VOLUME I of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Berkeley County

Maite Murphy, Circuit Court Judge

DAVID JUDSON PENN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000882

APPENDIX

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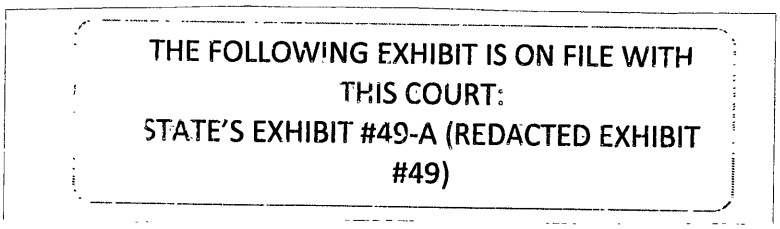
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STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY	)	
State of South Carolina,	)	
	)	
v.	)	Case No. 12-GS-08-0501 - 502
	)	
David Justin Penn,	)	
	)	
Defendant.	)	

TRANSCRIPT OF JURY TRIAL

The within Hearing in the above-captioned matter was held on September 30th and October 1st, 2013, before The Honorable R. Markley Dennis, Jr. in Courtroom E of the Berkeley County Courthouse, 300 California Avenue, Moncks Corner, South Carolina; attended by counsel as follows:

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SEPTEMBER 30, 2013 9:20 A.M.

(DEFENDANT PENN PRESENT)

THE COURT: Let the record reflect that Mr. Penn is present. Good morning, Mr. Penn.

DEFENDANT: Good morning.

THE COURT: Anything from the defendant before we select the jury panel?

MR. GROEBER: I don't believe so, Your Honor. There are issues but we can deal with those.

THE COURT: I understand that.

MR. GROEBER: And the only witness that we would possibly have is my investigator, Ronnell Freeman.

THE COURT: Freeman?

MR. GROEBER: Yes, Your Honor.

THE COURT: Thank you.

THE COURT: Anything from the State before we bring the jury in?

SOLICITOR WILLIAMS: No, Your Honor.

Before we bring the jury panel over, I know that there are several Motions *in limine*. I don't think that they need to be dealt with before we qualify the jury. We

will certainly deal with those after qualifying the jury, before selecting a panel.

Mr. Penn, I know that your lawyers have shared with you that we have had a status conference concerning certain legal issues that have been raised. We -- I have discussed those with counsel, both sides. We will place those all fully on the record following the jury panel.

I have also been advised that you had some matters that you wished to raise as well, that were not included in the formal pleadings filed by your attorney. I know that he has discussed with you the ruling -- and it is not my rule but the Chief Justice's rule that we do not recognize in this state hybrid representation.

Hybrid representation is when you have an attorney -- you're not an attorney, you cannot represent yourself. In order to do so, you must have those attorneys removed. You are not asking me to do that and I would certainly be very, very reluctant to do that at this stage of this case. But I will allow

you to speak for the record, to at least reflect those concerns or issues that you wanted to raise. I am sure that they have indicated that to you. I'll be happy to do that, sir. Thank you very much.

All right, let's invite the jury to come on over.

(JURY PANEL IN @ 9:55 A.M.)

THE COURT: Good morning, ladies and gentlemen. My name is Markley Dennis. I am a circuit court judge for the 9th Circuit, which happens to be my home circuit. I have been assigned here in Berkeley County this week to conduct a term of General Sessions Court, which is criminal court.

You have been selected at random to help me resolve some of the disputes this week.

This is probably going to be the only day that I will see the majority of you because this trial that we are going to start today will consume the majority of the week. So from the standpoint of whether you will be picked or worrying about 'what is this week going to be for me', I can tell you that for most of you this will be the only day that

you will have to report.

You can only be required to do this, serve on a jury, every three years. So by your appearance here today, you will receive that exemption. Some of you may have served on magistrate's courts, municipal courts, had multiple opportunities to do so. That service does not exempt you from service in Circuit Court, but you will earn an exemption today for three years.

Jury service is certainly something that is fundamentally necessary for our society. It's a service that we as citizens render to assist in that regard. The State recognizes that and the exemption is a benefit for your service.

All of that to say that this may be a very good week for you to be summoned because we can only take twelve of you. The majority of you will earn your exemption for the next three years by your appearance here today, whether you're selected for this jury or not. That is one positive thing that will happen as you go through this ordeal.

Let me ask, have any of you ever served

in Circuit Court before? If so, raise your hand. (Various jurors respond by raising their hand). Good. I hope that it wasn't a horrific experience. I hope that you came away with a feeling that it was 'worth my while.' But if you didn't, then this week will either confirm that or change your mind. How about that? Because it is really an incredibly important part of our system.

In fact, they were talking this morning and maybe some of you have been following the ordeal in Italy where the individual was tried, now they're going back to try that individual again. What an ordeal. That couldn't happen in the States because the jury rendered a decision. Once a jury renders a decision, that's it. Now there may be some other issues that may arise that could cause a retrial but it won't be because of what the jury did. That's a beautiful system.

That coupled with some of the other aspects of our laws which are very, very important -- but most importantly we have a system, unlike Italy's, and some other

countries that may have professional jurors; that is literally what they do for a living, they are expert jurors. Having been a lawyer for twenty-one years and now a judge for almost twenty, I'll tell you that given a choice between the two that I'd take you any and every day, without any hesitation. I knew that as a lawyer, felt that as a lawyer, but that's been confirmed over the last twenty years as being a judge. This system is amazing, to me, and it works extremely well. I credit you for that.

I will talk with you some more after we call the roll and I'll talk some more with you about what is expected of you, those of you who will be selected to serve on this jury.

It's an honor and a privilege to serve with each one of you and I thank you for the service that you render to this county, to this state and to this process. Again, I will tell you that the one thing that I do that has been consistent over these years is that every time I've had to work with a jury, every week that I've been assigned to preside

over jury trials, one thing is for sure. I don't always enjoy the process of the trial that we have, I don't always enjoy the circumstances of what we might have to hear, but I always enjoy and appreciate the service of the jurors, who are the ones that make this system work. I thank you for that.

I'd ask you to give your attention now to Ms. Tucker. She is going to call the roll, get certain information from you. Once she has completed that, I'll return and discuss with you with you the qualifications for you to serve as a juror.

Ms. Tucker, I now turn it over to you for the roll call.

(ROLL CALL)

THE COURT: Thank you, Ms. Tucker. Ladies and gentlemen, there are a number of questions that I need to ask you to qualify you. Before qualifying you, we will go over a few exemptions that -- there still remain, uh, -- when I started doing this in 1973, a lot of you wouldn't have been here; doctors, lawyers, nurses were excluded from the pool. Over the years that has changed. I think it

makes for a better panel. Those of you who previously would have been included, you may not agree. But the whole purpose and concept of a jury is to have a cross section of our community. You've heard, as well as I have, that you truly represent a cross section of the community with your different life experiences. In other words, such things as your age.

The first exemptions deals with age. I can promise you that in 1973 I thought that this was old, but now that I have arrived, I don't think it's old anymore. But if you've reached your sixty-fifth birthday, you've earned the exemption from jury service. If any of you have attained that age and wish to exercise your right, you have that exemption. It doesn't mean that you cannot serve -- these exemptions don't prevent you from serving. They just give you the opportunity to claim them if you wish to claim them, if you wish to be excused. So does that apply to anyone? If so, please stand. (No response). If there are any of you, thank you. I really believe that those of us that

have achieved that, we -- I used to think that wisdom and knowledge came from reading a book, studying, but I've come to realize that it comes from being on earth, having life's experiences. But if you have accomplished that milestone and wish to be excused, please stand. (No response). Thank you.

The next one, I didn't hear any of these but if you're employed with the Department of Corrections, as a guard or any employee, you have an exemption. Does that apply to anyone? If so, please stand. (No response). Thank you, there are none.

If you have the care, custody and control of a child or children under the age of seven years and you do not work outside of the home or your working arrangements are such that you alternate with another caregiver, and you need to claim that exemption, please stand. Yes, ma'am?

JUROR NUMBER 32: I have two children.

THE COURT: How old are they?

JUROR NUMBER 32: Five and three, and I'm a homemaker.

THE COURT: Bless you. Your name and

number?

JUROR NUMBER 32: Linda Coppeak, Juror Number 32.

THE COURT: And you wish to claim that exemption?

JUROR NUMBER 32: I do.

THE COURT: You are free to leave.

JUROR NUMBER 32: Thank you, sir.

THE COURT: Thank you. Thank you for what you do.

(JUROR NUMBER 32 EXCUSED)

THE COURT: Are there others?

JUROR NUMBER 178: Yes. My wife and I work separate shifts. We have three small children, one that is three.

THE COURT: And you alternate ---

JUROR NUMBER 178: We alternate. We only have one means of transportation at this time.

THE COURT: All right, your name and number?

JUROR NUMBER 178: James Wilkerson, Number 178.

THE COURT: You are excused.

(JUROR NUMBER 178 EXCUSED)

THE COURT: Yes, ma'am?

JUROR NUMBER 101: I also have a five-year-old, a one-year-old and the person watching them right now is disabled and I could not ---

THE COURT: I'm sorry?

JUROR NUMBER 101: The person that is watching them right now is disabled and I couldn't leave them for ---

THE COURT: You are the caregiver?

JUROR NUMBER 101: (Affirmative nod).

THE COURT: You wish to claim your exemption?

JUROR NUMBER 101: Yes, sir.

THE COURT: Your name and number, please?

JUROR NUMBER 101: Doree Massey, number 101.

THE COURT: You are excused.

(JUROR NUMBER 101 EXCUSED)

THE COURT: Are there others? (No response). Thank you.

Ms. Massey raised another exemption. If you are the caregiver of a person of any age that requires fulltime care, has some

infirmity that requires constant care, please stand. (No response). Thank you, there appear to be none.

I heard a number of these. If you are a teacher, student or necessary employee of institutions of learning, and that would be K through 12 and higher learning, including technical colleges, and your duties and responsibilities conflict with serving on the jury panel and you need to claim that exemption, please stand. (No response). Thank you. I look forward to working with those of you that have indicated that you are in that category. Thank you.

The next one is -- I mentioned to you that you would earn an exemption by your appearance and/or service here this week. That's probably going to be most valuable thing that you'll receive -- including your check -- for your services. When you receive your check, you'll understand fully what I meant by that. But, please do not -- I am not finding fault with that. That's provided by law. Ms. Brown, our clerk of court, would love to pay you more and I'd love to pay you

more too. Your service -- the value of your service is priceless. So, thank you. But you do earn an exemption. If anyone has served on a jury in Circuit Court during the last three years, you earned an exemption. If you wish to claim that exemption, please stand. (No response). Thank you. There appear to be none.

The next exemption deals with persons that -- it originated from agricultural necessity, where obviously persons who farmed were given an exemption because of the timeliness of the crops. It has evolved to include any business where you are the sole person of the business and if you were chosen to serve on the jury the business would have to shut down. If you or your business, if no one else can be there and you would have to close the doors and operation of your business would cease, and you need to claim that exemption, please stand. Yes, sir?

JUROR: I own the shop, there's only one person there right now.

THE COURT: There is someone who is there while you are here?

JUROR: Yes, sir, but they can't work without me.

THE COURT: I understand that you are an important part, but if you have someone who can cover the shop then you do not fall into the category. Thank you, sir.

If you have somebody that is covering for you right now -- and I understand that it may not be a managing person but this is solely for those business owners/operators that would have to close the door and cease operation to serve on a jury.

Of course, if you're not picked on the jury then you'd be there and it would not be a problem. Thank you, sir.

COURT REPORTER: Name and number?

THE COURT: Yes, sir.

JUROR NUMBER 176: I am a precast engineer for Knights. Basically my boss told me that if ---

THE COURT: Oh, I know what your boss told you. He told you to please get out of it.

JUROR NUMBER 176: No, sir. He said, 'If we can't operate without you here, then

we obviously don't need you.' So I'm a vital part and my presence is required to ---

THE COURT: I understand that, sir, but that doesn't shut down Knights. I will talk to you about postponing your service if it is conflicting with some pending job, some deadline. As I mentioned to you, though, this may be a good week to serve because, for most of you, this will probably be the only day that you will have to be here. So -- that's not going to prevent you from serving, it would just postpone it. You'd still have the same dilemma later but I understand that sometimes there are situations, times when -- for instance, this might be the absolute worst week in the world for you to serve. But I'll give you an opportunity after we get through all the qualification questions to come discuss that with me. We'll see if we can arrange a time that may be better suited to your schedule. As to the exemption itself, there are strict guidelines as to that.

JUROR NUMBER 176: Thank you.

THE COURT: Yes, sir. This next group

of questions, unlike the previous questions, if you fall into any of these it is imperative that you share the responses with the court. These deal with your qualification to serve. There are all statutorily prescribed, not anything that I just picked up.

The first one is -- there will not be anyone who will fall into this category, and I finally figured out why. But if you don't have a driver's license, a Highway Department identification card or a voter's registration card, if you don't have any of those, please stand. You don't have to have all three. You don't have to have any of the three with you.

JUROR: I don't have a driver's license?

THE COURT: Do you have an ID card?

JUROR: Yes, sir.

THE COURT: That's all that you have to have. I knew that there wouldn't be anyone that would apply to because that's how we got your name to send you the invitation to be here. Anyone? (No response). But the law

requires that we ask that question, so I'll continue to ask it every time notwithstanding my feeling about it.

I didn't notice any of these, but if any of you have not reached your eighteenth birthday, please stand. (No response). Thank you, there appear to be none.

Are there any members of the jury panel who are clerks of court, deputy clerks of court, constables, judges, probate judges, sheriffs, county commissioners, county officers or any person employed within the walls of any courthouse? If so, please stand. (No response). Thank you. There appear to be none.

Are there any members of the jury panel who hold a law enforcement commission? (No response). That could be with or without pay. (No response). In other words, you are empowered to arrest someone generally? If so, please stand. (No response). There appear to be none.

Are there any members of the jury panel who are not residents or citizens of Berkeley County? Is so, please stand. (No response).

There appear to be none.

The next group of questions, ladies and gentlemen, I will need you to come forward to talk with you.

The first is, have any of you ever been convicted of a crime that carries the potential sentence of more than one year. You wouldn't have had to actually have received a sentence of more than one year, only that there was the potential for that sentence; and you haven't had your civil rights restored by pardon or amnesty. If that is the case, then you'd not be able to serve. Unfortunately it does not matter how long ago that may have occurred. If it has occurred in your lifetime, right now the state of the law is that unless you've done something to have it removed then it will prevent you from serving. I'll give you an opportunity to come forward and let me know if that's the case.

If there are any members of the jury panel who are unable to read, write, speak or understand the English language, I will need to talk with you about that.

Also if there are any members of the panel who have a physical or mental infirmity that they feel would impact their ability to be a juror, I will need to discuss that with you.

If there are members of the panel who do not have the equivalent of a sixth grade education, I will need to discuss that with you as well.

Also if there are persons now who have some compelling personal or business reason(s) which they wish to discuss with me, please come forward.

