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SEPTEMBER 29, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

RODNEY CHISHOLM,	)	
Appellant,	)	Supreme Court No. 20150099
vs.	)	District Court No. 18-2013-CV-01281
STATE OF NORTH DAKOTA,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

Appeal from the Order Denying Application for Post-Conviction Relief entered on March 12, 2015, by the Grand Forks County District Court, Northeast Judicial District, State of North Dakota, the Honorable Lawrence Jahnke presiding.

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ARGUMENT

[¶ 3] Chisholm argues the court erred in denying his post-conviction relief application. He argues his trial and appellate counsel, Steve Light, provided ineffective assistance. That is, Light's errors fell below an objectively reasonable standard and Light's performance prejudiced him. The State argues Light was not ineffective and the court's order was proper. Based on the evidence presented, the court erred in denying Chisholm's application. This Court should reverse the order denying his application.

[¶ 4] A. Light Should Have Challenged Chisholm's Confession

[¶ 5] Chisholm asserted a reasonable lawyer would have challenged the confession. Relying on State v. Greybull, 1998 ND 102, ¶ 17, 579 N.W.2d 161, the State claims Chisholm did not unambiguously assert his right to cut off questioning so failing to challenge the confession was not ineffective. Appellee's Br. ¶ 13. Greybull, however, is distinguishable.

[¶ 6] Greybull was told she was not under arrest, but she was asked to go to the police station for questioning. Greybull, 1998 ND 102, ¶ 7, 579 N.W.2d 161. There, Greybull was quickly Mirandized. Id. at ¶ 8. She was then questioned for about 75 minutes. Id. at ¶ 8. She

stated: "I didn't see her. I didn't do nothing to [her]. I don't even know her." The detective accused Greybull again. She responded: "You can't make me say nothing. I didn't do nothing. I didn't do nothing to her...." Id. Later, Greybull stated the victim came at her. Id. She then asked: "Do I have to get a lawyer?" Id. The detective told her that was up to her, and the questioning continued. Id. Eventually, Greybull confessed to the stabbing in self-defense. Id.

[¶ 7] Before trial, Greybull filed a motion to suppress. She argued the police violated her rights to remain silent and to an attorney. Id. at ¶ 11. The court denied the motion. Id. She was convicted of manslaughter. Id. This Court upheld the denial of the motion, rejecting Greybull's claim she invoked her rights. Id. at ¶ 16. This Court adopted the clear articulation rule from Davis v. United States, 512 U.S. 452, 459 (1994). In Davis, the Court held that to invoke the rights, the invocation must be unambiguous. Id. The person must assert their rights "sufficiently clearly that a reasonable police officer...would understand the statement to be a request for an attorney." Id. This Court held Greybull's statements were ambiguous. Id.

[¶ 8] Unlike in Greybull, the questioning here went on over the course of three days for hours. There, Greybull's the ambiguous

assertion came minutes into the questioning, Chisholm's assertion was "We're kind of getting nowhere here... I think we're at the end. We're just keep digging down the same shit," came after hours of questioning. Chisholm also stated, "Well, if we're just going to keep going on Donald and stuff, I'm done. Because we've chased it," and "Let's call it a wrap today. Let's go back so I can shower and shave and stuff, you know... Put the bad guy in the cell."

[¶ 9] Chisholm's statements are much different than Greybull's "you can't make me say nothing." Chisholm's statements clearly and unambiguously convey an intention to cease questioning. Chisholm did not want to be questioned anymore. He instructed officers to put him back in his cell. A reasonable officer would have understood it to terminate questioning. Nevertheless, the police continued. Any statements obtained thereafter should have been suppressed.

[¶ 10] The State then argues Light's failure to file the motion could have been "strategy." The State argues under Ernst v. State, 2004 ND 152, ¶ 11, 683 N.W.2d 891, the failure to file a pretrial motion is not ineffective assistance by itself. See State v. Woehlhoff, 473 N.W.2d 446, 450 (N.D. 1991). Counsel's strategy, however, must be based on the exercise of due diligence, reasonable investigation and research. In this

case, a motion to suppress the confession should have been attempted, as it was in Greybull. Had Chisholm's confession been excluded, both the State and Chisholm's strategy would have been markedly different. That is, the defense may not have been self-defense but rather failure-of-proof. The failure to file the motion here was unreasonable, and there was a reasonable probability the statements would have been suppressed.

