

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Berkeley County

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case No.: 2015-001735

**RECEIVED**

AUG 17 2016

**SC SUPREME COURT**

DONSURVI CHISOLM,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **PETITIONER'S 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

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Berkeley County. Petitioner was indicted at the August 2010 of the Berkeley County Grand Jury for assault and battery with intent to kill (ABWIK) (2010-GS-08- 1424), murder (2010-GS-08-1425), and possession of a weapon during the commission of a violent crime (2010-GS-08-1426). D. Ashley Pennington, Esquire, represented Petitioner. Petitioner pled guilty pursuant to Alford in exchange for the State not seeking the death penalty. Pursuant to a negotiated plea agreement, the Honorable R. Markley Dennis sentenced Petitioner to confinement for life without parole for murder, twenty years for ABWIK, and five years for possession of a weapon. The sentences were to run concurrently. Petitioner filed a timely notice of appeal for his guilty plea. The Court dismissed his appeal and the remittitur was issued on February 28, 2013.

On February 18, 2013, Petitioner filed an application for post-conviction relief. Respondent made its Return on or about December 8, 2014, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on February 19, 2015, in Charleston County before the Honorable Eugene C. Griffith, Jr. Rodney Davis, Esquire, represented Petitioner at the hearing. Ashleigh Wilson, Esquire, of the South Carolina Office of the Attorney General, represented Respondent. By an Order of Dismissal signed May 12, 2015 and filed May 19, 2015, the PCR Court denied and dismissed Petitioner's application with prejudice.

A notice of appeal was filed and perfected by a Petition for Writ of Certiorari. This Return follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

Petitioner argues that the PCR Court erred in failing to find Petitioner's plea counsel (hereinafter "Counsel") ineffective where Counsel allegedly impeded Petitioner's right to represent himself. Petitioner further argues that the PCR Court erred by failing to find Counsel ineffective where Counsel allegedly failed to advise Petitioner of the lesser included offense of involuntary manslaughter. For the following reasons, Respondent contends that these arguments are without merit.

### Relevant Law

In a PCR action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland,

466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. Because Petitioner pled under Alford, he must show there is a reasonable probability that, but for plea counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

**I. The issue of whether Counsel was ineffective for impeding Petitioner's right to represent himself is not preserved for appellate review. Nonetheless this argument is without merit.**

How the Issue Was Raised

Petitioner was represented at his plea hearing by Ashley Pennington (hereinafter "Counsel"). During the guilty plea colloquy, the plea court went over with Petitioner the nature of the offenses, Petitioner's constitutional rights, and the plea negotiations. After that discussion the plea court asked Petitioner the following:

The Court: Mr. Chisolm, are you totally satisfied with your lawyer?  
Petitioner: Yes, Your Honor.  
The Court: Do you have any complaints at all about how he has handled your case?  
Petitioner: No, Your Honor.

App. 11, l. 25 – 12, l. 6.

The plea court asked Counsel if he discussed with Petitioner the nature of each offense and possible punishments, and then asked Counsel the following:

The Court: And [Petitioner] has requested after a review of the investigations that you have conducted on his behalf, he advised you and requested that you negotiate a sentence or the best arrangement that you could for him?  
Counsel: Yes, sir.  
The Court: The record now reflects the results of your efforts in that regard; is that true?  
Counsel: Yes, sir, it is.

App. 12, l. 25 – 13, l. 9.

Counsel informed the plea court that after his investigation he believed that the State would be able to prove beyond a reasonable doubt that Petitioner was guilty of murder and that there was a significant benefit to Petitioner by the plea court accepting the negotiated sentence. The plea court then went over Petitioner's waiver of jury trial rights, to which Petitioner agreed and gave no indication that he would rather have a trial. App. 14, l. 16 – 15, l. 19. After the solicitor's recitation of the facts, the State asked Petitioner if he believed the jury would most probably find him guilty of murder, to which Petitioner replied, "I believe that's a strong possibility and I am not willing to take that chance." App. 21, ll. 9-11. Once again, Petitioner agreed that he was totally satisfied with Counsel and Counsel's advice. App. 22, ll. 9-12.

At the PCR hearing, Petitioner explained that he had had several hearings in order to proceed pro se on his Berkeley County charges. Petitioner testified that Counsel visited him in prison, after he was convicted on Dorchester County charges, and explained to him that the State would be seeking the death penalty. He testified that he never asked Counsel to take over his case and never agreed to have his pro se status taken away. Petitioner further testified that if Counsel never took over his case, he never would have pled but would have gone to trial. App. 78, ll. 4-12.

Counsel testified at the PCR hearing that the State informed his office that Petitioner was pro se but may need representation because they intended to file a death penalty notice. App. 86, ll. 14-18. He testified that he met with Petitioner and explained that the State expressed their intent to seek the death penalty and Petitioner would need representation. App. 87, ll. 12-15. Counsel testified that upon asking Petitioner if he was interested in having representation, Petitioner "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. 17-23. Counsel testified that after filing the notice of representation, he visited Petitioner in prison "at least a half dozen or more" times and had several meetings with his family members. App. 90, l. 23 – 91, l. 5.

In the State's closing argument at the PCR hearing, the assistant Attorney General noted that in the ten months that elapsed between Counsel's initial meeting with Petitioner and Petitioner's plea, Petitioner never once filed any motion to relieve Counsel, nor was there anything in the record to indicate that Petitioner wanted to proceed pro se. App. 115, l. 18 – 116, l. 2. The record also reflects that Petitioner had relieved his previous plea counsel, evidencing the fact that he knew he had the right and ability to do so. See App. 86, ll. 22-25.

