STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Eugene C. Griffith, Jr., Circuit Court Judge

DONSURVI CHISOLM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001735

PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
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INDEX

ISSUES PRESENTED

I.

Whether the PCR court erred in finding plea counsel effective where plea counsel impeded Petitioner's right to represent himself under the federal and state constitutions?

II.

Whether the PCR court erred in finding plea counsel effective where plea counsel failed to advise Petitioner of the lesser included offense of involuntary manslaughter?

STATEMENT OF THE CASE

Introduction

Petitioner DonSurvi Chisolm said that the unfortunate shooting death of his nephew, M.S., in this case occurred when the weapon in his hand "went off" either before or after he started to drop it and that "it was just an accident, period." App. 71, l. 25 – 72, l. 8. Chisolm had represented himself at a trial on an unrelated offense in another county and was granted leave to proceed *pro se* in the instant case in April 2011. App. 75, l. 23 – 76, l. 23. During an administrative meeting in November 2011, the solicitor's office indicated that it may file a notice of intent to seek the death penalty in Chisolm's case. Upon hearing that, Circuit Public Defender Ashley Pennington took it upon himself to visit Chisolm in prison, aimed at "saving" Chisolm from the death penalty and unconcerned about his *pro se* status. App. 86, l. 6 – 87, l. 15. Chisolm reasonably understood from Pennington's visit that because of the possibility of the death penalty, he could no longer represent himself and that Pennington would represent him going forward. App. 76, l. 20 – 77, l. 14; see also App. 83, l. 24 – 84, l. 12.

The PCR Court erred in denying Chisolm's application for post-conviction relief. Plea counsel Pennington rendered effective assistance by impeding Chisolm's right to represent himself by leading Chisolm to believe that he could not represent himself in a capital case. He was further ineffective in failing to discuss the lesser included offense of involuntary manslaughter. App. 73, l. 23 – 75, l. 22; App. 110, l. 17 – 112, l. 1; App. 113, l. 13 – 114, l. 12. Had Chisolm proceeded to trial and presented the testimony that he did at the PCR hearing, he would have been entitled to a jury charge on involuntary manslaughter. See State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477,

478 (2008). Instead, following Pennington's advice, Chisolm entered an Alford[1] plea to murder for the death of M.S. App. 1 – 38.

Indictment and Plea Hearing

On June 16, 2010, the Berkeley County Grand Jury indicted Chisolm for murder, assault and battery with intent to kill ("ABWIK"), and possession of a firearm during the commission of a violent crime. App. 131 – 140 (Indictments). These charges related to a shooting that injured his brother, Dansa Chisolm, and killed his fourteen year old nephew, M.S.

On October 16, 2012, Chisolm appeared before the Honorable R. Markley Dennis and entered an Alford plea as to the murder charge and guilty pleas as to the ABWIK and weapons charges. Chisolm was represented by Ashley Pennington and the State was represented by Solicitor Scarlett Wilson. The plea judge accepted Chisolm's pleas and imposed the negotiated concurrent sentences of life imprisonment for murder, twenty years for ABWIK, and five years for the weapons offense. App. 1 – 38.

Post-Conviction Relief Application and Evidentiary Hearing

On February 18, 2013, Chisolm filed an application for post-conviction relief ("PCR"). App. 40. On August 18, 2014, he filed an Amendment to his PCR application. App. 47. On December 9, 2014, the State filed its Return. App. 49.

On February 19, 2015, an evidentiary hearing was held before the Honorable Eugene C. Griffith, Jr. Chisolm was represented by Rodney Davis and the State was represented by Assistant Attorney General Ashleigh Wilson. App. 56. Both Chisolm and plea counsel, Ashley Pennington, testified at the hearing. Among other allegations, Chisolm presented testimony relevant to his claims that plea counsel was ineffective in impeding his right to proceed *pro se* and failing to advise

[1] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

him of all of the possible lesser-included offenses, specifically **involuntary** manslaughter. App. 110, l. 17 – 112, l. 1; App. 113, l. 13 – 114, l. 12.

