: I call Mr. Plowden.

16 THE WITNESS: (Approaching.)

17 DAVID PLOWDEN,
18 having been produced and first duly sworn as a
19 witness on behalf of the State, then testified as
20 follows:

21 DIRECT EXAMINATION

22 BY MR. SMITH

23 Q. Mr. Plowden, when were you -- when were you
24 admitted to practice law in South Carolina?

25 A. November 19, 1992.

1 Q. Can you give me a summary of your legal
2 experience?

3 A. The first year out of law school, I was a law
4 clerk for the Honorable G. Ross Anderson, Jr.

5 After that, I worked for maybe two-and-a-half
6 years in the Tenth Circuit Solicitor's Office.

7 Then I went into private practice and was
8 part-time public defense in Oconee County.

9 And then in June of 1998, I accepted a position
10 at the Federal Public Defender's Office in
11 Greenville. Retired from that in 2017.

12 Then was on the 608 conflict appointment list.
13 That's how I got this case.

14 Q. Okay. Can you tell me the facts of the case as
15 you remember them?

16 A. What the -- well, start -- starting with the
17 deceased, the autopsy report indicated that it was a
18 bullet wound to the head. Indicated that there was
19 stippling, which means that the gun was very close
20 to the skin. Indicated that -- specifically
21 indicated that there was no upward angle to the --
22 to the path of the bullet. And that, I think, is to
23 differentiate between a potential suicide and a
24 homicide. And the coroner called this a homicide,
25 and then the case started.

1 I was Mr. Dunston's third free lawyer. He had
2 Suzanne Earle and Austin McLain before me. I had --
3 I got the case in November, I don't remember the
4 date, of 2019. I went over all of the -- all the
5 stuff.

6 When -- when somebody like me gets appointed
7 for a conflict, the case starts over. I -- I
8 don't -- I don't know what he was told before, but I
9 know that these are competent lawyers and I know
10 they went over the evidence with him, and he
11 confirmed that. Talking to me, he would tell me he
12 knew this, he knew that.

13 He would ask me questions about various
14 scenarios. He would ask me questions to explain, I
15 don't know, like rules of evidence. There was -- he
16 wrote me a letter one time and said there was a
17 statement in there about somebody who didn't sign
18 it, and because they didn't sign it, the State
19 couldn't use that. I explained to him how -- how
20 that worked. They'd call him as a witness.

21 We -- we talked about the disposition of this a
22 lot. And at various points, he indicated to me ---

23 Q. Well, let's ---

24 A. I'm sorry.

25 Q. --- let's backtrack a little bit if that's

1 okay, because you talked about discussing the case
2 with him. How many times did you meet with him?

3 A. Oh, I'm not sure. I don't have a tally, but
4 I'd be stunned if it wasn't at least once a month
5 over the 10 or 11 months that I knew him.

6 And as we got -- as plea negotiations sort of
7 heated up in, I think, August before the plea, then
8 I met with him more often. Every time I had
9 information from the Solicitor's Office, I -- I met
10 with. The jail in Oconee County is very close to
11 where I live and work. I mean, I'm talking five
12 minutes, and so it was no big deal for me to go see
13 him.

14 Pre-pandemic, it was easy to do. Post-pandemic
15 was a little harder. Now, we had -- I mean, not
16 post, but during the pandemic we had to schedule
17 appointments and that sort of thing, but I -- I went
18 over everything that -- I answered all of his
19 questions. I went over all of his options.

20 He never -- he never told -- I was going to
21 say, he never told me he wanted to go to trial. He
22 did say that in -- in a -- in a fit of heat. He --
23 he wanted a better deal from -- from the Solicitor,
24 and then this sort of, you know, insert your
25 favorite expletive here, "I'll go to trial."

1 Q. Okay.

2 A. And then he calmed down, and we talked about it
3 again. The -- I talked to ---

4 Q. Well, let -- let me stop you one more time if
5 that's okay.

6 A. That's alright.

7 Q. During your meetings with him, did you review
8 the discovery with him?

9 A. Did -- did I what?

10 Q. Review the discovery with him.

11 A. I -- I reviewed the -- what I -- what I thought
12 was the pertinent parts. There were -- there's a
13 lot of discovery in cases like this. Okay.

14 There are -- I got -- I got a bunch of videos from
15 cops running around after the fact with their body
16 cams on. None of that had anything to do with the
17 evidence that might be useful to the State at trial,
18 so we didn't go over that stuff.

19 But everything else, we talked about it. If
20 there was a question -- because he had seen it
21 before. If he needed another copy, I'd -- I'd give
22 him stuff. I don't -- but I can't tell you exactly
23 what the inventory was that I -- that I did give
24 him, but there was nothing material in it.

25 Q. Okay. And the stuff that you didn't give him,

1 is that stuff that you reviewed yourself?

2 A. Yes. Yes.

3 Q. Okay. Did you discuss the elements of murder
4 with Mr. Dunston?

5 A. We did talk about malice. I think that it --
6 and that manslaughter, the State doesn't have to
7 prove malice to get a conviction for manslaughter --
8 for voluntary manslaughter. They don't have to
9 prove it in any manslaughter, but I doubt seriously
10 I told him the only elements is that somebody had to
11 be killed because that's -- that is fairly obvious
12 and somebody was killed.