If you wish to postpone your service, and you have not had it previously postponed or transferred before, I will be happy to talk with you about that at this time.

Please just form a line here and we will take you one at a time.

BAILIFF: Juror Number 127, Richard Padgett.

SIDEBAR:

THE COURT: Good morning.

JUROR NUMBER 127: Back when I was -- I can't remember how long ago it was, thirty

years or so, I was convicted of a robbery in the city of Charleston.

THE COURT: I understand. Unfortunately that prevents ---

JUROR NUMBER 127: And I can't serve, can't buy a gun, can't ---

THE COURT: Yes, sir. I'm sorry.

JUROR NUMBER 127: I understand.

(SIDEBAR CONCLUDED)

THE COURT: Juror Number 127 is excused for statutory reasons.

(JUROR NUMBER 127 EXCUSED)

BAILIFF: Juror 167, Brian Varner.

SIDEBAR:

THE COURT: Yes, sir.

JUROR NUMBER 167: Yes, sir, I was convicted of four counts of ABHAN and have taken no action to have it removed.

THE COURT: Thank you.

(SIDEBAR CONCLUDED)

THE COURT: Juror Number 167 is excused for statutory reasons.

(JUROR NUMBER 167 EXCUSED)

BAILIFF: Juror 44, Bang Duoung.

SIDEBAR:

THE COURT: Good morning, sir.

JUROR NUMBER 44: I think that my English is limited. I can understand basic but real deep, I cannot always tell what is meant.

THE COURT: And that's why I asked the question if you don't understand English to come forward. Obviously if you can understand the question, then ---

JUROR NUMBER 44: Yes, sir. I am -- I understand the question but at times I don't understanding meanings.

THE COURT: So you think that it would make you uncomfortable to serve?

JUROR NUMBER 44: I would not want to make a wrong decision if I don't understand the meanings.

THE COURT: Yes, sir, I understand. Thank you.

(SIDEBAR CONCLUDED)

THE COURT: Juror Number 44 is excused for statutory reasons.

(JUROR NUMBER 44 EXCUSED)

BAILIFF: Juror Number 73, Carrie Hughes.

SIDEBAR:

THE COURT: Good morning.

JUROR NUMBER 73: Your Honor, I should have asked earlier. I am a self-employer dental hygienist. So when I'm not working, there is no one that I can send in to the dentists that I work for. I'm self-employed and the only employee of my business.

THE COURT: And you want to claim the exemption?

JUROR NUMBER 73: Yes, sir.

THE COURT: You are excused.

(SIDEBAR CONCLUDED)

THE COURT: Juror Number 73 has decided to exercise her exemption. She is the only employee, only person, her business could not operate and, therefore, she is excused.

(JUROR NUMBER 73 EXCUSED)

BAILIFF: Juror Number 17, Carol Braswell.

SIDEBAR:

THE COURT: Good morning.

JUROR NUMBER 17: Good morning, Your Honor. I have two children, eight and ten.

The reason I've come up is because my husband just started a new job and he's only been there six days, so it would be hard, or wouldn't be too good for him to take any time right now. Can I reschedule, give him a little more time on the job before ---

THE COURT: You can be postponed. It's your call. It's a good week to take a chance that you wouldn't be picked, but it's your call.

JUROR NUMBER 17: I don't think that I can take the chance this week. Happy to do it, but this is really not a good time.

THE COURT: I understand.

(SIDEBAR CONCLUDED)

THE COURT: Number 17 has a situation where she needs to postpone her service so that she can arrange childcare. Do you (clerk) want to give her a time now? Do you (juror) have a time that you think would be better?

JUROR NUMBER 17: Just ---

THE COURT: Next time you might have to serve the whole five days.

JUROR NUMBER 17: I don't know what to

do.

THE COURT: It's a gamble, a roll of the dice.

CLERK: November 4th.

THE COURT: That gives you at least a month to arrange it.

JUROR NUMBER 17: I'll roll the dice.

(SIDEBAR CONCLUDED)

THE COURT: Okay. She's going to remain.

BAILIFF: Juror Number 173, David Webb.

SIDEBAR:

THE COURT: Hello, Mr. Webb.

JUROR NUMBER 173: How you doing?

THE COURT: Okay. And you?

JUROR NUMBER 173: Fine, sir, just have a bad cold. Judge, I have a conviction for a B&E, breaking and entering, from twenty-five years ago.

THE COURT: I'm sorry to hear that.

JUROR NUMBER 173: I have been straight ever since.

THE COURT: I think that the law

should be changed and that you shouldn't be penalized for that.

JUROR NUMBER 173: I understand.

(SIDEBAR CONCLUDED)

THE COURT: Juror Number 173 is excused for statutory reasons. Have a great day, sir. I hope that your cold will get better.

(JUROR NUMBER 173 EXCUSED)

BAILIFF: Juror Number 45, Len Edwards.

SIDEBAR:

THE COURT: Yes, sir?

JUROR NUMBER 45: My wife works when I am off and then when I'm working she picks up the children from school, on Wednesday and Thursday. Will we be done by then?

THE COURT: It's a gamble. If you're not picked this morning, then you're done. Can you get by this week -- Wednesday will probably be in the ballpark of when we're finished but -- it's a gamble.

JUROR NUMBER 45: I am good for today and tomorrow but -- (pause).

THE COURT: You don't want to take the chance?

JUROR NUMBER 45: Well, no.

THE COURT: When do you want to serve? Because if we postpone it, then that's going to be the time you serve.

JUROR NUMBER 45: Well, if I could get my calendar and look at my work schedule, I could ---

THE COURT: November 4th.

JUROR NUMBER 45: Okay.

THE COURT: And that's when you'll have to serve.

JUROR NUMBER 45: Okay.

(SIDEBAR CONCLUDED)

THE COURT: Number 45 will be transferred to November 4th. Know that that will be your term, sir.

(JUROR NUMBER 45 TRANSFERRED)

BAILIFF: Juror Number 6, Patricia Anderson.

SIDEBAR:

THE COURT: Good morning.

JUROR NUMBER 6: Good morning. I am not sure if you were talking about offices that -- in our office, I'm a one-person department.

THE COURT: But it's a company. Like the man with Knights, it's -- the provision is for people who are self-employed, who ---

JUROR NUMBER 6: I didn't know that it was going to be a weeklong court.

THE COURT: Do you want to post-pone it or do you want to take a chance?

JUROR NUMBER 6: No, I'll take a chance.

(SIDEBAR CONCLUDED)

THE COURT: Number 6 will remain.

BAILIFF: Juror Number 179, Andrew Williams.

SIDEBAR:

THE COURT: Mr. Williams, good morning to you, sir.

JUROR NUMBER 179: I was once charged with larceny. It was the Town of Mount Pleasant, but I don't feel that I would be a very good juror because I ---

THE COURT: Well, in this case Moncks Corner is not a party. You'll have an opportunity to respond to questions later. So that doesn't disqualify you, sir. Thank

you, sir.

(SIDEBAR CONCLUDED)

THE COURT: Number 179 will remain.

BAILIFF: Juror Number 176, Jacobe Wheat.

SIDEBAR:

JUROR NUMBER 176: Good morning.

THE COURT: Good morning, how are you?

JUROR NUMBER 176: I'm fine. I just need to postpone this another week or so. I told the lady that I have some issues.

THE COURT: Like I told some of the others, you may want to take a chance. It's a pretty good week to ---

JUROR NUMBER 176: This week is just not -- I've got fibromytosis and Thursday I've got an appointment with my neurologist.

THE COURT: Can you reschedule it?

JUROR NUMBER 176: No, I've had the appointment for a long time and I wouldn't be able to get another one ---

THE COURT: It's your decision. People do that all the time. But if -- it's your call. If I postpone it, you'll have

about a month to -- it will be November 4th.

JUROR NUMBER 176: I need to keep that appointment.

THE COURT: Okay.

(SIDEBAR CONCLUDED)

THE COURT: Number 176 has a doctor's appointment worked into his work schedule, so November 4th will be his time. Good luck to you, sir. I hope all goes good with your doctor's visit.

BAILIFF: Juror Number 120, Autumn Morse.

SIDEBAR:

THE COURT: Yes, ma'am?

JUROR NUMBER 120: I am a nursing student and I have classes on Tuesday and Thursday. If I stay, I have to -- I'd need an excuse, otherwise they rate it as non ---

THE COURT: Okay.

(SIDEBAR CONCLUDED)

THE COURT: Number 120 will need an excuse -- if she is picked on the jury, we can give it to her today so that she can give it to her -- she's a student and she needs it for that reason.

CLERK: Yes, sir.

THE COURT: She will remain as a potential juror.

BAILIFF: Juror Number 53, Brandy Gaskins.

THE COURT: If Juror Number 120 is not picked, I will excuse her for the rest of the week. I'll do that for her.

SIDEBAR:

THE COURT: Ms. Gaskins, how are you?

JUROR NUMBER 53: Hey. I just wanted to let you know that I am moving to Texas, like next week. I have a job opportunity, it's my first big girl job and I'm -- if I'm picked, I -- there's just a lot going on in my head, planning the move and all that and packing and ---

THE COURT: Is it a permanent move?

JUROR NUMBER 120: It is, yes.

(SIDEBAR CONCLUDED)

THE COURT: Juror Number 53 is about to be noneligible. She's moving to Texas next week. I am going to excuse her.

Good luck. I hope you have a good experience in Texas.

JUROR NUMBER 53: Thank you so much.

(JUROR NUMBER 53 EXCUSED)

BAILIFF: Juror Number 134, Robert Putti.

SIDEBAR:

THE COURT: Mr. Putti.

JUROR NUMBER 134: Your Honor, I actually should have stood when you were talking about the business exclusion. I am the single person in the business.

(SIDEBAR CONCLUDED)

THE COURT: Juror Number 134 qualifies for the single business, single person. I am going to excuse him.

(JUROR NUBMER 134 EXCUSED)

BAILIFF: Juror Number 145, Dorothy Scarborough.

SIDEBAR:

THE COURT: Hi, Ms. Scarborough.

JUROR NUMBER 145: I have severe osteoarthritis and I'm on a lot of pain medications, it's hard for me to sit up for more than a couple of hours. I try not to

take the pain meds but I have to take them and when I do I can't -- it's just that I'm not real clear to drive, think.

THE COURT: And that is your status, always?

JUROR NUMBER 145: It has been for too long. It's not that I don't want to serve. I just don't know ---

THE COURT: Are you being treated by a physician?

JUROR NUMBER 145: Yes, sir.

THE COURT: Okay.

(SIDEBAR CONCLUDED)

THE COURT: Juror Number 145 is excused for statutory reasons.

(JUROR NUMBER 145 EXCUSED)

JUROR NUMBER 145: God bless you.

THE COURT: God bless you, ma'am.

(SIDEBAR WITH SOLICITOR)

THE COURT: Juror 111, Ms. Milford. Could I see you for just a moment?

SIDEBAR:

THE COURT: I'm sorry to bother you, ma'am, but were you previously convicted of being a habitual traffic offender?

JUROR NUMBER 111: Yes, sir.

THE COURT: I'm sorry but that would disqualify you.

JUROR NUMBER 111: I didn't know.

THE COURT: That's okay.

(SIDEBAR CONCLUDED)

THE COURT: Juror Number 111 will be excused for statutory reasons. Have a great day, ma'am.

(JUROR NUMBER 111 EXCUSED)

THE COURT: Number 147, Mr. Scull, could I see you for just a minute?

SIDEBAR:

JUROR NUMBER 147: Yes, sir?

THE COURT: Were you previously convicted of burglary?

JUROR NUMBER 147: Yes, sir.

THE COURT: That would disqualify you.

JUROR NUMBER 147: Okay.

(SIDEBAR CONCLUDED)

THE COURT: Number 147 will be excused for statutory reasons.

(JUROR NUMBER 147 EXCUSED)

THE COURT: Any others? (No

response). Thank you. Thank you very much, ladies and gentlemen. How many do we have?

CLERK: Fifty-three.

THE COURT: I am privileged to qualify you, to find that you are qualified. I look forward to working with some of you this week. Some of you are -- and I've talked about how important your service is. So what has happened now is that you've been qualified to be a judge with me.

Also, you've taken a responsibility that I sometimes, when assigned to court that is nonjury, that means that I -- will be trying cases to decide the factual issues and to rule on the law. But when I have a jury trial, I do not decide any factual issues because that will be your sole responsebility.

Before you become a little concerned about being a "judge", there is no need to be. Because I can promise you, without any hesitation whatsoever, and make this statement that there is no one in the world more qualified than you to perform this task. And the reason that I say that, let me

qualify that -- and I'll give you an opportunity if you want to try. If you can convince me that there is somebody in the world who can apply your commonsense, your sense of logic and reasoning and your life's experiences better than you can, maybe I would agree with you; but I don't believe that that person exists.

The reason that I believe in this system is the second part. You will have to do that, and you will have to do that fairly and impartially. Now, who will know that? Nobody in this room will but you. That's up to you as to whether or not you apply your knowledge, life's experiences and common sense fairly and impartially. But that's why I say what I say about the jury system, because I find that people do that every single day.

I'm going to tell you something. You may not realize this, but you have spoken volumes about yourselves already. You may say, 'what does he mean by that?' One thing. What stopped you from standing and saying that you have small children under the age of

seven? You didn't hear me ask the gentleman who sat there, 'aren't you kind of old to have small children that age?' I didn't do that. Why? Because he took an oath, just as you took an oath. I accepted what he said as true. But what stopped you from doing that? Because what he said -- because, for you, it wasn't true. So you've already said something about yourself. So, thank you, ladies and gentlemen.

I promise you something. I've been a judge now for almost twenty years. I can tell you that what we do as judges, it won't please everybody. You probably are going to displease somebody with your decision. But the one thing that I have found to be true and consistent with the experience of being a judge is this, if I honor what I just said about you; that is that I apply my common sense, my sense of personal knowledge and reason, my knowledge of the law fairly and impartially, while somebody may not like it and may disagree with it, and I respect their right to do that, I am comfortable with it because I did what I was assigned to do, to

the best of my ability. I just ask that you do the same thing. That is why I believe so strongly in this process, because I find that people do that all the time.

You see, you will make a commitment just as I did when I took this job, you will raise your hand and you will promise to decide the case based on the evidence and the law.

Now, the evidence consists of testimony of witnesses and exhibits that might be introduced through their testimony. That's it. Imagine that? How many times a day do we hear something or read something and make a decision for ourselves whether we believe it or not? I'd hate to guess how many times a day that it is done. Most of the time it's a subconscious process. We don't really say to ourselves, 'I believe that'; though there may be occasions when that's the case.

Certainly during this crises that we're having and we are bombarded with information every day about certain things in our government we have to, if we choose to, decide what we believe about it. You'll do the same thing as a juror. You'll do the

same thing that you do every day in your life, in your business. You'll listen to something and decide 'do I believe that or not?' You, and you alone, will have the responsibility of deciding the true facts of the dispute.

The second part of the oath that you take is to make a fair and true decision according to the evidence and the law.