Plea counsel Pennington testified that in the fall of 2011 he attended a status conference, where the solicitor's office was discussing the status of some of the older cases. Solicitor Wilson "announced that there was a case where the defendant was *pro se*, a DonSurvi Chisolm, where she was intending to file a notice to seek the death penalty." App. 86, ll. 6-17. The solicitor "suspected that he was going to need representation if that occurred." App. 86, ll. 17-18. Pennington learned that deputy public defender Patty Kennedy had represented Chisolm and that, after a series of hearings, she was relieved because Chisolm "opted to go *pro se*." App. 86, ll. 19-25.

Nevertheless, Pennington drove to Lieber Correctional Institution to meet with Chisolm, who was serving a life sentence for a separate murder conviction. Pennington wanted to "sit down with him and make sure that he understood the stakes that he was facing and that the State had stated to me, what seemed to be an authentic intent of seeking the death penalty." App. 87, ll. 1-8. Plea counsel described his meeting with Chisolm:

> So, we met in the large visitation room there at the Lieber Correctional. I explained who I was. I explained that I was aware that he was acting *pro se*. I expressed my concern that because of the fact that the State was going to seek the death penalty, that he, in all probability, needed representation, and was he interested in having representation. I asked him that question.

App. 87, ll. 9-15. According to Pennington, Chisolm said that he was interested in representation. App. 87, ll. 16-23. Pennington sent an e-mail to the solicitor on December 20, 2011, indicating that Chisolm "is now requesting me [to] represent him on his Berkeley murder/ABWIK/pistol charges. I will ask Judge Dennis to reappoint our office while he is here January 3rd." App. 88, ll. 8-21. Pennington then filed a notice of appearance, though he never

sought a formal appointment by the court and no hearing was conducted to reverse the order allowing Chisolm to proceed *pro se*. App. 88, l. 22 – 89, l. 11; App. 108, l. 24 – 109, l. 12.

Chisolm explained that after representing himself at trial for an unrelated offense in Dorchester County, he again sought to proceed *pro se* in the instant Berkeley County case. After three hearings, Chisolm's motion to relieve his public defender and proceed *pro se* was granted. App. 75, l. 23 – 76, l. 23. In December 2011, the same month that Chisolm's case was set to go to trial, Pennington visited him at the prison. Chisolm testified:

> [Plea counsel] Pennington . . . informed me that, obviously, I wasn't going to trial, and that the State would possibly be seeking the death penalty. He also informed me that he was -- or made me believe that he was sent with the approval of Judge Dennis and that he possibly would be taking over my case.
>
> From there, he actually took over my case. I never actually asked that Ashley Pennington take over my case. I never went in open court and requested that the judge take away my *pro se* status or reassign me a public defender. As far as I was made aware, through Ashley Pennington, he was kind of approved by Judge Dennis to take over my case. And they just took over my case. They just stopped my *pro se* status.

App. 76, l. 20 – 77, l. 14; see also App. 83, l. 24 – 84, l. 12. Chisolm confirmed that he was adamant about proceeding *pro se* and had not contacted the court, the public defender's office, or any private attorney about retaining an attorney. App. 77, ll. 15-24. Further, he testified that had Pennington not shown up and told him that he was assuming representation, he would have represented himself at his trial and would not have accepted a plea offer. App. 77, l. 25 – 78, l. 23.

Chisolm also described the witness statements related to the incident and how the incident actually occurred. Chisolm was renting a house, in which his brother Dansa Chisolm and his nephew M.S., Dansa's son, were residing with him. App. 69, ll. 15 – 22; App. 70, l. 3. Chisolm testified that Kristen Graves and Russell Kapinski both confirmed that Dansa started an argument with Chisolm over some music they were working on together. Chisolm tried to get away from his

brother on multiple occasions by either going outside or into another room. Russell Kapinski brought two guns into the kitchen area. Dansa took one of them and Chisolm took the other to protect himself. Dansa tried to take the gun from Chisolm, so Chisolm locked himself in another room. Dansa, who Chisolm believed was still armed, kept coming to the door and yelling at Chisolm. Chisolm eventually came out of the room and he shot Dansa. Chisolm testified that he was "in fear" "the whole time." After he shot Dansa, the two had a physical altercation resulting in the dislocation of Chisolm's shoulder. App. 69, l. 15 – 72, l. 14.