13 Q. Did Mr. Dunston tell you that it was an
14 accidental shooting?

15 A. He told -- he told me a lot of different
16 things. One of the things that he told me was that
17 he had never left the apartment, and the only way
18 that he could've fired a gun that killed -- that
19 killed the victim would've been to shoot through the
20 door. Well, that just wasn't true and -- and it was
21 forensically unsupportable.

22 And I don't -- I don't hold that against him.
23 I mean, he's in a -- he's in a tough situation. And
24 I think I've had any number of clients that sort of
25 try out theories to see if something will stick.

1 When we got into the -- is that ---

2 Q. Well, you said he told you lots of stories.

3 What other stories did he tell you?

4 A. That -- that she had the gun and he was trying
5 to get it away from her. Somehow it got turned
6 around and -- and -- and -- and -- and shot -- shot
7 her.

8 And there wasn't -- there wasn't an eyewitness
9 to any of those events. There were two people
10 that -- that went through that event and one of them
11 is dead. Okay. The other was Mr. Dunston. Okay.
12 So I took at face value what he told me.

13 But then when one of the problems we had was
14 that the Solicitor was not remotely entertaining a
15 plea toward -- to involuntary. I think they did --
16 they did make an offer. They came off of murder and
17 they -- they made an offer of 25. I countered and
18 tried to get that down further. It was -- it was a
19 recommendation which meant we could still argue for
20 a sentence. I felt like that we had some things
21 that we could say. I felt like we had a judge that
22 I was comfortable making those arguments with, so
23 that -- that's where that was.

24 Now, you know, looking at -- the only -- the
25 only way that we could have even gotten a charge of

1 involuntary would be if he would have to testify,
2 and his prior record had problems with that. He had
3 had -- he had had assault and battery seconds. He
4 had had CDVs on more than one occasion. And the --
5 the Solicitor and the -- and the police officers
6 were indicating that, you know, he had a violent
7 record and -- and that makes it -- that makes it
8 difficult.

9 So they went back and forth with the Solicitor.
10 I -- I communicated his -- any time he told me that,
11 "I -- I want you to take X, Y, Z offer to the
12 Solicitor," I did that. That's my job. I -- I
13 might not think that it's going to be possible, but
14 that's my job to take it to them and -- and I'd talk
15 to them about it.

16 We ended up going into -- into court with a
17 25-year recommendation. The transcript indicates
18 that the plea didn't go particularly smoothly. And
19 Judge Verdin had just sort of started over, and --
20 and I wasn't sure what to do to be honest with you
21 about that. I had not heard that story. I didn't
22 think -- I didn't think it matched what I knew to be
23 the testimony.

24 There was going to be testimony that he and the
25 victim had been arguing and that he was quoted as

1 saying, "I'll shoot you." And the jury could
2 believe that or not believe that. I get that. But
3 to get a charge of involuntary, he would've had to
4 testify and I think that would've been a mistake.

5 Q. So did you tell Mr. Dunston what his rights
6 would be if he went to trial?

7 A. Oh, of course.

8 Q. Okay. What did you tell him about those
9 rights?

10 A. I -- I essentially recited what -- what --
11 having -- having done, dare I say, thousands of
12 pleas -- recited what the judge was going to say his
13 rights were. And we would go over that, and I asked
14 him if he had any questions. If he had questions, I
15 answered them. He -- he had been through the
16 judicial system before and he knew what a plea was
17 like, but I -- I always do that. That's just --
18 that's just what I'm supposed to do and I do it.

19 Q. Okay. Did you explain to him that he'd be
20 waiving those rights if he plead guilty?

21 A. Yes.

22 Q. Okay. Did you ever discuss the difference with
23 him between murder, voluntary manslaughter, and
24 involuntary?

25 A. I don't recall discussing involuntary. We did

1 talk about the difference in voluntary and murder
2 and the difference being the malice element, but the
3 significant difference was the -- was the potential
4 sentence.

5 I had been told by the -- by the Solicitor that
6 if he went to trial, they would -- they would --
7 they intended to seek a life -- a life sentence.
8 Take that at face value. Maybe that was just part
9 of the negotiation, I don't know, but I told him
10 that. And as far as -- as -- as going over the
11 penalty for voluntary, I doubt I -- I doubt I told
12 him that.

13 Q. What was his reaction when you told him that
14 the State would seek life if he went to trial?

15 A. I think that was the time when he said, "Well,
16 eff it. We'll -- we'll go to trial." Okay. But
17 he -- he wasn't saying that because he felt like
18 that he needed to do that to -- to try to get an
19 involuntary conviction. He was just -- he was just
20 mad and that -- and that -- that cooled. That went
21 away.

22 Q. He relented?

23 A. Yeah, I mean, we didn't stick to that. We went
24 trial.

25 Q. Okay. So during the plea hearing, what did you

1 discuss with Mr. Dunston at the part where you sort
2 of had a break during the guilty plea hearing?