[¶ 11] Moreover, Light's unreasonable performance is not limited to the motion. Light's errors were compounded by not communicating with Chisholm, to research the confession issue, obtain expert assistance, or investigate key facts regarding Don Chisholm's violence. The cumulative effect of Light's failures to act in a reasonable manner prejudiced Chisholm under Strickland v. Washington, 466 U.S. 668 (1984).

[¶ 12] B. Light Should Have Presented Expert Testimony Regarding Chisholm's State of Mind

[¶ 13] Light should have presented expert testimony regarding Chisholm's state of mind. The only defense presented here was self-defense. Whether self-defense was applicable depends entirely on Chisholm's state of mind.

[¶ 14] Here, Light knew psychological testimony was necessary to explain Chisholm's post-mortem behavior. In his opening, Light stated: "I believe you will probably find that that could also be explained by a phenomena known as disassociation." Tr. Vol. 1, 45:9-10. Even as Light discussed this psychological condition, he did not retain a psychologist, present evidence on it, or research it despite its importance to Chisholm's defense. Rompilla v. Beard, 545 U.S. 374, 387 (2005) (lawyers have a duty to promptly investigate the facts regarding the case). Had Light investigated and presented psychological testimony, he could have addressed the biggest concern with raising self-defense here: Chisholm's post-mortem actions. Had those actions been explained, there is a reasonable probability the jury would have reached a different result.

[¶ 15] C. Light Should Have Asked for Lesser Included Offenses

[¶ 16] Light's failed to properly address the lesser included offenses. At the evidentiary hearing, Chisholm testified Light never discussed lesser included offenses or excuse instructions with him. Hrg. Tr. 15-17. Light did not propose lesser included or excuse instructions despite raising self-defense as Chisholm's only defense. Chisholm, 18-

10-K-01273, Doc. 50 (Proposed Instructions). At trial, Light also failed to request those instructions.

[¶ 17] While the court is responsible for correctly instructing the jury, the lawyers have a responsibility to request and object to specific instructions. State v. Klose, 334 N.W.2d 647, 651 (N.D. 1983). The court here instructed the jury on murder without lesser included offenses. Chisholm, 18-10-K-01273, Doc. 149. The court instructed on self-defense and limits of using of deadly force, but not excuse. Id.; N.D.C.C. § 12.1-05-08; State v. Leidholm, 334 N.W.2d 811, 816 (N.D. 1983) (an honest but mistaken belief that deadly force is necessary will never result in a conviction for murder, but may result in a conviction of a lesser included offense).

[¶ 18] Chisholm concedes there was a discussion of waiving lesser included offenses; however, he asserts the waiver was involuntary. Light did not discuss those issues with Chisholm, pressured him into waiving his rights, and gave him a pill shortly before that discussion. State v. Webster, 2013 ND 119, ¶ 21, 834 N.W.2d 283 (a voluntary relinquishment of a right must be "the product of a free and deliberate choice rather than intimidation, coercion, and deception, ... [and] ... must

have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.").

[¶ 19] Even if the waiver was "voluntary," the lesser included offense instructions are mandatory and should have been given. This Court has held:

> [A]ny time the court instructs a jury on self-defense, it must of necessity include a special instruction on manslaughter as well as an instruction on negligent homicide. The difference between self-defense and manslaughter is the reasonableness of the accused's belief that the use of force is necessary to prevent imminent unlawful harm. If the accused's belief is reasonable, he will be found to have acted in self-defense. If unreasonable, he is guilty of either manslaughter or negligent homicide, depending upon whether his belief was held recklessly or negligently, respectively.

Leidholm, 334 N.W.2d at 821 (citations omitted); State v. Clark, 1997 ND 199, ¶¶ 10-11, 570 N.W.2d 195; State v. Weidrich, 460 N.W.2d 680, 684 (N.D. 1990); but see State v. Frey, 441 N.W.2d 668, 670-71 (N.D. 1989) (counsel's waiver of lesser included instructions may be strategic).