In the PCR Court's Order of Dismissal, the PCR Court found that Counsel was not ineffective, had provided thorough representation, and demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. App. 126. Nowhere in the PCR Court's Order did the Court specifically rule on the issue of whether Counsel was ineffective for impeding Petitioner's right to represent himself. See App. 118-130.

#### Analysis

Petitioner's argument is without merit. First, it is important to note that the PCR Court found Counsel's testimony to be credible and Petitioner's testimony to be not credible. App. 137. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct.

App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

Next, Respondent would point out that the issue of whether Counsel was ineffective for impeding Petitioner's right to represent himself is not preserved for appeal. "To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). Although this issue was listed in Petitioner's PCR Application and discussed at the PCR hearing, the PCR Court never made findings or came to a ruling on this issue. Petitioner never filed a Rule 59(e) Motion to raise this issue to a ruling.

Nevertheless, this issue is without merit. Counsel provided credible testimony that Petitioner indicated immediately and unequivocally that he was interested in representation given that Petitioner was unhappy with the life sentence he was serving at the time as a result of his pro se representation in Dorchester County. Petitioner also testified at the plea hearing that he was satisfied with Counsel's representation and the way he handled Petitioner's case, whereby Counsel negotiated a life sentence to help Petitioner avoid a death penalty notice. Most importantly, Petitioner was familiar with his ability to have his counsel relieved and proceed pro se, as he had done in the past, yet he spent the entire duration of Counsel's representation (ten months) without evidencing any intent to relieve Counsel and proceed pro se.

Accordingly, Petitioner has failed to prove both prongs of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms and

that he was prejudiced by Counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of plea counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

**II. There is evidence of probative value to support the PCR Court's ruling that Counsel was not ineffective in advising Petitioner of the lesser included offenses.**

How the Issue Was Raised

Petitioner testified at the PCR hearing that Counsel did not discuss any lesser-included options to murder. App. 73, ll. 23-25. He testified that he has studied the lesser-included offenses since his plea and realizes now that he would not have pled guilty had he known about the possibility of a verdict on a lesser-included offense at trial. App. 74, ll. 1-6. He further testified that Counsel never discussed the lesser-included offense of involuntary manslaughter, which will provide a much lower sentence than murder. App. 75, ll. 4-9.

Counsel testified at the PCR hearing that he discussed with Petitioner self-defense and voluntary manslaughter as potential matters. App. 95, ll. 1-9. He testified that during investigation it became clear that there would be evidence that would show malice. App. 98, ll. 10-14. He further testified that Petitioner never told him that he had shot his nephew on accident. App. 103, ll. 16-20.

In the PCR Court's Order of Dismissal, the PCR Court found Petitioner's testimony concerning Counsel's failure to apprise Petitioner of lesser included offenses not credible, while finding Counsel's testimony credible. App. 128. The PCR Court also found that Counsel discussed self-defense and voluntary manslaughter with Petitioner, and that Counsel testified that self-defense would not have been a viable defense since the most credible evidence showed

Petitioner was angry after a fight with his brother and there was no evidence of Petitioner's brother being armed or threatening. The PCR Court further found that Counsel testified it was unlikely the jury would believe Petitioner was acting with provocation. App. 128.

#### Analysis

Petitioner's argument is without merit. There is certainly evidence of probative value to support the PCR Court's ruling. First, it is important to note that the PCR Court found Counsel's testimony to be credible and Petitioner's testimony to be not credible. App. 137. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

The PCR Court found that Counsel discussed self-defense and voluntary manslaughter and believed that these would not be viable. Regarding involuntary manslaughter specifically, the PCR Court made no specific finding as to whether Counsel did not discuss this lesser-included offense. The PCR Court ruled that Counsel was not ineffective as to Petitioner's entire allegation of whether Counsel failed to discuss with him the lesser-included offenses of murder, but never specifically made findings or ruled upon whether Counsel was or was not ineffective concerning advising of involuntary manslaughter in particular. Petitioner never filed a Rule 59(e) Motion asking the PCR Court to make a finding concerning involuntary manslaughter. As such, Respondent would argue that the issue of Counsel's advice concerning involuntary manslaughter is not preserved for appellate review.

Despite not being preserved for appellate review, Respondent would argue that Petitioner's plea waived any defenses. Additionally, Petitioner cannot show that he was prejudiced by Counsel failing to discuss involuntary manslaughter. Counsel and Petitioner (through his plea colloquy) both agreed that the State had substantial evidence that would lead a jury to find Petitioner guilty of murdering his nephew. If Counsel indeed did not discuss involuntary manslaughter with Petitioner, Respondent would argue that it was not unreasonable to do so considering the facts were of such a nature that the State intended to seek the death penalty.

Accordingly, Petitioner has failed to prove both prongs of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms and that he was prejudiced by Counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of plea counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

## CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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By:   
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August 17, 2016

STATE OF SOUTH CAROLINA  
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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Laura R. Baer, Esquire**  
**SC Commission on Indigent Defense**  
**PO Box 11589**  
**Columbia, SC 29211-1589**

This 17<sup>th</sup> day of August, 2016.

  
\_\_\_\_\_  
JOCELYN BAKER  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

August 17, 2016

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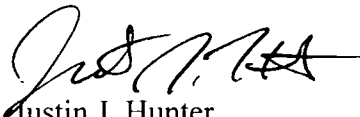
The Honorable Daniel E. Shearouse  
Clerk of Court, Supreme Court of South Carolina  
PO Box 11330  
Columbia, SC 29211

**Re: DonSurvi Chisolm v. State of South Carolina**  
**Appellate Case No. 2015-001735**  
**Lower Court Case No. 2013-CP-08-0422**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

  
Justin J. Hunter  
Assistant Attorney General  
SC Bar No. 101254

JJH/jyb

Enclosures

cc: Laura R. Baer, Esquire  
Trisha Allen, Victim Services (w/o enclosures)