3 A. I'm sorry. Say -- say that again.

4 Q. What was the discussion between you and
5 Mr. Dunston when he starts to indicate he might not
6 plead guilty during the plea hearing?

7 A. Let me get the transcript. So where are you --
8 what are you referring to?

9 Q. Page 19 and 20. Do you have any sort of
10 sidebar with Mr. Dunston in there?

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

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

1 moment passed.

2 Q. Okay. The portion where he says he doesn't --
3 he couldn't say if his finger was on the trigger.
4 He didn't remember, but he thought the gun just went
5 off. Did you consider at that point maybe moving to
6 withdraw his guilty plea?

7 A. Well, he hadn't entered it yet. I mean, the
8 judge hadn't ruled on that, so there wasn't -- there
9 wasn't anything to withdraw. He -- what -- what was
10 happening was, that he was contradicting -- he --
11 when he had told Judge Verdin the first time that he
12 was guilty of that, that is a con -- that is an
13 admission of all the material elements. And so --
14 but the judge hadn't ruled, so there's nothing to
15 withdraw.

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

20 A. Well, in the heat of the moment there, I -- I
21 thought the plea would go away altogether if I did
22 that, and then we would -- we'd go to trial, that
23 the Solicitor's patience would be at an end and that
24 would be the end of it.

25 I still thought that I could -- I could

1 convince Judge Verdin to give him less than what she
2 ended up giving him. But it was difficult -- it was
3 a difficult situation because I -- I don't know.
4 But I don't think the outcome would've been any
5 different one way or the other.

6 Q. And Mr. Dunston still decided to plead guilty
7 anyway though, right?

8 A. Oh, absolutely.

9 Q. Okay.

10 A. And, I mean, that was -- that was of his
11 volition. He didn't have to say anything. And I
12 wasn't -- I wasn't there whispering in his ear. I
13 wasn't trying to push him one way or the other. I
14 didn't have the ability to do that, but it's -- it's
15 his call and I understand that and trying a case is
16 fine.

17 MR. SMITH: Okay. All right. Thank you. No
18 more questions.

19 THE COURT: Cross-examination?

20 CROSS-EXAMINATION

21 BY MS. ROSS:

22 Q. Do you recall if there was any GSR done, a
23 gunshot residue test done in this case or whether
24 there was any DNA?

25 A. I don't recall that because I think too -- I --

1 the reason it wasn't done -- I didn't see anything
2 in the autopsy report where they did -- where they
3 did that. Okay. The test wasn't pending.

4 The -- it wouldn't have been any -- by the time
5 that law enforcement was in contact with
6 Mr. Dunston, too much time would've passed. I'm
7 sure they didn't do one then.

8 Q. Okay. And though he made statements suggesting
9 that maybe he didn't pull the trigger or his finger
10 didn't pull the trigger, you chose to just go -- go
11 forward with the plea and not stand down at that
12 time?

13 A. Well, Judge Verdin chose to go forward with the
14 plea. No, I didn't -- did I suggest to her that we
15 should stop? No, I did not obviously. It's not in
16 the transcript.

17 MS. ROSS: Okay. I have no further questions.

18 THE COURT: Any redirect?

19 MR. SMITH: No, Your Honor.

20 THE COURT: All right. You may step down.

21 THE WITNESS: (Complying.)

22 THE COURT: Any additional?

23 MR. SMITH: No, Your Honor. The State rests.

24 THE COURT: All right. Anything else from the
25 Petitioner?

1 MS. ROSS: No further witnesses. You know, the
2 only argument would be what -- what he's put
3 forward, that the facts that he presented did not
4 conform to a voluntary manslaughter and I guess I
5 move to conform the pleadings to the testimony under
6 *Love v. State* if necessary, but then that would add
7 the question was there a factual basis to support
8 the plea. And I guess that would be the question
9 for Your Honor in this PCR, was there a factual
10 basis supporting that plea to voluntary versus
11 involuntary.

12 THE COURT: Let me address that first before we
13 go. In light of the narrow view of this and what I
14 got, really I think that the only thing for my
15 consideration is any kind of applicable law to the
16 strength. The reason I'm saying that is to address
17 your request, you know, kind of, first, to talk
18 about a possible continuance.

19 I don't see how any review of any additional
20 information is going to change my review of this.
21 And that's what I'm saying. I don't -- I don't see
22 anything that would make me keep this record open,
23 but I think I need to review this transcript in
24 light of that. I just want to put that on the
25 record. And now I'll be glad -- I didn't mean to

1 interrupt you on your own ---

2 MS. ROSS: No, that -- that's fine. I -- I
3 would agree with that. I do think the transcript
4 speaks for itself. And I guess when I was
5 formulating Mr. Dunston's position, he's saying
6 his -- the facts what he's saying happened during
7 that transcript did not support voluntary. And --
8 and though I didn't request it, I guess that would
9 bring up the question, is there a factual basis for
10 the -- the plea itself.