[¶ 20] The State may argue Light's failure to request the lesser instructions was strategic, however, strategic choices must be made after thorough investigation of the law and facts. But see Mathre v. State, 2000 ND 201, ¶¶ 5-11 619 N.W.2d 627 (holding a failure to

confer with defendant about waiving lesser included offenses is not per-se unreasonable if counsel can articulate a reasonable strategy for doing so). Here, Light could not explain or articulate why he did not ask for lesser included offenses because he killed himself. Nobody testified Light discussed or researched waivers of lesser included offenses. Chisholm testified Light did not start preparing for trial until less than a month before. Chisholm testified Light did not discuss those matters before trial, and they argued about it when Light pressured him to waive them at trial.

[¶ 21] Had Light been diligent, researched the issue and discussed it with Chisholm, the matter may have been strategy. However, he did none of those things. Chisholm would not have waived lesser included instructions. Then, had the jury found Chisholm's belief unreasonable, Chisholm could not have been found guilty of murder. At most, he could have been convicted of manslaughter. That is, had Light's performance been reasonable, the outcome would probably have been different.

[¶ 22] D. The Court Should Have Made Findings Regarding Recent Incidents of Violence.

[¶ 23] Chisholm argues the court did not address all of the concerns raised in his application and subsequent briefs. The State

argues the issues were limited to those identified in the amended brief supporting Chisholm's petition. Appellee's Br. ¶ 27. The court and the State attempt to review the issues in a vacuum without regard to the single cause of action in Chisholm's petition: Light was ineffective. However, evidence was presented at the hearing regarding Light's failure to investigate and present evidence concerning two recent incidents of Don Chisholm's threats and violent behavior. The court erroneously failed to address this in its order.

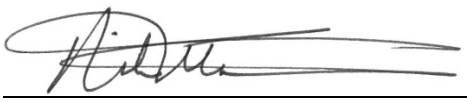
[¶ 24] Chisholm acknowledges the Court issued an order stating that it intended to limit the evidence to the "issues" raised in the amended brief, the Court nonetheless received evidence relevant to Chisholm's unamended petition. The court received evidence on Light's failure to present more recent specific instances of Don Chisholm's threats and violence while using drugs. Despite being told of the recent incidents, Light attempted to introduce evidence regarding two specific instances of Don Chisholm's violence occurring ten to twenty years before. Chisholm, 2012 ND 147, ¶ 7, 818 N.W.2d 707. At trial, the court excluded all testimony regarding those instances because they were too old. Id. at ¶14. Because Light failed to present evidence regarding these recent incidents where the victim threatened Busaw and

Sweeney, the jury did not hear evidence relevant to Chisholm's state of mind and fear of his brother. This was crucial evidence in evaluating Chisholm's self-defense claim. Had the jury been able to hear this, there is a reasonable probability that the jury would have reached a different result.

[¶ 25] CONCLUSION

[¶ 26] For these reasons, Chisholm requests this Court reverse the denial of Chisholm's application for post-conviction relief.

[¶ 27] Dated: September 29, 2015.



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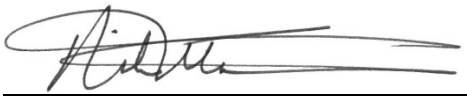
[¶ 28] CERTIFICATE OF COMPLIANCE

[¶ 29] This brief complies with N.D.R.App.P. 32. It was prepared with Franklin Gothic Book, 14 point typeface. This brief does not exceed 2,000 words, as calculated using Microsoft Word, excluding the table of contents and table of authorities.

[¶ 30] Dated September 29, 2015.



Nicholas Thornton (ND # 06210)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

RODNEY RAY CHISHOLM, Appellant, vs. STATE OF NORTH DAKOTA, Appellee.	CERTIFICATE OF SERVICE Supreme Court No. 20150099 District Court No. 18-2013-CV-01281

[¶ 1] I, Nicholas D. Thornton, an attorney licensed in the State of North Dakota, hereby certify that on **September 29, 2015**, the following documents were filed with the Clerk of the Supreme Court:

Appellant's Reply Brief (Word format); and
Certificate of Service.

Copies of these documents were served electronically on all parties at the e-mail addresses listed below:

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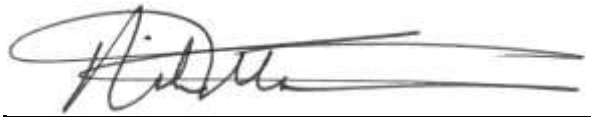
[¶ 2] Dated: September 29, 2015.



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