Well, you don't have anything to do with the law. Just as I have nothing to do with the facts, you'll have nothing to do with the law. You will take the law as I give it to you and apply it fairly and impartially to those facts. When we do that, combine our efforts, because I will give you the law as I believe it to be fairly and justly applied in this particular case and then you will follow it. Whatever the decision is, it is.

One thing for sure, if we honor the commitment that we make, then the result will be the results intended by this process. I will tell you right now -- I promise you that I am not totally naïve. I understand that we are all human and anything that man has

devised is capable of error. I am not saying that this system is perfect, please don't hear me say that. I am not saying that at all. But we can sure try for perfection. That is left up to each one of us. If we make a mistake, then there -- in your situation, there is no one that is going to review that. But you're not going to make a mistake. You're going to honor the oath.

If I make a mistake, there is a review process that they can check to see if I've read a law properly or not.

But don't worry that there is not a review. Because, as I said, there is no way to review something that you are being honest and fair about. Don't worry about that.

Also don't worry about the fact that you may -- in some states the jury is involved in sentencing. This is a criminal dispute but you -- you don't have to concern yourself about that at all because you'll not be involved in that at all. The only situation in this state is a capital murder case, where I try a capital murder case. So you will not be involved in any sentencing. That is my

job as a matter of law. So you can rest assured as to that. All you are going to decide is the true facts of the dispute and render your decision.

I look forward to working with you. You know, there are a lot of people that are involved in this process. We have persons -- and have already met some of them. Mrs. Brown, of course, is here represented by Mrs. Tucker and Ms. Hill. There are here, they serve -- they're wonderful assistants. Mrs. Brown is a fabulous clerk. We are fortunate to have someone with her experience in that job. We are blessed with that. She has a multifaceted job and she can't be in every place, so she has persons who assist her and represent her office here.

There are also persons wearing burgundy garbs right now. We have a gentleman who used to serve in that capacity, he was a Clemson fan and I used to think how wonderful it was that he had to wear that Carolina color. I used to tease him about it. He always had his Tiger paw tie on with the jacket or his Tiger paw IPTAY pin. But, uh,

this week -- this weekend -- I am a Carolina fan, and it was a tough weekend.

Nevertheless -- (pause). Those persons are bailiffs. That is their legal title. I call them friends, because they are friends both outside of this job and in this job. I'd hate to try a case without their assistance. You will find them extremely helpful because they will be your liaison with the court. Anything you need, please do not hesitate to ask them for assistance or share any concerns or questions that you may have. They will bring any questions you may have to the proper person's attention and then we will address those things. Clearly important.

Mr. Harris standing back there, I've had the pleasure of working with him. I'd love to be able to try a case without having to involve security -- Mr. West was here just a moment ago. You know, -- it'd be great if we could say 'y'all go somewhere else and take care of other things', but we live in the real world. We have to acknowledge that security is a necessity, and I appreciate

their service in order to provide us a safe environment so that we can perform the tasks that we have to do.

There are persons seated inside of this rail -- what scares me is that this young man (indicating young lawyer), we used to go to the same church. I remember when -- he, like my son, who has just celebrated his fortieth birthday, that's one thing that age does make you realize you're getting older. Clearly the persons inside of this rail, they're attorneys.

There are persons who are litigants involved in this process. They are obviously important in this process.

The attorneys have a very important responsibility of presenting the case in a fashion that will assist us in making the decisions that we have to make.

I have -- Mr. (Brian) West is my law clerk. I appreciate his being here. He has a very important part, as well.

The lady that some of you met when you came up and spoke to me, Ms. Garrison, is a lady that I've had the privilege of working

with for a number of years. I can tell you that we have a team, we are a team.

This really is a team effort. Everybody that we've talked about has a very important job, a very important role in this process of resolving disputes. Ms. Garrison probably has -- with all due respect, I've never been a juror but I hope and pray that some -- right now I am disqualified because, as you heard, I happen to be employed within the walls of a courthouse. That bumps me from service. One day I hope to serve as a juror and I sincerely, really and truly, mean that. My wife has served on a jury -- in fact, a jury (sic) that I tried. That was interesting. My son served on a panel, as well. I hope that one day I will be able to serve as a juror, too.

I doubt that Mrs. Brown would employ me as a bailiff, it might be too hard to teach me some things. I am not sure that I am qualified.

Mr. Harris would surely say that 'you are not qualified to be on security detail.'

But the one job that I will never apply

for is the one that Ms. Garrison does. She has the responsibility of keeping the record -- it is a verbatim record, and that's her job. I can tell you, that is not always easy. Right now, I'm the only one talking -- and she's probably saying, 'hurry up and finish, so that I can quit typing.' But sometimes people get a little angry, a little passionate -- not angry but passionate -- and they start talking at the same time. Imagine the difficulty of listening to what each one is saying, and also having to identify the person who is saying that. I don't want that job, thank you. It's a tough role, one that she does exceptionally well.

And she would tell me -- and we've talked about this, that one thing age has taught me is that -- I can promise in 1973 I probably entered this courtroom thinking, mistakenly, that I had the power to control what a person did or thought. The older that I've gotten, I've realized that we don't have the power to control anybody but ourselves. That's it. If you think about it, that's true. I can tell you right now that I don't do a good job

of controlling me sometimes. I know that I can't control you. I know that. I just ask you, though, if you'll make the same commitment that everybody in this room makes.

And it's the beauty of this process, I'm sure, that none of you -- well, maybe somebody did. Is there anybody here that really, this week, this was the week that they really wanted to be in this courtroom and listen to some judge ramble on? Probably not. It probably didn't make your Top Ten. But you're here and I appreciate that. I know that you didn't make this choice, that you didn't chose to be here but I'd ask that if you're chosen that you do the best that you can, to be the fairest person that you can be, that you will apply your common sense fairly and impartially. I promise you if we all do that we'll have a good job.

The process -- we will start work probably about 9:30 and we will work generally -- I think that about a three-hour work period, about six hours of testimony, sometimes a little more, sometimes a little less, depending. We take a lunch break

generally about 12:00, 12:30. We take a break -- I'll try to take a break generally about every hour and a half. I find that that is about what people are able to remain focused for without -- I try to keep it to that timeframe, but sometimes we may run a little over or a little less. So we'll take a break in the morning and in the afternoon.

None of you will be required to spend the night in any motel. We are not going to be sequestering you. You'll be able to go home at night.

More than likely most of you will not have to come back again. There is still one case we need to -- but I don't think that we have enough jurors to pick that second case today. So if you are not selected on the jury, just call the number that has been given to you every day after 6:00 o'clock until you are instructed not to call anymore. If the message is to call tomorrow or to come back the next day, then you will know that we need you so that we can pick another jury. If the message says to call the next day after 6:00 o'clock, you will know that is

your day and you won't have to worry about reporting. We won't be calling to say, 'oops, we made a mistake and we're going to need you after all.' We won't do that to you.

The call-in line is one of the beauties of the evolution of this system. Back in 1973, you would have had to come in this morning so that we could pick a jury. The judge might, or might not, have let you leave the courthouse until 2:00 o'clock. You'd have to had to have come back at 2:00 in the afternoon. The next morning you'd have to come at 9:30, notwithstanding that the first trial was still ongoing; then come back at 2:00; the next day, same thing. So you can see that the phone line is a wonderful improvement for your convenience. Obviously if you were coming here every day, twice a day, you couldn't work or do anything else. Now we don't require that you come unless you're needed.

I promise you that should it be necessary for you to come back this week that you wouldn't be here as long as you have been

this morning.

We now have to qualify you in a second qualification, qualify you as to this particular case. As I told one person who expressed a concern about something that has happened in his life, that that is precisely what this second qualification is for.

Unlike the first qualification, where there were some answers to questions that had statutory restrictions, these questions are to help you determine whether or not you feel that you can be a fair and impartial judge.

I use this example and it is probably sounds trivial but it probably says it best. If you happen to see someone or if you happen to see the name of somebody who is your best friend, there is no question that you probably aren't going to be totally fair and impartial in assessing that person's credibility. Also, if it happens to be a person who has lived on your street for ten years, you haven't spoken to them in ten years and don't care to speak to them if they live there ten more -- in fact, when they come out, you go in, then you probably aren't

going to be able to fair and impartial in assessing that person's credibility.

That is the kind of thing that these questions are, it's to help you make the decision of whether you feel that you can be a fair and impartial juror in this matter.

The ultimate decision is whether you can be a fair and impartial juror and that is what these questions are designed to help you determine.

The overall process -- obviously we have been here since about 9:00 o'clock. If you have to come back, or when you do come back, that would probably only take forty-five minutes. It won't be this length of time, it won't take as long as it has taken this morning. Obviously, if you are not picked in that case then it would be the last time that you would have to come. Actually I anticipate that this will be the only day that you will have to come.

What I am going to do now is that I'm going to give you about ten minutes to take a break. I'll ask you be back in your seats at 11:15 and we will start that second

qualification. Thank you very much.

(BRIEF RECESS)

(DEFENDANT PENN PRESENT)

THE COURT: Thank you, ladies and gentlemen. We are ready now to begin the first case that we have. I am going to identify the caption. The caption identifies the dispute. The first party that I am going to name is the party that is making the claim, which is true in -- in a civil proceeding, we would call the party making a claim the "plaintiff." In this case, a criminal proceeding, the State of South Carolina is the only party who can make a claim in a criminal dispute. The State of South Carolina is making a claim against Mr. David Penn.

The claim -- that obviously means that he has been charged with criminal acts. He has been charged with two criminal acts, he has been charged with the offense of murder and he's charged with the offense of grand larceny. We will talk about that in just a moment.

First, let me introduce to you Mr. Penn.

He is seated at the table to my left. Mr. Penn, good morning. If you would, please stand and face the jury panel for me.

DEFENDANT: (Complies).

THE COURT: Mr. Penn is the gentleman in the beige/yellow shirt. Thank you. You may be seated. Thank you, Mr. Penn.

Are there any members of the jury panel who are related by blood or marriage, who have any business dealings with, who are socially or casually acquainted with, have any connection with Mr. Penn? If so, please stand. (No response) Thank you. There appear to be none.

Mr. Penn is represented by Mr. Groeber. Mr. Groeber, if you would, stand and identify yourself and anyone who will be assisting you, sir.

MR. GROEBER: Thank you, Your Honor. My name is Cody Groeber. I am an attorney with the Public Defenders Office. Sitting with me today, assisting, will be David Schwacke. He is also an attorney in my office. Thank you.

THE COURT: Thank you, Mr. Groeber. Are there any members of the jury panel who are related by blood or marriage, who have any business dealings with, who are socially or casually acquainted with, or who have any connection with or who have ever been represented by Mr. Groeber or Mr. Schwacke? (No response). Thank you. There appear to be none.

Mr. Ashley Pennington is the Public Defender for the 9th Circuit. Are there any members of the jury panel who are related by blood or marriage, who have any business dealings with, who are socially or casually acquainted with, ever been represented by or have any connection with Mr. Ashley Pennington? If so, please stand. (No response).

The Public Defenders Office has offices in Charleston County and in Berkeley County. Are there any members of the jury panel who are related by blood or marriage, who have any business dealings with, who are socially or casually acquainted with, have any connection with anyone employed with the

Public Defender's Office? If so, please stand. (No response). Thank you. There are none.

The State of South Carolina is represented primarily by our Solicitor. Our Solicitor is Ms. Scarlett Wilson. Are there any members of the jury panel who are related by blood or marriage, who have any business dealings with, who are socially or casually acquainted with, have any connection with Ms. Wilson? If so, please stand. (No response). Thank you. There are none.

Ms. Wilson has assistant solicitors, and one of those will be handling this case for her. Ms. Williams, if you will, please identify yourself and anyone who will be assisting you, please.

SOLICITOR WILLIAMS: Thank you, Your Honor. Good morning, ladies and gentlemen. My name is Ann Williams. I am an assistant solicitor with the Berkeley County Solicitor's Office. Seated with me is Colleen Dixon, who is an assistant solicitor. This is Brian (sic) Fenton, who is the case agent in this case, and he worked with the

Berkley County Sheriff's Department. Anita Brown is our paralegal. Thank you.

THE COURT: Are there any members of the jury panel who are related by blood or marriage, who have any business dealings with, who are socially or casually acquainted with, ever been represented by Ms. Williams or Ms. Dixon, or have any connection or acquaintance with any of the persons that she has identified as working with her in this case. (No response). Thank you. There appear to be none.

Are there any members of the jury panel who have any business dealings with, who are socially or casually acquainted with anyone employed with the Solicitor's Office? She has offices in Berkeley County and Charleston County. If so, please stand. (No response). Thank you. There are none.

I am going to identify a number of persons, ladies and gentlemen. If you're related by blood or marriage, have any business dealings with or are socially acquainted or have any business dealings with or are socially acquainted with any of these

individuals, I need for you to stand and share that information.

The following, who are employed with the Berkeley County Sheriff's Office:

Detective Brent Fenton
Neil Johnson
Dean Kokinda
Deputy Amanda Jones
Deputy Chrystal Spence
Deputy James Rogers
Detective Renee Ramsey
Detective Brian Fenton
Sergeant Geno Alteri

Any of those persons? (No response). Thank you. There appear to be none.

The following individuals:

Neil Croft
Thomas Blair
Darrell Hackney
Roger McFadden
Ryan McFadden
Nitesh Dinesh Patel
James Ryan Price
Anne McNeil Stiles

Catherine Stiles

Adrienne R. Hefney with the South Carolina Law Enforcement Division, also known as SLED.

Patty Cobb

Penny Blair

Joan Rivera

Dr. Erin Presnell with MUSC.

Any of those? (No response). Thank you. There appear to be none.

Are there any members of the jury panel who are related by blood or marriage, have any business dealings with or who are socially or casually acquainted with persons employed with the Berkeley County Sheriff's Office? If so, please stand. (No response). Thank you. There are none.

Are there any members of the jury panel who have previously been involved in law enforcement in any capacity, now or formerly? If so, please stand. Yes, sir?

JUROR NUMBER 30: Yes, sir. I am a retired U.S. Marshal.

THE COURT: And would that influence or affect you in this dispute, sir?

JUROR NUMBER 30: It would not.

THE COURT: Would you base your decision on the evidence and the law and would your decision be fair to both sides?

JUROR NUMBER 30: Eugene Koon, Juror 30.

THE COURT: Thank you, Mr. Koon. Are there others? (No response). Thank you. There appear to be none.

The dispute, ladies and gentlemen, that brings us here is framed by these two documents that I hold in my hand. They are what they appear to you to be, pieces of paper. They are called indictments. An indictment is simply a charge against a person.

I am going to share with you what is alleged. It is not evidence but I need to ask you certain questions.

Mr. Penn, in one indictment -- in one indictment, Mr. Penn is accused of committing the offense of murder in that it is alleged that he did, in Berkeley County, on or about October 12th, 2011, with malice aforethought, kill and

murder Kathy Chrastina by means of strangulation and that Kathy Chrastina did die in Berkeley County as a proximate result on October 12th, 2011.

It is also alleged that at that time, in Berkeley County, he did take and carry away property of Kathy Chrastina, valued more than two thousand dollars but less than ten thousand dollars, described as a 2004 Chevrolet Ventura minivan, with the intent to deprive the owner of such property; in violation of the statute which prescribes conduct identified as grand larceny.