11 And then if so, was Mr. Dunston -- was his
12 lawyer in error to pursue a plea to voluntary in
13 this situation and advise him to go forward with it,
14 and that -- I leave that to your consideration.
15 Those are the arguments in the case.

16 My understanding is involuntary was whether,
17 you know, they were involved in an illegal argument
18 and where it was unlikely to result in death or
19 whether they were involved in a legal argument, but
20 that it was unduly dangerous and criminal and
21 negligent to give rise to involuntary manslaughter.

22 THE COURT: Mr. Smith?

23 MR. SMITH: Your Honor, I think that in this
24 case, I will cite to *Boycon v. Alabama*. It lays out
25 the things that have to be in place in order for a

1 guilty plea to be knowing and voluntary. I think
2 those are all here based on the testimony and the
3 transcript from the guilty plea hearing.

4 I'd also say that, you know, Mr. Dunston is
5 saying his lawyer should've tried to get an
6 involuntary guilty plea. What I understood from
7 Mr. Plowden's testimony was that that wasn't on the
8 table from the Solicitor's Office, that this was the
9 best offer he was going to get. It was this or a
10 trial on murder.

11 And -- and even Mr. Dunston knowing what he did
12 and knowing his explanation for what happened
13 decided to plead guilty anyway I think to get the
14 benefit of that bargain, so I think Your Honor
15 should just deny the application.

16 THE COURT: And I believe that even though
17 the -- I mean, very regularly -- very commonly it's
18 kind of a little difference in the facts presented
19 and what the defendant was willing to admit to, but
20 I don't think that that necessarily goes to the
21 voluntariness of the -- the voluntariness of the
22 plea or the basis of the plea. So I believe that
23 the -- I don't believe that there's sufficient
24 information or evidence presented to grant -- to
25 show ineffective assistance of counsel. I'm going

1 to deny the petition and ask that you submit an
2 order to that effect.

3 MR. SMITH: Thank you, Judge.

4 MS. ROSS: Thank you, Judge.

5 (The proceedings concluded at 2:17 p.m.)
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1 C E R T I F I C A T E O F R E P O R T E R

2

3 STATE OF SOUTH CAROLINA

4 COUNTY OF ANDERSON

5

6 I, the undersigned, Lisa Scott, Circuit Court
7 Reporter for the Tenth Judicial Circuit of the State
8 of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete
10 transcript of record of all the proceedings had and
11 the evidence introduced in the hearing of the
12 captioned cause, relative to appeal in the Circuit
13 Court for Anderson County, South Carolina, on the
14 27th day of February, 2023.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.

17

18

June 27, 2023

19

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/s/Lisa Scott

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Lisa Scott
Circuit Court Reporter

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I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. During its October 2018 term, the Oconee County Grand Jury indicted Applicant for murder and possession of a weapon during the commission of a violent crime (2018-GS-37-1238). Assistant Solicitor Lindsey Simmons of the Tenth Circuit prosecuted the case. David W. Plowden (Plea Counsel), Esquire, represented Applicant on these charges.

On October 15, 2020, Applicant appeared before the Honorable Letitia H. Verdin (Judge Verdin) and plead guilty to the lesser included offense of voluntary manslaughter with a negotiated sentencing cap of twenty-five years imprisonment. Additionally, the State dropped the weapons charge as part of the plea agreement. Defense counsel requested a lesser sentence of fifteen years. Following the State's recommendation, Judge Verdin accepted Applicant's plea and sentenced him to twenty-five years imprisonment.

Applicant filed a timely notice of appeal. On December 16, 2020, the Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(s)(1)(B)(iv), SCACR,¹ for failure to provide sufficient explanation as to why an appeal from his guilty plea should proceed. Dunston v. State, S.C. Ct. App. Order dated Dec. 16, 2021. The remittitur was issued on January 11, 2021.

II. CURRENT APPLICATION

In her application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on (excerpted verbatim):

1. "My attorney denied me due process of not giving me sufficient advice, and giving me erroneous advice."
 - a. "He never counsel[sic] me about my plea negotiation."

Applicant requests relief in the form of a new trial.

¹ Rule 203(d)(1)(B)(iv) requires "a written explanation showing that there is an issue(s) which can be reviewed on appeal [,] . . . including how the issue(s) was raised below and the ruling of the lower court on that issue(s)."

PTH

At the evidentiary hearing, Applicant proceeded with the allegation in his original PCR application, specifying Plea Counsel was ineffective for advising him to plead guilty to voluntary manslaughter when the facts allegedly supported a charge of involuntary manslaughter. Stated another way, the allegation was that counsel erred in advising the Applicant to plead guilty to voluntary manslaughter rather than involuntary manslaughter. PCR Tr. 7.

III.

The charge voluntary manslaughter was stated at his plea hearing by the Assistant Solicitor, as follows:

MS. SIMMONS: Judge, on May -- on or about May 17th, 2018 here in Oconee County, without malice aforethought, the defendant did unlawfully kill **M.L.** (Victim) by means of striking her in the head -- fired a handgun striking her in the head and causing her death.

(Plea Tr. 6, ll. 9-14).