Regarding the shooting of his nephew, Petitioner said:

> [W]hen I was getting away from him [Dansa Chisolm], backing away from him, I heard a loud noise to the left – I'm sorry, to my right. While I was backing up, I backed into something and turning at the same time. I'm not actually sure -- because we were all intoxicated at the time -- if the weapon in my hand went off first while I was dropping it or if I started to drop it and it went off. But that is when my nephew got shot. That was an accident, you know. It was just an accident, period.

App. 71, l. 25 – 72, l. 8. The three potential witnesses who were at the house at the time of the incident, Kristen Graves, Russell Kapinski, and Clint Kapinski, gave conflicting statements about the M.S.'s shooting. Russell Kapinski said that he saw Chisolm shoot his brother and then heard a second shot. When he went into the living room, he saw that M.S. was shot in his upper neck, but no one else was around. App. 92, l. 23 – 94, l. 1. Kristen Graves alleged that Chisolm shot M.S. when he "came into the kitchen asking Mr. Chisolm why he had shot his father." App. 94, ll. 3-14. Clint Kapinski claimed that he did not witness the shooting. App. 94, ll. 21-25.

According to plea counsel Pennington, there was "some confusion" over who shot M.S. App. 92, ll. 1-7; App. 95, l. 22 – 96, l. 4; App. 101, ll. 14-16. Though Chisolm acknowledged that he shot his brother, Dansa, he initially told Pennington that M.S. was shot by Clint Kapinski.

App. 91, ll. 3-7. Pennington claimed that Chisolm never told him that the shooting of M.S. was an accident. App. 101, ll. 14-20; App. 105, ll. 2-13.

Chisolm said that Pennington did not discuss the defense of accident or the lesser included offense of involuntary manslaughter with him. Notably, the maximum sentence for involuntary manslaughter is only five years, as opposed to the sentencing range for murder of thirty years to life. App. 73, l. 23 – 75, l. 22; App. 79, ll. 9-24. Plea counsel never testified that he discussed involuntary manslaughter with Chisolm. Rather, they discussed "self-defense and voluntary manslaughter as potential matters, because that's just sort of the standard boilerplate of our practice." App. 95, ll. 3-9.

Order of Dismissal

On July 14, 2015, Judge Griffith entered an Order of Dismissal denying Chisolm's PCR application. App. 118 – 130. The PCR judge plea counsel "adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation." App. 126. Despite the specific allegation that plea counsel failed to discuss ***in*voluntary** manslaughter, the PCR judge noted plea counsel's testimony that they discussed self-defense and voluntary manslaughter and found that Chisolm failed to show that plea counsel's performance was deficient. App. 128 – 129.

ARGUMENT

I. The PCR court erred in finding plea counsel effective where plea counsel impeded Petitioner's right to represent himself under the federal and state constitutions.

Plea counsel Pennington had no more right to impose his paternal instinct against self-representation than a trial court has in the face of a defendant's Faretta[2] motion. See State v. Barnes, 407 S.C. 27, 35-36, 753 S.E.2d 545, 550 (2014) ("Recognizing that it may be to the defendant's detriment to be allowed to proceed *pro se,* his knowing, intelligent and voluntary decision 'must be honored out of that respect for the individual which is the lifeblood of the law.'" (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975))). Pennington failed to explain to Chisolm that he could still represent himself in a capital trial and it was not unreasonable for Chisolm to believe that Pennington was conveying to him that he was being appointed to Chisolm's case because the State was now considering the death penalty. Further, regardless of Pennington's status as a public defender, it was improper of him to approach Chisolm about representation after Chisolm had successfully moved to relieve the public defender's office and proceed *pro se*. See Rule 7.3(b)(1), RPC, Rule 407, SCACR ("A lawyer shall not solicit professional employment from a prospective client . . . by in person . . . contact even when not otherwise prohibited by paragraph (a), if: the prospective client has made known to the lawyer a desire not to be solicited by the lawyer . . . ."). But for Pennington's involvement in the case, Chisolm would have represented himself at trial and would not have accepted a plea offer. App. 76, l. 14 – 78, l. 20.