I share that with you first of all to find out if any member of the grand jury has heard anything, read anything, if you have any prior knowledge of this dispute. If so, please stand. (No response). Thank you. There appear to be none.

Are there any members of the jury panel who have -- who were related by blood or marriage, had any business dealings with, socially or casually were acquainted with, the individual, Kathy Chrastina? If so, please stand. (No response). Thank you.

There appear to be none.

Are there any members of the jury panel that have ever been involved in a criminal dispute, in that you were either accused of committing an offense, you were the accuser or the person who was -- the result of -- who was involved in or was the subject of a criminal action, or if you were a witness to those, either side. If you've had any involvement at all, please stand. (No response). Thank you. There appear to be none.

Is there anything about the nature of this dispute that you, because of something that has happened to you in your lifetime, or some strong philosophy or feelings that you have because of any teachings, any readings, anything that you believe would influence or affect your ability to fairly and impartially analyze the facts by considering the evidence, applying your common sense, your sense of logic and reason. Once deciding those facts, fairly and impartially applying the law so that your decision would be fair to both sides. If you

feel that you would have difficulty in that process, please stand. (No response). There are none.

Are there any members of the jury panel, member(s) of your immediate family or close personal friends that have ever lived in the Horseshoe Road area of Bonneau, South Carolina? If so, please stand. (No response). There are none.

Are there any members of the jury panel that have dealt with the Solicitor's Office or the Public Defender's Office in either Berkeley County or Charleston County for any reason? If so, please stand. (No response). Thank you. There are none.

Are there any members of the jury panel, or members of your family, who are members of any victims rights of law enforcement organizations such as Citizen Against Violent Crimes, known as Citizens Against Violent Crimes, known as CAVC; Mothers Against Drunk Driving, known as MADD; Persons Empowered to Save Teens, PEST; and similar organizations? If so, please stand. (No response). Thank you. There are none.

Any other specific questions from the State?

SOLICITOR WILLIAMS: Nothing from the State, Your Honor.

THE COURT: Any other specific questions from Mr. Penn?

MR. GROEBER: May we have just a moment?

THE COURT: Yes, sir.

MR. GROEBER: (Sidebar with defendant).

SOLICITOR WILLIAMS: Your Honor, may we ask if anyone on the jury panel has lived on Horseshoe Bend?

THE COURT: I asked about the Horseshoe Road area. I asked that question.

SOLICITOR WILLIAMS: Thank you, Your Honor.

COURT REPORTER: Your Honor, there was a defense witness, Ronnell Freeman, that we didn't ask about.

THE COURT: Thank you. I told you that I'm glad to be on her team. What was the last name?

COURT REPORTER: Freeman.

THE COURT: Are there any members of the jury panel related by blood or marriage, have any business dealings with, who are socially or casually related to Ronnell Freeman? If so, please stand. (No response). Thank you. There appear to be none.

The last question that I have for you, ladies and gentlemen, is basically a -- and it will be contained in the oath that you will take. Is there anything that you've heard about this dispute that would give you any concern about your ability to make a commitment to the State and to Mr. Penn that you at the appropriate time can apply your sense, your common sense, your sense of logic and reason, fairly and impartially in analyzing the evidence. The evidence, of course, consists of testimony and the exhibits that are introduced through that testimony, decide what you believe to be the true facts and then once making that decision to take the law as I give it to you and apply that law fairly and impartially. If you feel that you would have difficulty in performing

that task for any reason, please stand.
(Juror stands).
I am going to ask you come forward, please, ma'am. The attorneys may approach, as well.
BAILIFF: Juror Number 102, Mary Mathews.
SIDEBAR:
THE COURT: Ms. Matthews?
JUROR NUMBER 102: I just did a two-year custody battle, finished in June and I have -- my least favorite people right now are lawyers and judges.
THE COURT: So you believe that you would have trouble participating in a trial?
JUROR NUMBER 102: I would, (affirmative nod).
THE COURT: I respect your opinion.
(SIDEBAR CONCLUDED)
THE COURT: Juror Number 102 will be excused from the trial of this case. If you would, call the number after 6:00 tonight and follow that instruction.

Are there any others? (No response). Thank you very much.

(JUROR NUMBER 102 EXCUSED)

THE COURT: What is going to happen now is that your names are going to be drawn and placed on a list. That list will be handed to the attorneys. Your names will be called one at a time and you will be asked to bring with you your personal effects, to come and stand right here where these chairs are. Stand here, face the attorneys (demonstrating).

First the State will have an opportunity -- each side will have an opportunity to excuse jurors. The State in this case will have five opportunities to excuse jurors, Mr. Penn has ten. They will go through that process.

If they say 'excuse the juror', then you will just return to your seat.

If they say 'seat the juror', then you will be asked to take a seat in the jury box.

We will continue through that process until we have identified our twelve jurors and one alternate. Bear with us. We're

almost there.

Please understand that if one side or the other should excuse you, you're not to take offense. That's the way that it works. Nobody means anything personal by that. Understand that's just how we got through the process until we have selected twelve people and one alternate. Ms. Hill will give us a list and they will call your names.

Are we all ready?

SOLICITOR WILLIAMS: State is ready, Your Honor.

MR. GROEBER: We're ready, Your Honor.

THE COURT: Very well. Ms. Tucker.

CLERK: Juror Number 70, Dylan Hoffman.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat the juror.

(JUROR NUMBER 70 SEATED)

CLERK: Juror Number 120, Autumn Morse.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat the juror.

CLERK: Seat the juror.

(JUROR NUMBER 120 SEATED)

CLERK: Juror Number 39, Steven Demenna.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please excuse the juror.

CLERK: Excuse the juror.

(JUROR NUMBER 39 EXCUSED)

CLERK: Juror 136, Glenn Ramsey, Sr.

(JUROR, WHITE MALE) BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: (Sidebar with defendant), please seat the juror.

CLERK: Seat the juror.

(JUROR NUMBER 136 SEATED)

CLERK: Juror Number 152, Leonard Simmons.

(JUROR, BLACK MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Court's indulgence?

THE COURT: Yes.

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat the juror.

CLERK: Seat the juror.

(JUROR NUMBER 152 SEATED)

CLERK: Juror Number 100, Peter John Maningding.

(JUROR, ASIAN MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat

the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat the juror.

CLERK: Seat the juror.

(JUROR NUMBER 100 SEATED)

CLERK: Juror Number 23, James Caples, III.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: One moment, please.

THE COURT: Yes, sir.

MR. GROEBER: (Sidebar with defendant), please excuse this juror.

CLERK: Excuse the juror.

(JUROR NUMBER 23 EXCUSED)

CLERK: Juror Number 87, Cathy Kirkland.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please excuse the juror.

CLERK: Excuse the juror.

(JUROR NUMBER 87 EXCUSED)

CLERK: Juror Number 55, Susan Gilmore.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat this juror.

CLERK: Seat the juror.

(JUROR NUMBER 55 SEATED)

CLERK: Juror Number 14, Lawrence Bonderer.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat the juror.

CLERK: Seat the juror.

(JUROR NUMBER 14 SEATED)

CLERK: Juror Number 108, Cynthia Meadows.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat this juror.

CLERK: What says the defense?

MR. GROEBER: Please excuse this juror.

CLERK: Excuse the juror.

(JUROR NUMBER 108 EXCUSED)

CLERK: Number 90, Jean La Clair.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please excuse this juror.

CLERK: Excuse the juror.

(JUROR NUMBER 90 EXCUSED)

CLERK: Juror Number 95, Vanessa Lipscomb.

(JUROR, BLACK FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please excuse the juror.

CLERK: Excuse the juror.

(JUROR NUMBER 95 EXCUSED)

CLERK: Juror Number 64, James Heath.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please excuse this juror.

CLERK: Excuse the juror.

(JUROR NUMBER 95 EXCUSED)

THE COURT: Juror Number 96. Harold London, Jr.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: One moment, please. (Sidebar with Defendant), please excuse this juror.

CLERK: Excuse the juror.

(JUROR NUMBER 96 EXCUSED)

CLERK: Juror Number 84, Megan Kassel.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat this juror.

CLERK: Seat the juror.

(JUROR NUMBER 84 SEATED)

CLERK: Juror Number 65, Jardin Hedman.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please excuse this juror.

CLERK: Excuse the juror.

(JUROR NUMBER 65 EXCUSED)

CLERK: Juror Number 86, Stephanie

Kinard.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat this juror.

CLERK: Seat the juror.

(JUROR NUMBER 86 SEATED)

CLERK: Juror Number 141, Louie Roberts, Jr.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please excuse the juror.

CLERK: Excuse the juror.

(JUROR NUMBER 141 EXCUSED)

CLERK: Juror Number 41, Ashley Dingle.

(JUROR. BLACK FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat this juror.

CLERK: Seat the juror.

(JUROR NUMBER 41 SEATED)

CLERK: Juror Number 77, Michael Jacobs.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please excuse this juror.

CLERK: Excuse the juror.

(JUROR NUMBER 77 EXCUSED)

CLERK: The defense has nine strikes. Juror Number 157, Mary Starnes.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat this juror.

CLERK: Seat the juror.

(JUROR NUMBER 157 SEATED)

CLERK: Juror Number 46, Jennifer Elliott.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: One minute, please.

THE COURT: Certainly.

MR. GROEBER: (Sidebar with Defendant), please excuse this juror.

CLERK: Excuse the juror.

(JUROR NUBMER 46 EXCUSED)

CLERK: Juror Number 179, Andrew Williams.

(JUROR, BLACK MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please excuse the juror.

CLERK: Excuse the juror.

(JUROR NUMBER 179 EXCUSED)

CLERK: Juror Number 17, Carol Elizabeth Braswell.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please excuse the juror.

CLERK: Excuse the juror.

(JUROR NUMBER 17 EXCUSED)

BAILIFF: Juror Number 29, Sharon Claiborne.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please excuse the juror.

CLERK: Excuse the juror.

(JUROR NUMBER 29 EXCUSED)

THE COURT: The State has exhausted its strikes.

CLERK: Juror 68, Stephen Hilden-brand.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: Any challenge for cause from the State?

SOLICITOR WILLIAMS: No challenge from the State.

CLERK: Any challenge for cause from the Defendant?

MR. GROEBER: Judge, may we

approach?

(OFF RECORD SIDEBAR)

THE COURT: I will put on the record that I do not find that a sufficient basis to challenge. Seat the juror.

CLERK: Seat the juror.

(JUROR NUMBER 68 SEATED)

THE COURT: Let's pick one alternate. Strikes will be one and two.

CLERK: Jennifer Shillingford, Juror 150.

(JUROR, WHITE FEMALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. SIMPSON: Please excuse this juror.

(JUROR NUMBER 150 EXCUSED)

CLERK: Juror Number 88, Edward Klippi.

(JUROR, WHITE MALE, BEFORE COUNSEL)

CLERK: What says the State?

SOLICITOR WILLIAMS: Please seat the juror.

CLERK: What says the defense?

MR. GROEBER: Please seat the juror.

CLERK: Seat the juror.

(JUROR NUMBER 88 SEATED)

THE COURT: Any Motions from the State regarding the jury selection?

SOLICITOR WILLIAMS: None from the State, Your Honor.

THE COURT: Any Motions from the Defense?

MR. GROEBER: One moment, Your Honor?

THE COURT: Yes, sir.

MR. GROEBER: (Sidebar with Defendant), nothing from the defense, Your Honor.

THE COURT: Very well. Thank you, ladies and gentlemen. Those members of the jury that were not selected, I appreciate your assistance. I am now at liberty to excuse you for the balance of today. Please call the number after 6:00 tonight and follow that instruction. Have a great day. Thank you.

(JURY PANEL EXCUSED)

(JURY PANEL SEATED @ 11:50 A.M.)

THE COURT: Ladies and gentlemen, those of you who were selected, thank you very much for your assistance as well. There are some matters of law that I have to take up now. That's going to work beautifully, because it's time for lunch anyway. We are going to take a little bit longer, so you're going to get a longer lunch break than normal.

I am going to ask you to please come back to your jury room, please, by 2:30 and we will resume the trial at that time.

When you exit, you will exit through the door to your left. You need -- Mrs. Wiggins, you need information?

BAILIFF: Yes, sir.

THE COURT: Before you leave, make sure that you give Mrs. Wiggins or her assistant your information, or her assistant, the information that they need.

Please remember that you've heard no evidence in this case. Please do not engage in any independent research or discussion among yourselves or with anyone else about

this case. Don't permit anyone to talk with you about this case or to talk about it in your presence. Have a good lunch break. You will return directly to your jury room.

When you come back into the courtroom, let me talk to you about the seating arrangements. Mr. Klippi, you have been selected as the alternate juror. That term really doesn't have any significance at this point. If at the end of the trial the first twelve who were selected are able to continue, then you will not participate in the final deliberations. But neither you nor I know the status of those jurors. But neither you nor I know the status of those jurors. So please know that until I excuse you, should that occur -- it is not uncommon for us to use an alternate and that's precisely why we have we have an alternate, because things can happen during a trial. But while you are the alternate, you may occupy either of those chairs on the end of the jury box. They belong to you.

So I would ask jurors, as you come in -- the first twelve of you -- to please leave

the two end chairs vacant.

The only other assigned seat is being occupied by Mr. Hildebrand. He's eligible to serve, as any of you are eligible, of the first twelve are eligible to serve, as -- I call them presiding jurors. They are also known as foreperson, forelady, foreman. Someone has to be selected by you to sign the verdict form on behalf of the panel. The other responsibility is that if there are exhibits that are introduced, you receive those. When the jury has completed its deliberations, then you return those to the court.

There really are -- from time to time there may be some written communication from the jury to the court and it would be your responsibility as the presiding juror to draft that on behalf of your fellow jurors. Other than that, there really are no additional responsibilities.

Any of you are eligible to serve. I can appoint a person to serve as the presiding juror or I can let the jury select their own. I've done it, pretty consistently

for the last twenty years, letting the jurors choose their presiding juror. So you can pick whomever you wish to serve as the presiding juror. It doesn't have to be done right away but at some point, once you have identified that person, I'd simply ask that that individual occupy that seat. Until that is done, anyone may occupy that seat. The only person who is not eligible is the alternate juror at this time unless he is seated on the jury before you make a selection. Again, the only two seats that are off limit are the two on the end that belong to our alternate.

The only person who is not eligible is Mr. Klippi. Any of the rest of you are eligible. In selecting a presiding juror, it's just been my observation over the years that -- I think that the presiding juror, that one of the things that a presiding juror does is to serve as a facilitator to facility discussions. Some persons have a better ability to do that than others. I'll let you decide that. But, as I say, any of you are qualified. If you would take care of that at

some point, I would appreciate it.

Have a great lunch. I will see you at 2:30. Thank you, you may exit now.

(JURY OUT @ 11:55 A.M.)

THE COURT: Anything from the State before we proceed with the *Jackson v. Denno*?

SOLICITOR WILLIAMS: Nothing from the State, Your Honor.

THE COURT: Anything from Mr. Penn before proceeding with that?