After hearing the facts presented by the Assistant Solicitor, Applicant pleaded guilty. Judge Verdin accepted Applicant's plea as being freely and voluntarily made. (Plea Tr. p. 6). Later in the proceedings, Applicant addressed the court, stating his version of the facts, as follows:

Okay. Everybody just making it seem just like an (inaudible). It was none of that. Me and **M.L.** was arguing. **M.L.** was not my girlfriend as stated. I have a wife. My wife's name is Raven Simone (phonetic) Dunston. **M.L.** was not my girlfriend. **M.L.** was upset with me that day because **M.L.** took care of them when I was in prison. I was up here in prison and I got home. Upset with me because I didn't want to be with her. I was staying back and forth to my wife. 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. So why we were arguing, she was arguing with me and I was trying to walk away. My cousin from New York came down here. He stay with Chad Lawson (phonetic), which is my cousin at (inaudible). He was down here having a cookout with a girl that stayed in 251, Tyisha. Summer Brown, (phonetic) that is where I basically lived and that is the only reason that **M.L.** was up there, **M.L.** went up there, **M.L.** told Summer on me. 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.

(Plea Tr. 16, ll. 15-25 – 17, ll. 1-19).

At this point, Judge Verdin stated she could not accept Applicant's plea as Applicant was not admitting fault, and asked the State's position concerning these facts. The State stated the following:

Judge, at trial we would present evidence that obviously he was in possession of a firearm prior to this incident. We have video evidence of that from social media. Witnesses would put him going on the porch, [M.T.] -- them both being on the porch, the witnesses hearing gun shots. Immediately when the door is opened, [M.L.] has the gunshot wound to the head. Mr. Dunston 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 Mr. Dunston. 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. And having further --...And the witnesses inside the house while all of this is going on, the small stoop of the apartment, can hear him yelling at her.

(Plea Tr. 18, ll. 7-23, 25 – 19, ll. 1-7). Plea Counsel then questioned Applicant, asking him if he pulled the trigger and if his finger was on the gun, and Applicant responded, "I couldn't tell you, I don't remember." (Plea Tr. 19, ll. 4-14). At this, Judge Verdin stated:

Here is what we are going to do. I want you to read the facts again. And I want to apologize to the family that we are having to go through this again. And if you need, if you need to step outside, I'll understand that too. I'm going to have you read the facts one more time. I'm going to have you listen to them one more time. And I'm going to decide whether or not I accept your plea.

(Plea tr. 19, ll. 15-22). The Assistant Solicitor then restated the facts, as follows:

Judge, on or about May 17th 2018, here in Oconee County, without malice aforethought, the defendant did cause the death of [M.L.] by shooting her with a handgun in the head.

(Plea Tr. 19, l. 25 – 20, ll. 1-3). Judge Verdin then asked Applicant, "...And how do you plea to that charge, guilty or not guilty?", and Applicant responded "Guilty." (Plea Tr. 20, ll. 4-6). Judge Verdin accepted Applicant's plea.

PHC

FINDINGS OF FACT & CONCLUSIONS OF LAW

Applicant has alleged his guilty plea was not voluntarily, knowingly, and intelligently made because of the erroneous advice of Plea Counsel. This Court has heard the testimony and evidence presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighted their testimony accordingly, and finds Applicant's allegations are without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all the probative evidence presented.

Ineffective Assistance of Plea Counsel

Applicant alleged that his guilty plea was not freely and voluntarily given, because it was unlawfully induced by Plea Counsel erroneous advice. Specifically, Applicant contends Plea Counsel's failure to advise him of possible mitigation of a lesser charge of involuntary manslaughter induced him to plea. He claims that had he been properly advised about involuntary manslaughter he would have either entered a plea to involuntary manslaughter or gone to trial and been convicted of it. PCR Tr.p. 11-12.

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. Strickland v. Washington, 466 U.S. 668 at 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687-88; Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624,625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700;



see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[without proof of both deficient performance and prejudice to the defense... it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea. Hill v. Lockhart, 474 U.S. 52 (1985), extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. See Padilla v. Kentucky, 559 U.S. 356,373 (2010) (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). The analysis of counsel's performance under the first prong of Strickland remains unchanged, the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58-59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000).

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58-59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

An applicant who enters a plea on 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 plead guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Counsel has a duty to investigate all available defenses before a defendant enters a guilty plea. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991)(counsel was deficient for advising a defendant to plead guilty without informing the defendant that if he went to trial, he could have requested a jury charge on a lesser offense and might have been convicted of the lesser offense).

It must be determined whether or not involuntary manslaughter was available based on the facts of Applicant's case to determine whether counsel erred in failing to recommend that the plea offer be rejected to voluntary manslaughter. Involuntary manslaughter is 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 the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. Douglas v. State, 332 S.C. 67, 74, 504 S.E.2d 307 (1998). "A person charged with the crime of involuntary manslaughter may be convicted only upon a showing of criminal negligence as defined in this section." S.C. Code Ann. § 16-3-60 (1976). Criminal negligence is defined as "the reckless disregard of the safety of others." S.C. Code § 16-3-60. 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. Gibson, 390 S.C. 347, 356, 701 S.E.2d 766 (Ct. App. 2010).²

² In State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), the Supreme Court addressed in a trial setting when an instruction on involuntary manslaughter was authorized. In Light, the Court found a murder defendant was entitled to a charge on involuntary manslaughter when there was evidence that the defendant was lawfully armed in self-defense at time of shooting since defendant allegedly took loaded gun from victim who was threatening him with it, there was evidence defendant recklessly handled gun since gun allegedly fired almost immediately after he took possession of it, and fact defendant and victim were struggling over weapon was sufficient evidence to support charge.