A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions. State v. Starnes, 388 S.C. 590, 600, 698 S.E.2d 604, 609-10 (2010); U.S. CONST. AMEND. VI; S.C. CONST. ART. I, § 14. A capital defendant, like

[2] Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

any other criminal defendant, may waive his right to counsel. Starnes, 388 S.C. at 600, 698 S.E.2d at 609-10; State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010).

In Faretta, the United States Supreme Court reconciled a defendant's constitutional rights to effective assistance of counsel and to self-representation, explaining:

> [I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.

422 U.S. at 833-34, 95 S.Ct. at 2540. The Faretta Court went on to say:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.

Id. at 834, 95 S.Ct. at 2540-41 (internal quotations and citations omitted). The Court ultimately determined that the trial court's imposition of state-appointed counsel upon Faretta deprived him of his constitutional right to conduct his own defense. Id. at 836, 95 S.Ct. at 2541.

In the present case, it was plea counsel rather than the court that imposed representation upon Chisolm in contravention of his constitutional rights. Prior to their meeting, Pennington was well aware that Chisolm had filed and won a motion to relieve counsel and proceed *pro se*, following multiple hearings. App. 76, l. 16 – 77, l. 6; App. 86, l. 19 – 87, l. 8. Pennington alleged that his intention in meeting with Chisolm was to "sit down with him and make sure that he understood the stakes that he was facing and that the State had stated to [him], what seemed to

be an authentic intent of seeking the death penalty." App. 87, ll. 1-8. He then expressed to Chisolm his "concern that because of the fact that the State was going to seek the death penalty, that **he, in all probability, needed representation.**"[3] App. 87, ll. 9-15 (emphasis added). According to Pennington, Chisolm "indicated immediately and unequivocally that he was interested in representation, that he was unhappy with the way things had turned out when he represented himself in Dorchester County, and that he would appreciate the assistance." App. 87, ll. 16-23. However, Chisolm testified that Pennington lead him to believe that Judge Dennis had already approved his taking over Chisolm's representation and "just stopped [his] *pro se* status." App. 77, ll. 3-14; see also App. 120 – 122.

Regardless of whether Chisolm's representation was forced or accepted, Pennington should have never contacted Chisolm in the first place. The order relieving the public defender's office from representation was sufficient to inform plea counsel of Chisolm's "desire not to be solicited." See Rule 7.3(b)(1), RPC, Rule 407, SCACR ("A lawyer shall not solicit professional employment from a prospective client . . . by in person . . . contact even when not otherwise prohibited by paragraph (a), if: the prospective client has made known to the lawyer a desire not to be solicited by the lawyer . . . ."). Even if Pennington's concerns about Chisolm's ability to

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[3] If Chisolm's case was set for trial in December 2011, as he testified, then by the time plea counsel visited him on December 19, 2011, the State would not have been able to timely serve him with a notice of intention seek the death penalty. App. 76, l. 24 – 77, l. 6. A death notice must be sent at least thirty (30) days prior to the trial of the case. S.C. CODE ANN. § 16-3-26(A). Thus, the only way that a death notice would have been timely served was if the solicitor's office utilized its control of the docket to delay the calling of Chisolm's case for trial. See State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) (holding that the statute that vested exclusive control of the criminal docket in the circuit solicitor violated separation of powers); Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot,* 32 Am. J. Crim. L. 325, 351 (2005) ("There are innumerable ways in which prosecutors can use their control of the docket to gain a strategic advantage."). Notably, the public index reflects that Chisolm filed multiple motions invoking his right to speedy trial.

represent himself in a death penalty case were genuine, a capital defendant is no less entitled to self-representation. See Brewer, 328 S.C. at 120, 492 S.E.2d at 99 ("There is no prohibition against a capital defendant knowingly and intelligently waiving the right to counsel.").