MR. GROEBER: No, not at this time, Your Honor.

THE COURT: All right. We had a sidebar concerning Mr. Hildenbrand. It was pointed out to me that there was some concern from Mr. Penn and counsel that Mr. Hildebrand apparently made some intensive eye contact, or what was observed to be intensive eye contact, even what could be categorized as staring at the defendant. The court -- however, the last question that I asked of the jury panel before submitting the panel for selection is was there anything that -- and Mr. Hildebrand, nor anyone else, responded other than the lady that did come

forward and indicated that she had a problem with the court system. She was excused. So I have to rely on his being honest and candid and, therefore, do not find that to be for cause.

Is there anything else that you wish to supplement that with, Mr. Groeber?

MR. GROEBER: No, sir. Thank you for that.

THE COURT: Okay. All right. We will go ahead with the *Jackson v Denno*. Ms. Dixon?

MS. DIXON: Thank you, Your Honor. The State would call Detective Geno Alteri.

(WITNESS TAKES STAND)

GENO ALTERI, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR DIXON:

Q. Good morning, Sergeant Alteri. Can you tell the Court, did you encounter the Defendant, David Penn, in the investigation of this case?

A. Yes, ma'am.

Q. Can you tell the Court, did you question the defendant?

A. Yes, ma'am.

Q. Do you know what date that was?

A. Yes, ma'am, I believe that it was October 15, 2011.

Q. Do you know what time that it was when you questioned the defendant?

A. Sometime after 8:00 or 8:30, somewhere along in there.

Q. And was the defendant in custody during that questioning?

A. Yes, ma'am.

Q. Did you advise the defendant of the nature of the investigation and the questioning?

A. Yes, ma'am.

Q. And what did you tell him?

A. Advised him that we were investigating a homicide that I was called out for.

Q. Who was present during the questioning?

A. I believe that it was Jason Pottinger. He's a deputy with Berkeley County.

Q. And where did the questioning take place?

A. In one of our interview rooms.

Q. Briefly describe that room for us, please.

Q. It is a small room, probably about six foot by seven foot, five by seven, it's got soundproofing on it, audio and video recorded, got two chairs, possibly three chairs, a table.

Q. Do you remember, Sergeant Alteri, if the defendant was wearing handcuffs at the time of his questioning?

A. I don't recall. I would imagine that he was, but I don't recall.

Q. About how long did the interview last?

A. It was a pretty quick interview. I'd say it was probably about an hour.

A. Do you know if the defendant received or was offered any food or beverage?

A. We did offer some -- we asked him what he would like. He asked for some water. We got him some water.

Q. Did the defendant ever request to

take a break during that hour?

A. Not that I recall.

Q. Before you began questioning the defendant, did you advise him of his *Miranda* rights?

A. Yes, ma'am.

Q. And how did you do that?

A. I used the *Miranda* form that we have when we take them into the interview room.

SOLICITOR DIXON: Permission to approach, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Sargent Alteri, can you identify that for us, please?

A. Yes, ma'am. This is the *Miranda* form that we fill out.

Q. Is that the one that you used with Mr. Penn that day?

A. Yes, ma'am.

SOLICITOR DIXON: Your Honor, could we mark this as a court's exhibit?

THE COURT: State's Exhibit for the purpose of this proceeding?

SOLICITOR DIXON: Yes, sir, Your Honor. That would be State's Exhibit 15?

COURT REPORTER: State's Exhibit 1 for this hearing. Then if you need to remark it during the trial, we need to mark a clean copy.

SOLICITOR DIXON: Okay. Thank you.

(SO ENTERED AS STATE'S EXHIBIT 1)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Can you tell the court -- did you read the *Miranda* warnings off of that form to the defendant?

A. I believe so, yes. Sometimes I will read it, sometimes I will have them read it. I believe that I read it to this one.

Q. Could you read them for us now, please?

A. Yes, ma'am. (Reading):

"*You have the absolute right to remain silent. You do have not to answer any questions or give a statement, and this fact cannot be used against you.*

If you do answer questions or give a statement, anything that you say can and will

be used against you in a court of law. You have the right to consult a lawyer of your choice before answering questions and also have him present while being questioned.

If you wish to talk to a lawyer or have him present but are unable to hire -- afford or hire a lawyer, one will be appointed to represent you free of charge.

If you decide to answer questions or give a statement without having a lawyer present representing you, you have the absolute right during the interview to stop answering questions and remain silent.

There is a phrase there that "I have read this Miranda *warning and form and my signature will represent my understanding and competence."*

Q. Did the defendant indicate that he understood those rights?

A. Yes, ma'am.

Q. And did he initial that on that paper?

A. Yes, ma'am.

Q. And where did he do that?

A. Right above the word "Subject".

Q. Did you make any promises to the defendant before he gave you any information?

A. No, ma'am.

Q. Did you threaten him in any way?

A. No, ma'am.

Q. Did he indicate whether or not he did wish to speak with you without a lawyer present?

A. Yes, ma'am.

Q. And what did he say?

A. He wanted to talk with us.

Q. Did the defendant appear to have any trouble understanding the rights as you read them to him?

A. No, ma'am. Once I read him the warning, I request that they initial next to it only if they understand it.

Q. And did he do that?

A. Yes, ma'am.

Q. And did you do that?

A. Yes.

Q. Did the defendant appear to be, to you, under the influence of any drugs or alcohol during the time of questioning?

A. No, ma'am.

Q. Did he say anything to you about the consumption or use of drugs or alcohol that day?

A. Yes, ma'am, he indicated that he did earlier that day. I asked him if he was still under the influence of that and he said 'no.'

Q. At any point did the defendant ever ask to stop the interview?

A. No, ma'am.

Q. Did he ever ask to speak with an attorney?

A. No, ma'am.

Q. To your knowledge, was his statement freely and voluntarily given?

A. Yes, ma'am.

Q. Is how you -- this was previously marked as State's Exhibit 49. Do you recognize what this is?

A. Yes, ma'am.

Q. Can you tell the court what that is, please?

A. This is a recording of the interview.

Q. Have you had an opportunity to

review that disk?

A. Yes, ma'am.

Q. Do you know if that is the same one that you saw?

A. Yes, ma'am.

Q. How do you know that?

A. I initialed and dated the CD.

Q. When you reviewed the disk, was that a true and accurate copy of the interview that you had with the defendant?

A. Yes, ma'am.

Q. Did any alteration appear to have been made?

A. No, ma'am.

Q. Is that the entire interview?

A. Yes, ma'am.

SOLICITOR DIXON: Your Honor, at this time we would ask that State's Exhibit 49 be ---

THE COURT: Why don't we have it identified as -- for identification purposes have it referenced as State's 49 (sic). I think we can stipulate and agree that the State has had the benefit of State's 49 presented for my review, and I have reviewed.

Any objection to proceeding in that fashion?

MR. GROEBER: No, Your Honor.

THE COURT: Or from the State?

SOLICITOR DIXON: No, Your Honor.

THE COURT: The court has reviewed State's Exhibit 49. It really is not necessary to introduce it at this time. I have had the opportunity to watch it and to review a transcript of that interview; which was provided to everybody, as I understand.

SOLICITOR DIXON: Thank you, Your Honor. Just one more question.

THE COURT: Sure.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Did the defendant do any writings or drawings during your interview?

A. Yes, ma'am. I had -- or I requested him or asked him if he could tell me where the victim's body was at. He told me that yes, he could. I asked him to draw me a diagram of the residence, showing the location of the victim's body.

Q. And was he able to do that?

A. Yes, ma'am.

Q. Thank you.

SOLICITOR DIXON: Nothing further.

THE COURT: Thank you. You may cross-examine, Mr. Groeber.

MR. GROEBER: Thank you, Your Honor. May I have a moment?

THE COURT: Sure.

MR. GROEBER: Just a few questions, Your Honor.

THE COURT: Sure.

CROSS EXAMINATION

BY MR. GROEBER:

Q. Sergeant Alteri, I want to ask you a little bit more about -- he said that he was under the influence.

A. Yes. He said that he'd smoked some crack earlier that day.

Q. Did he tell you what time that was?

A. If my memory doesn't fail me, I'd say that it awes probably around 3:00'ish.

Q. In the afternoon?

A. Yes, sir.

Q. And he said that it was crack?

A. Yes.

Q. When were you having this particular

conversation about his earlier intoxication with crack?

A. During the interview.

Q. During the interview?

A. Yes, sir.

Q. What exactly did he say when you asked him if he was still under the influence?

A. To the best of my recollection, he just said that he was no longer under the influence. He said that he -- that he felt fine enough for the interview.

Q. Were there any other statements that the defendant made other than what is captured on State's Exhibit 49?

A. If there is, I don't recall them. When I got to the office, he was already inside the interview room. I believe that he was taken to the detention center by somebody else, so the whole time that I was talking to him was in the interview room.

Q. So there were no other statements, that he made to you, other than what is shown on State's Exhibit 49?

A. Not that I recall.

MR. GROEBER: One moment, Your Honor.

THE COURT: Sure.

MR. GROEBER: (Sidebar with defendant), nothing further from the defense, Your Honor.

THE COURT: Redirect?

SOLICITOR DIXON: Nothing further, Your Honor.

THE COURT: You may come down.

(WITNESS STEPS DOWN)

THE COURT: Any additional witnesses from the State?

SOLICITOR DIXON: None from the State, Your Honor.

THE COURT: All right. Do you wish to present any witnesses?

MR. GROEBER: Nothing, Your Honor.

THE COURT: Okay. I will be happy to hear from you, any argument that you might have.

MR. GROEBER: Your Honor, we think that certainly the video speaks for itself.

THE COURT: I have reviewed it. I think that the video clearly reflects that while he was certainly very emotional at the time, and that was noted throughout, and

understood, I find the statement to be freely, voluntarily, knowingly and intelligently made. Clearly he was given his *Miranda* warnings. Clearly he indicated a desire to talk to the police, to make the statement, and I find it to be his statement, by the preponderance of the evidence or greater weight of the evidence.

All right. Do we have any other matters?

SOLICITOR WILLIAMS: No, Your Honor. Just with regard to that piece of evidence, Mr. Groeber has been kind enough to redact two portions, which we have agreed on; which is the part where the defendant refers to a prior CDV on his record and the part where he refers to a life sentence.

THE COURT: Correct.

SOLICITOR WILLIAMS: In trial, we will have Sergeant Alteri identify State's Exhibit 49 but we will mark the redacted version as 49-A, and just ask to publish 49-A pursuant to our earlier hearing, so that the jury doesn't know that there is any difference.

THE COURT: Is that correct, Mr. Groeber?

MR. GROEBER: It is, Your Honor. I just want to follow up that the objections that we have to other parts of the video, so that we have it on the record.

THE COURT: Okay.

MR. GROEBER: We would argue that these particular time periods, and I will quote what the defendant says, are not relevant and are substantially more prejudicial than probative.

Specific between two minutes and twenty-eight seconds (2:28:00) and two minutes and thirty seconds, (2:30:00), the defendant says that *"there were two more people that I wanted to hurt. I don't know why."*

There is also a statement between fifteen minutes and zero seconds (15:00:00) and fifteen minutes and ten seconds (15:10:00), where the defendant states, *"I took it out on Kathy when I should have went and found them -- I'm telling you guys that I wanted to hurt them, too. It ain't right."*

And finally, Your Honor, with regards to these, we'd argue that these are substantially more prejudicial than

probative.

Between twenty-eight minutes and eleven seconds (28:11:00) and twenty-nine minutes and thirty-seven seconds (29:37:00), that's a little longer portion and more discussion. From our perspective the defendant says -- he was asked the question, (reading): *"You said something earlier about some guys."*

He response in this colloquy, *"I was at the point where I wanted to hurt them."*

So I just want to put that on the record. I believe that Your Honor would rule against me but, uh, I do want that preserved for the record.

THE COURT: Thank you. And the position you -- because we've discussed this at length during our status conference that we held on Friday. And the State's position is relevant for what reason, Ms. Williams?

SOLICITOR WILLIAMS: Your Honor, the State's theory of the case is that Mr. Penn was very upset with the fact that his girlfriend was seeing somebody else and he wanted to hurt his girlfriend, his girl-friend's sister and the person that she was

seeing. He said that repeatedly. Our position is that it goes directly to the claim that we think is going to be made; it goes to voluntariness, it goes to motive, it goes to intent. We think that it is a third party provocation situation where he is upset with somebody else and he takes it out on Kathy Chrastina. In fact, those are his words exactly, *"I shouldn't have taken it out on Kathy."* So we think that it is important to the case because it goes to motive and intent.

THE COURT: All right. Anything else?

MR. GROEBER: Just one thing, Your Honor. I apologize that I didn't say it earlier. I think that we argued that the State is trying to essentially transfer malice or transfer motive. We don't think -- for those reasons, we don't think that exists. But we understand the court's rulings. Thank you.

THE COURT: Thank you. I appreciate your position. I just believe in this particular situation -- clearly, as I

understand from our communication, there's going to be the request. And we're way ahead. We're talking before it happens. But -- that this is not murder but, rather, manslaughter. I think that it goes specific to malice, malice aforethought. The jury could consider that to be very probative information. While I acknowledge the potential prejudice, I think that the probative value, to show murder versus manslaughter, is quite significant given the comments specifically. Many of those comments were not solicited by law enforcement but, rather, him responding and indicating a sense and a presence that he had that I think could be probative. I don't it necessarily says one thing or the other but I think that a jury could use it in drawing inferences, reasonable inferences, therefrom if they chose to do so. So I would allow it under a 403 analysis.

I think that it has significant benefit for the State in presenting its theory. Therefore, I will permit it.

All right, anything else?

SOLICITOR WILLIAMS: Not with regard to the *Denno*. We have the pending 803(3) Motion, the State's Motion in Limine.

MR. GROEBER: And I've got several things that we could probably dispense with quickly, at your pleasure. You just tell me when ---

THE COURT: You want to take the 803, the *Garcia* issue?

MR. GROEBER: Sure.

THE COURT: Okay, let's take up that first at this point.

MR. GROEBER: It is our belief that the State intends to introduce testimony of certain witnesses who would testify about what the victim told them days -- I think the days before she ended up being killed. To the extent, I believe, that she would say that she was fearful of Mr. Penn -- and I am not sure that I am phrasing this right, exactly, because I haven't heard them because -- because or in relation to her intention to fire him. We think that that would be hearsay. We don't think that -- and I will -- we think that *Bell v. State* is the controlling case, and in *Garcia* where

essentially they discuss -- the quote is, that if the "reservation and the conviction is to have any effect, it must be understood to narrowly limit those statements to conditions and not belief. So we think that probably it's appropriate that they could say that she was scared. I think that the law is pretty clear on that. But I think that as to the reasoning for the fear, we think that the *Vail, Garcia* all clearly state that it would not be admissible to show why she was fearful.

THE COURT: Okay.

MR. GROEBER: Thank you.

SOLICITOR WILLIAMS: And, Your Honor, I would agree.

THE COURT: Okay.