The question of what constitutes criminal negligence depends on the facts and circumstances of each case. DeLee v. Knight, 266 S.C. 103, 110, 221 S.E.2d 844 (1975). Evidence that the killing resulted from a struggle between the defendant and the victim or a third person over a weapon is sufficient to submit an instruction on involuntary manslaughter to the jury. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). When the victim was killed by a gunshot and no evidence is presented showing that the defendant fired the gun unintentionally, the defendant is not entitled to a charge on involuntary manslaughter. Sullivan v. State, 407 S.C. 241, 754 S.E.2d 885 (Ct. App. 2014).

In the case of Applicant, he was indicted for murder. The State intended to present the following evidence if Applicant went to trial: he had possession of the firearm as evidenced by a video from social media; witnesses placed him and the Victim on the porch where the incident took place; witnesses saw the Victim enter the home with a gunshot wound to the head from the porch; witnesses saw Applicant flee the scene on foot after the fact; and witnesses heard Applicant yelling at the Victim at the time of the incident. (Plea Tr. 18-19) There were no eyewitnesses to the actual shooting itself (or the actual alleged struggle). The only person knowing what actually happened was the Applicant.

Plea Counsel testified Applicant had told him prior to the plea several different stories about how the shooting occurred:

He told -- he told me a lot of different things. One of the things that he told me was that he had never left the apartment, and the only way that he could've fired a gun that killed -- that killed the victim would've been to shoot through the door... That -- that she had the gun and he was trying to get it away from her. Somehow it got turned around and -- and -- and -- and -- and shot -- shot her.

(PCR Tr. 20, ll. 15-20; 21, ll. 4-7). These facts may have triggered Plea Counsel's duty to inform Applicant to consider the viability of a lesser offense of involuntary manslaughter or accident, but Plea Counsel testified that Applicant's versions of the story were "forensically unsupportable." (PCR

Tr. 20, l. 21). The Applicant has not proved Counsel was not deficient in his assessment.

There were witnesses that placed Applicant and the Victim on the outside the apartment, on the porch arguing, when the Victim came into the apartment with a gunshot wound to the head. No evidence suggested the gunshot went through a door, as Applicant contended. Additionally, Plea Counsel testified to an autopsy report that indicated there was “stippling”, which meant the gun was very close to the skin. There was also evidence that there was no upward angle to the path of the bullet, questioning the claim of the Applicant concerning a struggle over the gun. (PCR Tr. 16). This evidence also caused the coroner to rule the Victim’s death a homicide, not suicide, with Applicant being the last one to be with her.

Plea Counsel further testified he had not heard the version Applicant stated at his plea hearing before. They had met at least ten or eleven times leading up to the plea hearing. Plea Counsel further stated Applicant’s statement during his plea hearing did not match the testimony that the State would have been presented at trial which evidence intent and express malice. (PCR Tr. 22).

There was going to be testimony that he and the victim had been arguing and that he was quoted as saying, "I'll shoot you." And the jury could believe that or not believe that. I get that. But to get a charge of involuntary, he would've had to testify and I think that would've been a mistake.

(PCR Tr. 22-23). This was the evidence of intent and malice that would have supported a conviction of murder – not voluntary manslaughter, involuntary manslaughter or accident.

Plea Counsel believed Applicant testifying at a trial would have been a mistake, because Applicant had violent record of assault and batteries and domestic violence, which could have come in against him if he testified at trial. Further, the Applicant had never given the counsel the version he gave the court. In fact, Applicant advised the plea court at one point he may not have had his finger on the weapon suggesting the victim actually shot herself with a weapon. Plea TR. p. 19.

Importantly, Plea Counsel testified the Solicitor was not “remotely entertaining” a plea

toward involuntary manslaughter, and intended to seek a life sentence for murder at trial. (PCR Tr. 21, ll. 13-23; 24, ll. 5-12). Also, important to note is the fact the State also intended to present inculpatory statements where Applicant stated, "he had killed the person he loved, or a person he loved, and how he had done a terrible things." (Plea Tr. 21, ll. 9-11).

Under Strickland, counsel is given leeway to make reasonable strategic decisions, and where counsel articulates a valid strategic reason for his action or inactions, counsel's performance will not be found ineffective. Roseboro v. State, 317 S.C. 292, 452 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992).

Plea Counsel did not recall discussing involuntary manslaughter differences with murder and voluntary manslaughter. PCR Tr.p. 23-24. However, counsel suggested that involuntary manslaughter was not a viable option prior to his plea based on the facts as he knew them, the evidence before him, and the negotiations with the State. Moreover, he had no reason to stop the plea hearing and inform Applicant of the defense of involuntary manslaughter.