Regarding prejudice, Chisolm testified:

> As far as I believe, if Mr. Pennington never took over my case, I would have never went to a plea hearing. It would never happened. I would have still been trying to go to trial. I still would have had to research my own case. Whether I would have found the correct information or not, I don't know, but we would have been going to trial.

App. 78, ll. 4-12. Thus, Chisolm was prejudiced by Pennington's involvement in that, but for plea counsel's representation, he would not have accepted a plea offer. He would have instead represented himself at trial.

Therefore, the PCR court should have found that Pennington rendered ineffective assistance of counsel by impeding Chisolm's right to self-representation.

II. The PCR court erred in finding plea counsel effective where plea counsel failed to advise Petitioner of the lesser included offense of involuntary manslaughter.

Plea counsel Pennington was deficient in failing to advise Chisolm of the lesser-included offense of involuntary manslaughter. Chisolm was prejudiced because but for counsel's failure to advise him of the lesser offense, Chisolm would not have entered an Alford plea to the murder charge for the shooting death of his nephew. App. 73, l. 23 – 75, l. 22; App. 79, ll. 9-24.; see also App. 121. Pennington's testimony that they discussed voluntary manslaughter and self-defense is inconsequential to Chisolm's allegation, as involuntary manslaughter is a separate and distinct lesser included offense to murder. App. 95, ll. 3-9. Thus, the PCR court erred in finding that Chisolm "failed to meet his burden of proof" as to plea counsel's "failure to apprise Applicant of lesser included offenses." App. 128 – 129.

Pennington testified: "It was never articulated to me, as it was said today in the courtroom, that Mr. Chisolm acknowledged shooting his nephew by accident. And so that would have been interesting to pursue, but that was not presented to me." App. 109, ll. 17-20. The matter was discussed further on cross-examination and Pennington said he did not recall Chisolm later telling him "it was really me" that "fired the weapon." App. 105, ll. 2-13. Of course, even at the PCR hearing, Chisolm never said that the gun was intentionally "fired." Rather, he said the gun "went off" either as he was dropping it or when he dropped it and that it was "just an accident, period." App. 71, l. 25 – 72, l. 8.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238

(1969). The decision to waive the right to trial is that of the defendant, not the attorney. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."). A trial lawyer's performance can be deficient where he or she fails to inform a defendant of possible charges on lesser-included offenses that could have been requested at trial where there is evidence that the defendant is only guilty of the lesser offense. See, e.g., Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991) (holding petitioner's counsel was ineffective because where "he failed to advise petitioner that if he went to trial, he could have requested a charge on the lesser offense and might have been convicted of the misdemeanor of use of a vehicle without permission rather than the felony of grand larceny" and "but for counsel's failure to advise petitioner of the lesser offense, he would not have pled guilty").

Essential to the analysis in this case is an understanding of the differences between self-defense and voluntary manslaughter, about which Chisolm was advised, and involuntary manslaughter, about which Chisolm was undisputedly not advised. Self-defense is a "complete defense," meaning that the jury must find the defendant not guilty if it has "a reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense." State v. Addison, 343 S.C. 290, 293, 540 S.E.2d 449, 451 (2000); State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Once raised by the defense, the State must disprove self-defense beyond a reasonable doubt. State v. Burkhart, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002). To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have

actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999). Here, self-defense was discussed as a possible defense to the ABWIK charge related to the shooting of Chisolm's brother, Dansa. App. 103, l. 2 – 104, l. 4. However, there was no testimony that self-defense was ever discussed as a defense to the murder charge that arose from the shooting death of M.S. Thus, any discussion of self-defense has no bearing on the failure to discuss involuntary manslaughter.