SOLICITOR WILLIAMS: I would just distinguish his understanding of the fact this way, the reason why ---

THE COURT: Let me just -- as long as we are not getting into the -- because I think truly *Garcia* identifies it and, really, I think it gives a clearer picture than even *Vail* does. But the -- the case that they

cite in their rationale is *State v. Reynolds*, which is the Ohio case. I think that it is fairly clearly stated there. I think that it is okay to say that she was fearful. But it stops at that point. You just can't give why she might be fearful; which makes perfect sense to me. It's a present sense impression and that's all we're talking about. Whether it was justified, whether she had a legitimate basis for it is really not an issue. So as long as that is the extent of it, I will allow that statement. I think anything beyond that would be hearsay.

SOLICITOR WILLIAMS: Just for clarification, there are three statements -- well, what we are not going to introduce is that the reason she was afraid of him was because of the way that he behaved.

THE COURT: I don't care if she was afraid of him because she just simply didn't like the way that he walked, or anything else. It just doesn't make any difference.

The only thing that we have, really, assuming that -- in this case, my only

concern and question would be, and I don't need to try your case for you because I haven't tried a case in twenty years or more. I just wonder why you want to get into an area that is borderline when you've got a case where there is no question that he did it and it doesn't really matter whether ---

SOLICITOR WILLIAMS: Just saying that she was ---

THE COURT: I understand your battle. I am just wondering why you want to fight that little tangential issue that is not really that significant. But you try your case, Solicitor, the way that you want. You're a better solicitor than I am. So -- that's fine.

I am going to allow the fearful, but that's as far as it goes. Be careful with it, though. That's all that I'd ask. Make sure that your witnesses are careful because I think that it could create some problems down the road.

SOLICITOR WILLIAMS: Thank you.

THE COURT: Again -- the significance, I understand your position and

argument, I just really -- it seems to me to be not very significant, but that's your call, nor mine. All right. What else? Anything else?

MR. GROEBER: Your Honor, we made a standard *Lyle* Motion. I think we are okay on that but just want to cover the record.

This also goes back to our argument with regards to statements in the confession about wanting to hurt someone else. I believe that there is also a statement that the State intends to introduce where ---

THE COURT: Yes.

MR. GROEBER: --- my client -- and we've have the same objections based on that.

THE COURT: I've reviewed that voice mail. Clearly those statements, if introduced, would again go to -- to prove that same issue of his malice -- malice, intent, his state of mind at that point in time. I think that it is very probative as to that issue.

MR. GROEBER: Thank you.

THE COURT: Further confirmatory. Additionally, I think that it supports his

position in his statements, so -- but the voice mail wasn't -- the voice mail is dated before the statement?

SOLICITOR WILLIAMS: Yes, Your Honor.

THE COURT: That's -- clearly that lends credence to -- I understand that there may be some cumulative issue but, because it is before then, it is confirmatory of that being his state of mind and his response. So I think that it has significant probative value for that reason. Okay.

SOLICITOR WILLIAMS: And just out of an abundance of caution, because I need to make sure that I instruct my witnesses, there is a separate statement. I am not sure if Mr. Groeber is opposed to it or not. It's where she is talking about her intent to fire the defendant. In *Garcia*, they let in a statement that he was intending to meet a victim. I am not sure if that is being objected to, but I just want to make sure what the court's ruling is so that we make sure that we don't make a misstep with our witnesses.

THE COURT: Are you making an objection to her statement of intent to fire him?

MR. GROEBER: Yes, Your Honor. That's the whole -- that's why she was fearful.

THE COURT: That's correct. I am not going to allow that.

SOLICITOR WILLIAMS: Thank you, Your Honor.

MR. GROEBER: Just a few more things, Your Honor. We talked on Friday about decomposition testimony, testimony about, uh, by SLED experts.

THE COURT: Right.

MR. GROEBER: I think that we resolved SLED experts but obviously testimony about a coroner -- a similar type discussion, we would be asking the State to refrain from doing that, because we think that it would be substantially prejudicial.

THE COURT: As I understood from our conversation, I think my indication was that that may be the subject of some reply testimony should it become necessary to

challenge that there was not an adequate investigation and that sort of thing. It certainly explains why they couldn't have done those things. But unless and without that challenge, I don't think that it has any probative value, other than that there was one part ---

SOLICITOR WILLIAMS: The only place where that might come in, Your Honor, is with the MUSC pathologist. There are certain things that she could not determine in terms of the strangulation. It was hard to see the petechial, for instance, because of the decomposition. So it was hard for her to tell how long that it took for the victim to die, and other issues.

THE COURT: And I think one of the issues with that was 'could he have done something beforehand to stop or get help to her?' I just ask you to tread lightly with that. I don't think that it is necessary. I don't think that there is any question that she was strangled. How long it took for her to die, at this point I don't know if that is significant. It may become necessary on

cross-examination. We'll just have to wait and see. But right now, I'd say stay away from that in your direct examination part. Okay?

SOLICITOR WILLIAMS: Yes, sir. Thank you, Your Honor.

MR. GROEBER: The next thing, Your Honor, is two stipulations that we have. One is testimony about the usage of the victim's credit cards, or lack of usage; which will come in through Detective, uh, -- the detective, so that we don't have to call the bank people.

THE COURT: Okay.

MR. GROEBER: We also have a stipulation about handwriting that the defendant wrote, actually a note.

There is a stipulation that ---

SOLICITOR WILLIAMS: May I approach, Your Honor?

THE COURT: Sure.

MR. GROEBER: We've agreed to those stipulations. I don't have anything written out about the bank and credit card usage. I just plan to elicit that on cross.

THE COURT: Well, at some point I will publish any stipulations.

MR. GROEBER: Thank you, Your Honor.

THE COURT: Okay.

MR. GROEBER: We would move to sequester the witnesses, with the understanding that the victim's family would be allowed to stay.

THE COURT: Certainly, and also the chief investigator. Who will that be?

SOLICITOR WILLIAMS: It will be Detective Fenton, Your Honor.

THE COURT: Okay.

SOLICITOR WILLIAMS: And just for clarification, there are two Fentons -- and they are identical twins: Brent and Ryan. They both are on the witness list. To make matters worse, there are two identical twin lay witnesses; named Larry and Patty Cobb. So if you start thinking that you are see double ---

THE COURT: I am. But -- well, we need to get -- I was told -- I don't know, I've never thought it through. I assume that the retina and the fingerprint identification

would be the same; while identical twins, there still would be a distinction there. Maybe we need to have a fingerprint scanner for each one to come in. I don't think we need to go that far.

MR. GROEBER: Two more substantive issues that we have, Your Honor. One is that I believe that the State intends to call the victim's sister to testify. My understanding is that she testified about identifying some jewelry in the defendant's possession. We argue that is not relevant. He's charged with grand larceny based on the theft of a car. That's what the indictment states. The theft or the alleged theft of these personal items, we think, is irrelevant.

THE COURT: What is the State's position?

SOLICITOR WILLIAMS: Your Honor, after the defendant murdered the victim, he stole lots of things. He stole her jewelry, he stole her credit cards, he stole her check book. It is our contention that he went over there angry at the world, then when she didn't give him any money that he decided to

murder and rob her. So it goes to motive.

The only thing that the victim's sister would identify are those very personal pieces of jewelry that were found in the lunchbox on the defendant's person when he was arrested.

THE COURT: Okay. That's the beauty of an indictment. You don't have to consult with anybody but you chose to limit it to the van; so I sustain the objection. Thank you. You could have very easily have put it in there. Didn't have to. But you did. I am going to -- you can be upset with it if you ---

SOLICITOR WILLIAMS: I am not upset.

THE COURT: Well, your body language reflects otherwise. Thank you very much, Ms. Williams, I sustain the objection. That ends that argument. Thank you.

I would find it, for any other purposes, extremely prejudicial and therefore the prejudice outweighs the probative value under a 403 analysis. So don't try to go another way with it. Thank you.

MR. GROEBER: Two other things from me, Your Honor. One is that I -- and I make this at every trial now and -- some judges say this, some don't, I don't remember, it's -- it's the description that a trial is a "search for the truth." We would object to that instruction, either in opening instructions or in closing instructions. I point directly to State v. Alessa (phonetic) in ---

THE COURT: Are you talking about the charge that we used, that was developed because there was an appeal on that, that 'your mission is to determine the truth regardless of the source of the evidence'? That's been affirmed.

MR. GROEBER: No, Your Honor. It's the -- I've heard some judges say, and again it's been a while since I've appeared in trial with you, but they describe a trial as -- the words are "a trial is a search for the truth." We believe that a trial is a determination of guilt beyond a reasonable doubt. That's why we make that argument.

THE COURT: You can argue -- I

don't use that terminology.

MR. GROEBER: Thank you, Your Honor.

THE COURT: Thank you. Other than I do give that instruction in my charge that 'when you evaluate the evidence, it doesn't matter whether you believe all of a witness or part of a witness because your mission has been to determine the truth regardless of the source of the evidence.' In that sense it's an indirect saying that it's a search for the truth. But I think -- I think specific language has been approved by decision after we've started using it. So -- okay. Anything else?

MR. GROEBER: I think that we have gotten a picture set. We'll object at the appropriate time.

THE COURT: Okay.

MR. GROEBER: Our objection would be that they are substantially more probative than ---

THE COURT: We've gone through some pictures, that we selected. I think the State whittled it down, but we'll deal with those -- we will do those at the time that it

becomes necessary. I will be happy to do that.

MR. GROEBER: Thank you, Your Honor. The only other thing is that I -- I know that there are some things that my client wanted to put on the record.

THE COURT: Yes, I have ---

MR. GROEBER: Shall we do that now?

SOLICITOR WILLIAMS: We stipulated to the chain of evidence.

MR. GROEBER: Yeah.

THE COURT: I think he said that he was not going to call but -- but just so that it is clear, you are -- the chain of evidence, you're not requiring them to establish every link of the custody chain?

MR. GROEBER: No, Your Honor. We are not going to require that.

THE COURT: Anything else before I hear from the defendant?

SOLICITOR WILLIAMS: Nothing from the State.

THE COURT: Okay. All right, Mr. Penn, you had some matters that you wanted to raise?

DEFENDANT PENN: Yes, Your Honor, this is referring to the upcoming trial and I would greatly appreciate it if you could assist me in getting these comments on the record, please.

This was -- I first read it to Ms. Kennedy when she was my attorney. She was my attorney when I first wrote this.

(Reading): *"Ms. Patricia Ann Kennedy, it would be greatly appreciated if you could assist me with the above-stated. I have complied with your every request for information, my every analyses and so forth since I've been doing my research in the law library, independently gathering documents from the internet and have learned that if I am not successful at trial, on direct appeal or on my post-conviction relief following appeal, then I would not be able to present any evidence or concerns that were not presented to the court or ruled on by the court.*

I am writing these concerns to you in a brief that I want you to present in pretrial Motions to the court, so that these

concerns will be on the record; thus, preserving them on the record to be later reviewed and ruled upon by the judicial system as to their constitutionality.

Thank you in advance for your cooperation and understanding, I state under penalty of law that I am not an attorney or well-versed in the law and any mistakes in the following areas are not intended to hinder or disrespect the Court in any manner. It is presented because I truly believe that I am entitled to present these matters because my liberty is at stake."

I previously addressed these concerns to Ms. Patricia Kennedy and addressed it to her. I wanted to present it to the defense to be sure that my concerns and requests would be documented on the record. I have since been assigned Mr. Groeber and not having an opportunity to know him or to know if the changing from Ms. Kennedy to Mr. Groeber, I wanted the court to know my concerns about the case.

I am now addressing those same concerns to Mr. Groeber so that he and the

Court are aware that these concerns do exist and have existed from the early beginnings of my incarceration and detainment.

I feel that I need to address these concerns to Mr. Groeber and the Court by presenting in writing these concerns and voicing these issues and concerns to Mr. Groeber, both written and vocally.

(Reading): *As previously stated to Ms. Kennedy, my defense is not that I did not commit the crime but the state of mind when the crime was committed. I feel that due to the mitigating circumstances in my case that pleading guilty to temporary insanity, based on my addiction and use of crack cocaine for a period of several days prior and on the day of committing my crime that my capacity to appreciate the criminality of my conduct or to conform my conduct to the requirements of the law. I was substantially impaired because of the continuous use of cocaine prior to the crime.*

I state under oath that I have a matter pending in the State of South Carolina, County of Berkeley, and I believe

that it is my Constitutional right to present the above-stated matters and concerns before this court and to have these matters ruled on. To have questions answered and these matters preserved on the record for later judicial review.

My first concern is a plea of guilty due to temporary insanity. It has been my desire to enter a plea of guilty but temporary insane based on the facts that I was not in a sane state of mind due to my crack addiction and that I was under the influence of crack cocaine.

Being under the influence of crack cocaine made me unable to appreciate the criminality of my conduct and to conform my conduct to the law. Crack is an addiction that makes a rationale person unrationale.

The act of murder is with malice aforethought. The presence or absence…" -- I'm sorry. (Reading resumed): *The presence or absence of malice distinguishes murder from manslaughter. A plea to voluntary manslaughter under the circumstances surrounding this case seem to me to be an*

option. An intentional killing committed under the circumstances mitigates the homicidal -- the homicide, although they do not justify it.

The mitigation facts are that at the time I was and had been using crack cocaine for several days, nonstop, and was not in a rationale state of mind.

Me and the victim had a working relationship and a personal friendship. Had I not been under the influence of crack cocaine, had I not been under the influence of…" ---

THE COURT: Mr. Penn, excuse me for interrupting you. You're reading from a document, sir?

DEFENDANT: I am reading what I wrote, (affirmative not).

THE COURT: Verbatim?

DEFENDANT: Yes, sir,

THE COURT: All right. That's fine. You don't need to do that. We will just mark that entire document as Court's Exhibit 1. It's your submission and now you can -- if you want to elaborate on any part

of it, you can, but you don't need to read it to us.

DEFENDANT: Thank you.

(SO ENTERED AS COURT'S EXHIBIT 1)

THE COURT: So we stop that process. Submit it to me and I will have it marked as Court's Exhibit 1. It has been so marked for purposes of this record. Okay?

DEFENDANT: Yes, sir. Your Honor, I did have -- I presented this to Mr. Groeber and asked him ---

THE COURT: It has been admitted as Court's Exhibit 1. I will review it in detail. What else?

DEFENDANT: Your Honor, I would like to address also the fact that after receiving my case, uh, and my case -- my case files, having been asking for it for some time, there was a lot of evidence that was not in my case file that I should have had access to.

THE COURT: To be candid with you, Mr. Penn, that's an issue that really and truly has nothing to do with this case today. That's the case that you alluded to in your

Court's Exhibit 1, the post-conviction relief procedure which you obviously have knowledge of, because you've mentioned it. That is when you'd raise that issue. It has nothing to do with this proceeding today.

You've been assigned extremely competent counsel. Ms. Kennedy, I have tried cases with her over the years. Mr. Groeber, I've tried cases with him. Mr. Schwacke, I've tried cases with him both as a public defender and as a solicitor. I'm also practiced law against Mr. Schwacke as a solicitor. So I am extremely comfortable in saying that you have extremely competent counsel.