Plea Counsel testified he had communicated back and forth with the Assistant Solicitor, and eventually got a negotiated plea to voluntary manslaughter with a recommendation from the State of a cap of twenty-five years. However during the plea, counsel chose to continue with the plea, even though there were statements from the Applicant about possibly not pulling the trigger because counsel feared the entire negotiation would have been vacated and implicitly that Applicant would face a realistic possibility of a murder conviction. PCR TR. 26-27. Counsel was able under the negotiations to argue for a lower sentence at the plea hearing and did ask for a fifteen year sentence. (PCR Tr. 21) Plea Tr. 20-22. Plea Counsel's ultimate concern from Applicant's plea statement was that the Assistant Solicitor's patience would be at an end, and the negotiated plea offer would be taken away. (PCR Tr. 26).

Moreover, "[a] guilty plea is a solemn, judicial admission of the truth of the charges against

an individual . . . , a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)); see McMann v. Richardson, 397 U.S. 759, 774 (1970) (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements.” Dalton, 376 S.C. at 137-38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); United States v. Broce, 488 U.S. 563, 569 (1989) (“A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.”). The Assistant Solicitor articulated the facts of Applicant’s case at his plea hearing, and Applicant accepted those facts and plead guilty. ((Plea Tr. 19, l. 25 – 20, ll. 1-3; Plea Tr. 20, ll. 4-6).

This Court finds the testimony of Plea Counsel credible, and finds Applicant failed to show Plea Counsel was deficient for not more aggressively pursuing the mitigation of involuntary manslaughter, rather than the negotiated voluntary manslaughter plea. Plea Counsel was not deficient as he properly advised and recommended Applicant make the reasonable decision to plea, which greatly benefited Applicant, helping him avoid a sentence over twenty-five years and the possibility of life imprisonment. Moreover, contrary to Applicant's hope, involuntary manslaughter was not and would not have been offered to him in exchange for a plea. It also may not have been available at trial depending upon the version given, assuming he testified. The Solicitor never entertained the notion of offering Applicant involuntary manslaughter in exchange for his plea, and intended to seek

a murder conviction and life imprisonment at trial based on the evidence they intended to present. The different facts presented to Plea Counsel prior to the plea by Applicant or the State's version did not support involuntary manslaughter. Importantly, Applicant agreed to the facts articulated by the State at his plea hearing.³ Under these facts, Plea Counsel was not deficient.

He has failed to prove Sixth Amendment prejudice to this Court. Applicant's contention he would have proceeded to trial had Plea Counsel advised him of the mitigation of involuntary manslaughter is not credible considering the totality of the circumstances at the time of Applicant's plea. First, the State intended to present facts showing Applicant was in possession of the gun used to kill the Victim, was the last person with her, there had been an argument, the Victim died from a gunshot wound to the head, and Applicant fled the scene immediately after. Forensic evidence, witnesses at the scene, and Applicant's own furtive actions following the incident weighed heavily in favor of the State's case. Second, Applicant has a violent criminal history, including domestic violence and assault and battery, which would have come in to impeach Applicant if he agreed to testify at trial. For Applicant to obtain a charge of involuntary manslaughter at trial, he would have had to testify to facts supporting such a charge as such a charge is not supported otherwise. Third, Applicant faced a possibility of a life sentence if he proceeded to trial. Applicant received a considerable benefit in pleading and being sentenced to twenty-five years. Evidence presented through counsel was that Applicant did not indicate to him desire to have trial, only a desire for a better deal. PCR Tr. 18-19, 24. Applicant's contention about being inadequately advised by Plea

³ A defendant may, as part of a plea bargain, agree to plead guilty to a crime for which he has been indicted (or to which he has waived grand jury presentment), but of which he is not guilty. In Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000). Anderson v. State, *supra*, for example, the Court held that an individual could plead guilty to voluntary manslaughter under an indictment charging him with murder, even though the facts would not support such a lesser charge. *Cf. Gaines v. State*, 335 S.C. 376 n. 1, 517 S.E.2d 439 n. 1 (1999) (explaining that in North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), United States Supreme Court held it was constitutional to allow accused to consent to imposition of sentence, although unwilling to admit culpability, where he intelligently concludes that a guilty plea is in his best interest and the evidence strongly supports his guilt). See also Rollison v. State, 346 S.C. 506, 510–11, 552 S.E.2d 290, 292 (2001)



Counsel about involuntary manslaughter—with the small possibility he would have received such a charge at trial—would have prompted him to not plea is improbable, at best. Considering these facts, Applicant was not prejudiced by Plea Counsel's advice. This Court find that Applicant failed in his burden of proof in showing that there was a reasonable probability he would have gone to trial instead of pleading guilty and risk a sentence of life imprisonment.