The discussion of voluntary manslaughter likewise failed to ameliorate the failure to discuss the separate offense of involuntary manslaughter. Both voluntary manslaughter and involuntary manslaughter are lesser-included offenses of murder. State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014). "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). "Both heat of passion and sufficient legal provocation must be present at the time of the killing." Id. The sudden heat of passion need not dethrone reason entirely or shut out knowledge and volition, but it must be such as would naturally disturb the sway of reason and render the mind of an ordinary person incapable of cool reflection and produce what may be called an uncontrollable impulse to do violence. Id. at 101–02, 525 S.E.2d at 513 (citing State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996)).

On the other hand, involuntary manslaughter is defined as **the unintentional killing of another without malice while engaged in** either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or **(2) the doing of a lawful act with a reckless disregard for the safety of others**. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (emphasis added). Involuntary manslaughter requires a showing of criminal negligence, which "is defined as the reckless disregard of the safety of others." S.C. CODE ANN. § 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. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (quoting State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2008)).

"A person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003). "The negligent handling of a loaded gun will support a charge of involuntary manslaughter." State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). Our Courts have noted that "there is a difference between being armed in self-defense and acting in self-defense." Brayboy, 387 S.C. at 181, 691 S.E.2d at 486. "At the point of the analysis of determining whether one is armed in self-defense, the court is concerned only with whether the defendant had a right to be armed for purposes of determining whether he was engaged in a lawful act, i.e. was lawfully armed, and not whether he actually acted in self-defense when the shooting occurred." Id. According to Chisolm, he thought his brother, Dansa, was armed, which is why he picked up the other gun in the kitchen. App. 70, l. 20 – 71, l. 18.

Notably, **involuntary manslaughter is distinguishable from the defense of accident.** See Crosby, 355 S.C. at 51 n. 2, 584 S.E.2d at 111 n. 2. "To satisfy the legal defense of accident,

it must be shown that the defendant used due care in the handling of the weapon." Id. (citing State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999)). "A defendant is, however, entitled to a charge on involuntary manslaughter where the evidence shows a reckless disregard of the safety of others." Id.

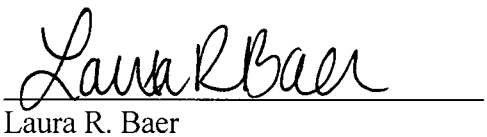
In the present case, Chisolm's testimony would have provided sufficient evidence from which the jury could have determined that he was lawfully armed in self-defense, and he negligently handled the loaded gun causing it to discharge. See Brayboy, 387 S.C. at 178, 182, 691 S.E.2d at 484, 486 (holding involuntary manslaughter charge appropriate when defendant claimed gun "just went off"); Burriss, 334 S.C. at 263, 265, 513 S.E.2d at 108, 109 (holding involuntary manslaughter charge appropriate where gun "went off" and defendant claimed "[i]t was an accident"); see also State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008) (holding that "[a]though petitioner had inconsistent stories" he was "entitled to a charge on involuntary manslaughter"). Thus, Pennington should have discussed the defense of involuntary manslaughter with Chisolm. His failure to do so rendered Chisolm's plea unknowing. Chisolm was prejudiced in that had he been advised regarding involuntary manslaughter, he would have gone to trial.

Therefore, the PCR court should have found that the plea counsel rendered ineffective assistance of counsel by failing to advise Chisolm about the lesser-included offense of involuntary manslaughter.

CONCLUSION

For the reasons set forth herein, Petitioner DonSurvi Chisolm respectfully requests this Court grant certiorari to allow full briefing on these issues.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Eugene C. Griffith, Jr., Circuit Court Judge

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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Justin Hunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and DonSurvi Chisolm, #347831, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 2nd day of May, 2016.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of May, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.