You have alluded in your statements that you are not a lawyer, and it's obvious by your statements that you are not. I don't mean that critically. I just mean that it is obvious. That's the problem with reading -- you're very competent, you can read, you understand and you obviously comprehend. You've been very lucid in your responses and very coherent about what you are talking about. But the problem with the law is not

in what you can read but in the application. It's also in the parts that you don't read that we learn through experience have some meaning. For instance, you made an observation that you're not a lawyer. You have lawyers.

We have an oath that we take and one of the issues -- one of the issues that you have raised is insanity. Insanity is the one thing that I know of that a defendant has the burden of proving. That has to have expert testimony. I am familiar with conversations -- Mr. Groeber, I believe, had an evaluation done -- and there is no one who will establish that for you. I can tell you that I've tried a case, it was a capital murder case, where that issue was presented by a competent, very competent expert. There is no question that it can affect and it can be a permanent effect, cocaine, extensive and prolonged cocaine usage. But that has to be presented through expert testimony. It can't be presented through you. You're a lay person and you are not qualified to present that. That would require expert testimony,

and you wouldn't be able to testify to that.

So as officers of the court, they can't make that representation? Why? Because it would be improper. They can't present something to the jury that can't be established under the rules of evidence that apply. So that's -- those are subtleties that laypersons cannot understand. Those are strategies that I don't need to hear today. You don't need to disclose those today.

That is something between you and your lawyer that ought to be preserved inviolate at this point and that can only be changed -- and the only time that I know that a lawyer, either Mr. Schwacke or Mr. Groeber, can disclose anything that you've said or anything discussions that you've had is when you file a post-conviction relief. Otherwise, they're bound by their oath to protect and preserve the attorney-client privilege, which is your privilege. So you -- you don't need to discuss that. Once you disclose those things, unfortunately that's another part of the law, then it becomes open and is fair game and you don't need to do

that at this stage of the game.

With respect to your Constitutional rights, those are being preserved by your lawyers. I am confidence of that. Insofar as the mitigation aspect and the voluntary use, there is no testimony -- as I understand and I didn't hear any from you -- that somebody held you down and forced crack cocaine into you, but rather that you chose to do that for a period of time; which is pretty common conduct for a person that is addicted to crack cocaine. I've seen it a number of times.

As I told your lawyers, and I'm sure that they have told you, voluntary intoxication does not, under our law, does not mitigate or minimize the intent issue. I will tell you this. I found that -- the only time that it does and that it is relevant, and there's no question about this, because I was reversed in a death penalty case that I tried in Sumter, because I -- I carried it over to the mitigation stage of a capital murder case. Can't do that. If we were in a capital murder case, you could present that

evidence in the second phase, but it would have nothing to do with the first phase because it does not in any way mitigate the intent. The law is clear. It is not relevant. As your lawyers have told, and as you have heard that term used, we restrict the testimony to relevant testimony. I made some determination here today. I will give you an example. The State wanted to produce -- and Ms. Williams may be right, ultimately, but at least for today I agree that the testimony concerning the jewelry is not relevant to grand larceny of the motor vehicle. I respect Ms. Williams and I don't quarrel with her assessment, she is entitled to do that. All lawyers do that. Somebody has to make that call. I made the call.

I would make the call insofar as your voluntary usage of crack cocaine that it has no relevance whether you're guilty of the crime of murder or manslaughter. Okay?

So that's why they are not presenting it. It doesn't have anything to do with whether or not they are vigorously providing for your defense.

What else do you want to add?

DEFENDANT: I wanted to ask then that if I don't get certain things on the record and then it comes to my appeal, then they're not going to be on the record.

THE COURT: Well, first of all, you can't put anything on the record because that would be hybrid representation. I am allowing you to present this for purposes of review, that this was an ongoing concern that you had in the appropriate stage, which would be a post-conviction relief matter. It has nothing to do with this particular proceeding.

With all due respect, you differ but you have no basis to differ other than the fact that you just believe strongly what you believe based on what you've read. But your opinion -- and I will give you an example. There is a case -- and this lawyer, most of us know, I've had him testify, and -- he wasn't one of my teachers but he teaches at the law school, and I think that he still teaches, John Freeman. He was called to testify in a case as to whether or not

something was legally correct. It was his opinion -- and guess what the Supreme Court said? "That doesn't matter. He's just a lawyer. The jury has to make that call, he doesn't get to say that."

You're in that same boat. You can say it all that you want but that doesn't make it so. I have to make the call.

The bottom line is that if you want to testify, that's your business. But therein lies the issue that we now have a problem, because you know that you don't have to testify but that if you testify that you open yourself up to wide-open examination. I don't know whether that's good or bad. I will leave that to you and your lawyer. I will not make the mistake that former judge -- and I knew him as a judge, practiced before him. Judge Harris made a statement and an observation about a person testifying or not testifying. I am not saying anything. You know and you've discussed that. But for you to put this stuff on the record, it has to be through testimony, sir. So -- that's up to you. I am not telling you what you can

testify to or not testify to. You'll make that call later. Okay?

DEFENDANT: Yes, sir.

THE COURT: Okay?

DEFENDANT: Yes, sir.

THE COURT: Okay. Thank you. What else?

DEFENDANT: I mean, these things that I have written did come out of a law book, so ---

THE COURT: I don't care whether they were written in stone. It doesn't make any difference. You can testify to anything that you want to.

I am not going to let you put something on the record of a ruling, because you're not a lawyer. You can't be that. You have lawyers.

I have tried a case in this very same courtroom by somebody who wanted to represent themself. I think that I had five hearings where I tried to discourage him from doing it. To his credit, the jury stayed out about five or six hours in deliberation. They convicted him.

It was so amazing -- I just tried one in Charleston about six months ago. When I asked the guy, we were preparing for closing arguments, I said -- you could see it in his face and I said, 'Now, you understand why I told you that it wasn't a good idea.' Because it moves really fast. That's where your not being a lawyer, not being trained, is a detriment because you don't have time to think about it.

These lawyers have done it so much that they are anticipating it, they know -- they've investigated your client. I used to tell my clients that 'if you think that all I've done in your case is the time that we have spent together, I got news for you. It's like an iceberg, the very top of the iceberg. The rest of it comes through years of experience and just knowing what is going to come up and knowing what not to do and what to do.' Those are strategies that you don't read in a book, I can promise you that.

I appreciate your position and I can't stop you -- you can testify to anything that is relevant, you can put that on the

record. But not through any kind of Motions filed by you in hybrid representation. I've submitted your Court's Exhibit 1. That may contain some things that have merit sometime later. I don't know.

There's a lawyer sitting in here that we went through a similar discussion with him. His client wanted to fire him. I refused to. The jury acquitted him. And I shouldn't have done this, I need to have been bigger than this but I couldn't resist it, I just couldn't. I looked at him when I excused the jury and I said, *'Do you still want to fire your lawyer?'* He just smiled and said, *"No, sir!"* That was the end of his case.

You just need to understand that there is a time and a place for everything and post-conviction relief isn't now. Thank you.

Anything else?

DEFENDANT: So it doesn't matter that Ms. Kennedy got relieved from my case -- that doesn't have to come in now?

THE COURT: Doesn't have a thing

in the world to do with this. Ms. Kennedy is not involved in the case.

DEFENDANT: Not now, sir.

THE COURT: Well, did you want her to be relived?

DEFENDANT: I made a Motion for her to be relived, which got continued and I never ---

THE COURT: Did you want her to be relieved?

DEFENDANT: Yes.

THE COURT: Okay. Well, you got your wish. You didn't even have to make a Motion. Thank you, sir.

DEFENDANT: The way that she relieved was not right.

THE COURT: However she was relived, you now have Mr. Groeber and you have Mr. Schwacke. You can raise any complaints that you want to against them, but I'd suggest that you not do that now -- but that's up to you. Okay?

DEFENDANT: Okay.

THE COURT: Okay?

DEFENDANT: Okay.

THE COURT: Anything else?

DEFENDANT: No, sir.

THE COURT: Anything from the State?

THE COURT: Anything from the defense?

MR. GROEBER: No, Your Honor. Thank you, though.

THE COURT: Thank you. Let's be at-ease until -- let's be back at 2:15 and we will bring in the jury at that time.

MR. GROEBER: Thank you, Your Honor.

(LUNCH RECESS)

(DEFENDANT PRESENT)

THE COURT: Please let the record reflect that Mr. Penn is present. Anything from the State before we bring in the jury?

SOLICITOR WILLIAMS: No, sir.

THE COURT: Anything from the defense?

MR. GROEBER: No, Your Honor.

THE COURT: Okay, we are waiting on one juror.

MR. GROEBER: My client just let me know that there were a couple of pages that

we meant to be marked, as well.

THE COURT: Very well. We will mark that as Court's Exhibit 2.

(SO ENTERED AS COURT'S EXHIBIT 2)

THE COURT: While we are waiting -- and thank you for putting in the supplementation.

The court wants to make one further observation about your claim of temporary insanity. One of the things that we know -- in fact, John Grisham made a lot of money writing a book, one nonfiction book, about the effects of prisons on persons with mental issues; what happens to persons who are simply detained and not treated. They just progressively worsen. As I alluded to -- and my court reporter and I were talking about it, because she was my court reporter in the trial of the case that I mentioned to you about the expert that testified to the psychological and permanent damage from continued cocaine use. It was extremely interesting.

I would note that according to your statement, assuming the accuracy of the

statement, which I have reviewed, your testimony is that the day or and the previous day of your statement you used crack cocaine. Also, as the record will support, you've been incarcerated since that day, since the day that you gave that statement. As I understand and have asked your attorney, you've not received any medical treatment since incarceration -- at all; is that correct?

DEFENDANT: That's right, sir.

THE COURT: Yet you have managed to establish and write a very lucid memorandum on your behalf; which reflects further the court's observation that really there is no basis for your attorneys to raise any issue, notwithstanding their own independent evaluation, which we don't need to go into at this point. He has disclosed the results, which has further confirmed what I concluded and what I have observed and my position that it couldn't be raised properly under our Rules. Thank you, sir. Appreciate that.

Okay. All right. We have all the jurors. Is the State ready to proceed?

SOLICITOR WILLIAMS: The State is ready, Your Honor.

THE COURT: Is the defendant ready to proceed?

MR. GROEBER: We are, Your Honor.

THE COURT: Let's bring in our jury.

(JURY IN @ 2:21 P.M.)

BAILIFF: Your Honor, our foreperson is Juror Number 86, Stephanie Kinard.

THE COURT: All right. Thank you, I appreciate that. Thank you very much, ladies and gentlemen. I hope that you had a good lunch. We are now ready to resume the matter that we started this morning.

Ms. Kinard, as I understand, you have been selected as the presiding juror; is that correct?

JUROR NUMBER 86: Yes, sir.

THE COURT: Thank you very much. Thank you, ladies and gentlemen. Of course, that will be your seat for the remainder of the trial.

I would ask you now to give your attention now, please, to Ms. Hill as she

administers your oath.

(WHEREUPON JURY SWORN)

THE COURT: Thank you very much, ladies and gentlemen. You now have become a judge with me. Now you and I will work together to resolve the dispute which you -- in which you just accepted that duty and responsibility.

I want to reiterate and remind you of something that we said when we qualified you. That is that each one of you is extremely qualified to perform the duties and responsibilities associated with that assignment. So rest comfortably that you've brought everything that you are going to need to accomplish that when you walked into this courtroom.

Each one of you will be expected to apply your common sense, your sense of logic and reasoning when you're instructed to analyze the evidence in this case. You will use those talents that you have developed in your life to determine what you believe to be credible and believable. Once you determine that, then you'll take the law and apply that

law fairly to those facts and report that decision. When you've accomplished that at the conclusion of this dispute, then both the State and Mr. Penn will have had a fair and impartial determination in this process.

I thank you for your willingness to do that.

You also brought something else, which I think is equally important to your common sense, your life's experiences, your sense of logic and reasoning. Each one of your brought an open mind. We didn't talk about that specifically but if you recall -- in fact, I think the last question that I asked, and one juror stood, you saw me excuse that juror who expressed some concern, is was there anything about this dispute that would give you any problem in making the commitment that you just made. None of you indicated that there was.

Basically what you said was, 'No, Judge. I have an open mind. I haven't predetermined anything. I haven't decided anything. There is nothing about this case that would even cause me to get to that

point. I would urge you and remind you that your responsibility that you just accepted requires you to maintain that until the court gives you an instruction to begin your deliberations.

Now, the last thing that I will tell you during the instruction phase, which is the last portion of this process is when you may start deliberating. So until then, keep that open mind. It is important for a number of reasons. Number one, the law says that you are not going to do that. Number two, the commitment that you've made to the parties -- because what you've said is that 'I need to go through the entire process before I begin to resolve this dispute.' That's critical, because while you will only hear evidence in one portion, the evidentiary portion, there are three other parts.

You will hear from the attorneys twice, once before you hear the evidence and once after you've heard the evidence. In just a moment both sides will have an opportunity to address you through counsel. They will give you what we call an "opening

statement." It's an overview of the dispute, wherein they may talk about some of the legal issues and they may talk about some of the evidence that they expect you will hear. I am confident that you will find those remarks very helpful to you as we go through the evidentiary portion of this process.

At the conclusion of the case, that is after you've heard all of the evidence, they will speak to you again in what we call closing arguments. Unlike opening statements, you will have heard the evidence and now it's appropriate for them to discuss that evidence with you and to suggest reasonable inferences that you may draw from that evidence. Obviously those remarks will be extremely helpful when you begin the process of deciding this case. That is, analyzing the evidence, deciding the true facts and applying the law.

Their remarks as officers of this court are very important. Please give them your attention, and I know that you will. But please remember something, that their remarks, just as may remarks in the closing

when I give you the instruction on the law or at any time during this proceeding, including presently, should never be considered evidence by you. The evidence will come through the testimony of the witnesses and exhibits. It is that witness testimony and the exhibits that are introduced that you will ultimately analyze.

The evidentiary portion -- in fact, this format is the same whether we proceed in the Circuit Court in a civil dispute or a criminal dispute, it doesn't make any difference. But there are several differences that are quite significant in a criminal dispute versus a civil dispute.

In a criminal dispute only one party has any burden to prove anything at all. Mr. Penn, who is accused of these criminal offenses has absolutely nothing to prove or disprove. He has no responsibility to present any evidence, he doesn't have to say anything, he doesn't have to do one thing because the law that I will charge you will tell you and instruct you that you -- that when a charging agency, such as the State of

South Carolina, makes these accusations, that agency alone has that responsibility. So you will look solely to the State to prove its case. That's what this dispute is about. Your analysis will be whether or not you're convinced -- when you are instructed to begin your deliberations, you will be asking yourself, 'Am I convinced that the State has established each element of the crime charged, to be entitled to a verdict of guilty?' Because that is what a verdict of Guilty means, it means that that jury analyzing the evidence in that case, in applying the law, was convinced as to every element of that crime to the requisite standard. Therein lies the other major difference in a civil dispute versus a criminal dispute.

In a civil dispute the typical burden of proof is called the preponderance of the evidence or the greater weight of the evidence. Simply stated, it is a probability standard of is it more likely so than not.