Therefore, Applicant failed to make an adequate showing that Plea Counsel was deficient for failing to inform him of the mitigation of involuntary manslaughter, or how being advised about the of involuntary manslaughter would have changed his decision to plea. Accordingly, Applicant's allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. This Court also finds Applicant's plea was freely, voluntarily and knowingly made. Therefore, this Court **DENIES** relief on all allegations and **DISMISSES** this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

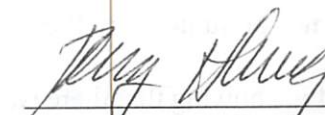
IT IS THEREFORE ORDERED:

1. This Court denies relief and dismisses the action with prejudice; and



2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED this 9th day of Oct, 2023.



THE HONORABLE PERRY H. GRAVELY
Presiding Circuit Court Judge
TENTH Judicial Circuit

Greenville, South Carolina

CERTIFIED TRUE COPY
OCT 18 2023
CLERK OF COURT
OCONEE COUNTY, SC

FILED OCONEE COUNTY, SC
MELISSA G. BURTON
CLERK OF COURT
2023 OCT 18 A 9:40

WITNESSES

Dyer Kelly
Seneca Police Dept.
Casey Bowling

ARREST WARRANT NUMBER

COUNT ONE 2018A3720300098
COUNT TWO 2018A3720300099

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury
Date:

OCT 29 2018

VERDICT

Foreperson of Grand Jury
Date:

DOCKET NO. 2018-GS-37-01238

The State of South Carolina
County of Oconee

COURT OF GENERAL SESSIONS

OCT 29 2018, TERM

THE STATE

VS.

RICHARD ANTHONY DUNSTON,
JR

INDICTMENT FOR

COUNT ONE - MURDER

SC Code: § 16-03-0010
CDR Code: 0116

COUNT TWO - POSSESSION OF A
WEAPON DURING THE COMMISSION OF
A VIOLENT CRIME

SC Code: § 16-23-0490
CDR Code: 0549

LSS

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2018 OCT 30 A 11: 25

ENTERED
LB
COMPUTER

STATE OF SOUTH CAROLINA
 COUNTY OF OCONEE

INDICTMENT

At a Court of General Sessions, convened on OCT 29 2018, the
 Grand Jurors of Oconee County present upon their oath:

COUNT ONE - MURDER

That Richard Anthony Dunston Jr did in Oconee County, on or about on or about May 17, 2018, unlawfully and with malice aforethought, either express or implied, kill **MT** **██████████** by means of: the defendant did fire a handgun striking the victim in the head and the victim died as a proximate result thereof. All in violation of §16-3-10, *South Carolina Code of Laws* (1976, as amended).

COUNT TWO - POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

The defendant, Richard Anthony Dunston Jr, did, on or about on or about May 17, 2018, in Oconee County, South Carolina, while committing the crime of Murder, a crime of violence, have in his possession a handgun. All in violation of 16-23-0490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 LINDSEY SATTERFIELD SIMMONS
 DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF OCONEE

STATE VS.

RICHARD ANTHONY DUNSTON, JR

INDICTMENT/CASE#: 2018GS3701238
A/W: 2018A3720300098
Date of Offense: May 17, 2018
S.C. Code §: 16-03-0010
CDR Code #: 0116

SENTENCE SHEET

AKA:
Race: Black Sex: M Age: 27
DOB: SS#:
Address:
City, State, Zip:
DL# SID#

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: VOLUNTARY MANSLAUGHTER

In violation of § 16-03-0050 of the S.C. Code of Laws, bearing CDR Code # 0217

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45

The charge is: As indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, Negotiated Sentence, Recommendation by the State.
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Lindsey Satterfield Simmons, Deputy Solicitor SC Bar # 70224 Defendant
Attorney for Defendant SC Bar # 65239

WHEREFORE, the Defendant is committed to the State Department of Corrections or County Detention Center, for a determinate term of 25 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and or payment of \$; plus costs and assessments as applicable; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SC Department of Corrections 882 days
The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP
Total: \$ plus 20% fee: \$ days/hours Public Service Employment
Payment Terms: Obtain GED

Set by SCDPPPS Attend Voc. Rehab. Or Job Corp.

Table with 3 columns: Description, Amount, Total. Includes items like §14-1-206 (Assessments 107.5%), §14-1-211 (A)(1)(Conv. Surcharge) \$100, §14-1-211 (A)(2)(DUI Surcharge) \$100, §56-5-2995 (DUI Assessment) \$12, §56-1-286 (DUI Breath Test) \$25, Proviso (Public Def/Prob) \$500, §14-1-212 (Law Enforce. Funding) \$25, §14-1-213 (Drug Court Surcharge) \$150, §50-21-114 (BUI Breath Test Fee) \$50, §56-5-2942(J) (Vehicle Assessment) \$40/ea, 3% to County (if paid in installments) \$ 3.75

TOTAL \$128.75

May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal consecutive weekly/monthly pmts. of \$ Beginning \$ Paid to Public Defender Fund
Other:

Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Clerk of Court/Deputy Clerk: Beverly H Whitfield
Court Reporter: Mona Lmanick
SCCA/217 (04/2018)

Presiding Judge:
Judge Code:
Sentence Date: 10/15/20