Not so in a criminal dispute. It's more than that. It's more than one being

probably guilty. It is proof beyond a reasonable doubt.

Now, I will instruct you on reasonable doubt and what that term means in the instructions portion, but I will tell you now that a reasonable doubt is that doubt that would make an honest, conscientious juror who is searching for the truth in a case to hesitate to act, take some action.

So that is what you will be doing. You will be applying that standard to each of those elements. And when you analyze it, you will be asking yourself, 'Am I convinced that that element has been established?' If it has, then you move to the next one, and so on until you complete all of them.

If at any point in analyzing a particular crime (sic) you say 'I am not convinced to that standard', and that is a collective decision, then the State has failed to meet its burden of proof. Why? Because the State has to prove every element to that requisite standard. That is precisely what a not guilty verdict means. A not guilty verdict means that the jury

assessing the verdict (sic) in that case was not convinced as to each element of that crime and, therefore under the law, in a criminal dispute that jury is instructed to return a verdict of not guilty. That is precisely what I will instruct you.

So that is what we will be about, to determine whether or not the State can meet its burden of proof in this particular case.

So the State, having the burden of prove, goes first. You will hear all of the State's evidence.

While I indicated to you that Mr. Penn doesn't have to prove or disprove anything at all, has no responsibility to present anything for your consideration, he still has the right to do that but it has to be after the State has presented its entire case; another very obvious reason why you wouldn't make a decision, because you have to hear all of the evidence, obviously, before you can possibly decide any case or change that position of having an open mind.

More importantly than that, it's because the process -- you really would

shortcircuited it or, stated another way, you would have violated the oath that you took, because you've said that you will not decide this case until the court gives you that instruction. So, please remember that.

During the instruction portion we will talk more about reasonable doubt and I will define for you the two charges and give you th4e elements of those charges. I will give you some more instruction on the law. Then at the conclusion, you will be instructed to retire and then apply that common sense, that sense of logic and reasoning that has helped you and served you so well during your life; in analyzing the evidence and in deciding what you believe to be the truth.

It's an honor to serve with each one of you as a judge and I appreciate very much the commitment that you've just made to this commitment, to this process, to the State, and to Mr. Penn. I know that they look forward to talking with you now.

Now, Ms. Williams or Ms. Dixon, you may proceed with your opening statement.

SOLICITOR DIXON: *"Anger, drugs and*

women. They don't mix." Those are the words of David Penn. He used those words while admitting to law enforcement that he killed Kathy Chrastina on October 12th of 2011.

Kathy was a widow. She owned her own painting business. She used to run it with her husband. When he died in 2009, she needed help. You will hear from a friend of Kathy's, Thomas Blair, who also knew the defendant, and he knows that Kathy hired the defendant to work for her in that painting business. But you will also hear, from the defendant in his own statement, that he became "unreliable" due to his drug use.

And you will hear from Kathy's friends that she was afraid of him.

Now, the Defendant is charged with murder. In South Carolina, "murder" is defined as the unlawful killing of another with malice aforethought.

Malice simply means ill will or hatred.

Aforethought just means before. There is no specific amount of time, not an hour or a day, that is required for that ill

will or hostility to have formed. All that is required is that the malice existed just before and during the time that David Penn killed Kathy Chrastina.

Now, when we talk about malice and we talk about aforethought, you've heard a lot of people talk about common sense today. The State is going to ask you to apply that common sense in deciding whether that malice existed just before and during that time that David Penn killed Kathy Chrastina.

You are going to hear testimony from the defendant's own statement, you'll be able to hear and see that. That statement will tell you that the defendant went to Kathy's house on October 12th. That at some point while he was there that he made a decision, that he made the decision to begin choking her. Then he made the decision to take her from the dining room of her home into the living room. At that point he unplugged the cord from her own laptop and he wrapped it -- not once, not twice but three times -- three times around her neck before tying it tightly and leaving her facedown on the floor.

Then you are going to hear that David Penn went to Kathy's purse and he took items from her purse: credit cards, a checkbook, her cell phone and the keys to her vehicle; before leaving her home, locking the door behind him and driving off in her van.

Next you are going to hear that three days later, on Saturday October 15th, that the defendant began making statements to people around Moncks Corner. He said things like, *"I did a bad thing." "I killed Kathy."*

It's based on these statements and law enforcement investigation that led them to find Kathy's van, abandoned in Bonneau. You will hear that DNA testing on that van indicated that David Penn was the driver. You will hear that when he was arrested that he had he keys to that van in his possession. Because of that, the defendant is also charged with grand larceny. Grand larceny is the taking or carrying away the property of another with the intent to deprive them, to convert it to your own use.

We will also have to prove that the value of the van was between two and ten

thousand dollars ($2,000 and $10,000). You will hear testimony about the value of the van.

You will also hear that it was only after they discovered that van that they were able to find Kathy; still in her home, facedown on the floor, with that cord wrapped around her neck.

There is other evidence in this case that points to the defendant's guilt that we will bring forth. You will hear testimony from a manager of a local hotel where the defendant checked in after Kathy's death. You will hear that police officers searched the dumpster at that hotel and found a note that began with, "I didn't mean to do it…".

You will also hear that on Saturday morning before he was arrested that the defendant went to Walgreens, and we will show you the surveillance video. He spoke to a manager there and indicated that he needed to get into the trash because he'd lost his debit card. But when police searched the trash the next day, they found not the defendant's credit card or debit card but

Kathy's, her checkbook, her cell phone and a man's gold bracelet engraved with the name "Lannie." That was her dead husband's.

Ladies and gentlemen, we are also going to bring forth the woman that David Penn was so angry at. It wasn't Kathy Chrastina. You will hear about it in his confession with law enforcement. The woman he was so angry at was his ex-girlfriend, Penny Blair. She is going to come and testify today. She's going to tell you how they had broken up. She's going to tell you, and you will be able to hear, voice mails that the defendant left for her that Saturday. In those voicemail, in the defendant's own words, he will say that it was because he was so angry at her -- and the new man in his life, -- that that is what drove him to kill Kathy.

As I said, there was a conversation that the defendant had with law enforcement and you will hear that. You will hear in the defendant's own words say that he was so angry at all the things going on in his life, so angry at his ex-girlfriend and her new

boyfriend that he took it out on Kathy and that he shouldn't have.

Once you've seen and listened to the video, listened to all the testimony, we will have proven to you beyond a reasonable doubt that David Penn murdered Kathy Chrastina and then stole her van.

Thank you.

THE COURT: Mr. Groeber.

MR. GROEBER: Thank you, Your Honor. May it please the court?

THE COURT: Yes, sir.

MR. GROEBER: Excuse me while I get settled, (arranging podium, arranging papers on podium). Okay. We are going to have to ask you to set aside your emotions, your anger, your sadness, your pity. The question for you to decide is 'what crime did he commit?' And to decide if he is guilty of murder or of manslaughter, you've got to weigh the evidence. Evidence is what people sitting in that witness stand say, or other evidence admitted through their testimony. You've got to weigh, listen to, hear what the State presents to you to convince you beyond

a reasonable doubt that Davis Penn acted with malice aforethought.

Another way that I think that you can talk about malice aforethought is a premeditated, cold-bloodied killing.

What is the evidence that you will see of premeditation. I will submit to you that there is no evidence of premeditation. There are no text message, no threats to the victi7ere is no testimony from a co-conspirator, any witness, that David Penn threatened Ms. Chrastina. There is no evidence that this was a planned robbery, no evidence that this was a planned burglary. In fact, he is not charged with burglary, breaking into her house. He is not charged with robbery, with taking stuff from her by force.

What other evidence will you see that suggests premeditation? The state or status of the house. You will see pictures of the house in this case. I want you to look carefully. The house is not in disarray, it is not "torn apart." You will see, too, the weapon that was used. It is a

weapon that was on hand. It was on the scene. Mr. Penn didn't bring a weapon to use against Ms. Chrastina. He didn't bring anything that he could use as a weapon against Ms. Chrastina.

The other factor, really issue, in the case is going to be malice. Ms. Dixon talked with you a little bit about that. She described it as ill will, an evil intent. The judge will talk to you at length about malice in the jury instructions after you hear all the evidence.

I submit to you that another way to think about malice is cold-bloodedness. I want you to think about those words. To contrast, hot-bloodied. The law calls that the "heat of passion." And when a person kills someone in the heat of passion, on adequate provocation, our law in the state of South Carolina defines that as manslaughter, voluntary manslaughter. It doesn't mean that the killing was not intentional. The killing was still intentional. But it means that it was done under the heat of passion. It is anger that you can't control.

You will hear Mr. Penn, from the stand, talk about he lost control. You will hear evidence from him how he lost control and how he did not mean to do it.

He's not saying that he didn't mean to actually kill her. He's saying that he didn't intend that when he got over there, he didn't intend it when they stated to argue.

You will hear too what provoked him into such a rage. There was a word and an act, a word and an act said out of anger, frustration and maybe even fear. A word and an act that I have no doubt Kathy Chrastina did not mean. A word and an act that I have no doubt that she would take back if she could. She called my client the N-word, perhaps the worst insult that you can use against a black person. A word so dirty and vile that we don't say it in polite conversation. I won't use that word. I don't feel comfortable using that word.

Then she spit in his face.

His blood boiled and, in a rage, he killed her -- with a cord, still plugged into the wall.

The evidence wills how that he realized the horror of what he'd done, what he did. He took her car, her purse, the credit cards inside of them and he left.

Three days later, his heart and his conscience eating away at him, he confessed. He confessed to the chief of police, to his family, to his friends, to strangers, to two police officers. He confessed after he was read his *Miranda*, and you will see this on the video, after he knew that this would be used against him, after he knew that he was being videotaped and audiotaped, after he knew that you, the jurors in his case, would see it.

Does he try to whitewash what he did in that? No, he doesn't. He took responsebility and he owned up for it.

And it is an emotional confession.

The issue in this case that you have to decide is was this premeditated cold-bloodied murder, was it done with malice aforethought?

We present to you or we maintain that you will not have evidence that proves

beyond a reasonable doubt those two things.

Now, you will have evidence that will arouse your passions, that will make you upset and sad.

At the end of this case, you will hear that Kathy Chrastina was a good-hearted woman. She gave him a job. She loaned him money. She helped him get on his feet.

Why in the world would Mr. Penn kill someone who had been so kind to him?

This will be a hard case. It will be a hard case because you will have to determine if someone killed someone one -- and what we're asking you to do is to listen to the evidence, to make a decision based on the law and the facts. We don't doubt that when you do so that you will render a just verdict in this case and that you will find him guilty of voluntary manslaughter. Thank you.

THE COURT: Thank you, Mr. Groeber. You may call your first witness, Solicitor.

SOLICITOR WILLIAMS: Thank you, Your Honor. The State calls Brent Fenton.

SOLICITOR WILLIAMS: Your Honor, may we approach?

THE COURT: Yes, ma'am.

(OFF RECORD BENCH CONFERENCE)

(WITNESS TAKES STAND)

BRENT FENTON, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Officer Fenton, Deputy Fenton, where do you work?

A. I work for the Berkeley County Sherriff's Office.

Q. How long have you worked there?

A. I've been with the sheriff's office since 2006, I've been a deputy since d2009, 2010.

Q. Were you employed there in October of 2011?

A. Yes, ma'am.

Q. Did you respond to a call at [redacted] in Moncks Corner?

A. Yes, ma'am.

Q. Is that in Berkeley County?

A. Yes, ma'am.

Q. Do you remember about what time that the call was?

A. I believe that we received the call about 5:40 and that I got there about 5:45 p.m.

Q. Do you remember what day of the week that was?

A. I don't recall what day of the week that it was.

Q. Okay. Could it have been October the 15th?

A. Yeah. Yeah, it was October.

Q. Would it refresh your memory to review your report?

A. Yeah.

SOLICITOR WILLIAMS: May I approach, Your Honor?

THE COURT: You may. Mark it for an exhibit for ID, please.

SOLICITOR WILLIAMS: State's Exhibit 55 for identification.

THE COURT: Okay.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. If you could review that.

A. (Upon review), okay.

Q. Was it October ---

A. --- 15th, (affirmative nod).

Q. And, uh, what kind of call was that?

A. It as a possible homicide.

Q. How did you hear about the call?

A. Before it was dispatched, Detective Corporal Brian Fenton called me and asked me to look for a yellow-in-color house along area 17-A.

Q. And did you learn how he got that information?

A. We didn't that far in the conversation.

Q. Were you the first one on the scene?

A. Yes, I was.

Q. What did you do when you got there?

A. I attempted to make contact with the resident. I checked the windows and doors. All the doors appeared to be locked and I couldn't see anything inside through the windows.

Q. Who was the next person on the scene?

A. Deputy Neil Johnson.

Q. What did he do?

A. All right.

Q. What did he do?

A. He checked the doors and windows with me.

Q. Did you eventually gain entry into the home?

A. Yes, ma'am.

Q. How was that accomplished?

A. Deputy Neil Johnson kicked the side door, kicked it open.

Q. At that time were any other officers or any other officers on the scene?

A. Yes, ma'am, Detective Corporal Brian Fenton and Detective Sergeant Geno Alteri.

Q. All right. When you got into the home, what did you see as you walked through the home? Kind of walk us through it.

A. From the side door, when you enter the house there is a laundry room area to the left, there is a kitchen and dining room. When you go inside the kitchen and dining room, to the right there is a living room area. To the right of that is an office

area. Beyond that is some bedrooms and bathroom.

Q. And did you see -- what did you see, if anything, in the living room?

A. In the living room, we saw the body of a dead female with like a laptop power cord wrapped around her neck.

Q. Okay.

SOLICITOR WILLIAMS: Court's indulgence.

THE COURT: Sure.

SOLICITOR WILLIAMS: I show defense counsel what has been previously marked as State's Exhibit 1 through 20.

THE COURT: Okay.

MR. GROEBER: (Review).

SOLICITOR WILLIAMS: May I approach, Your Honor?

THE COURT: You may.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. Corporal Fenton, I am going to show you these pictures. If you could, just look through all of them as a group and tell us if they fairly and accurately depict the scene

as you saw it that night?

A. (Upon review), they do. Yes, ma'am.

SOLICITOR WILLIAMS: At this time the State would offer State's Exhibits 1 through 20.

THE COURT: Any objection?

MR. GROEBER: No objection.

THE COURT: State's Exhibits 1 through 20 are admitted, each being a photograph.

(SO ENTERED AS STATE'S EXHIBITS 1-20)

SOLICITOR WILLIAMS: May we publish?

THE COURT: You may.

SOLICITOR WILLIAMS: Thank you, Your Honor.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. You are going to see some photographs behind you, and I'm going to hand you a pointer. As I ask you question, use this little red dot (demonstrating laser pointer) to show the jury what I am talking about. What is this a picture of?

A. It's the front of the residence as seen from the roadway.

Q. State's Exhibit 2, this is kind of

hard to see.

A. This is the driveway (indicating), this is the house, there was a landing for the side door.

Q. So how many doors -- put State's Exhibit 3 up -- were there?

A. There were three. There was on in the front, one on the side and one in the rear.

Q. This is a little clearer picture, which one is that?

A. This is the side door through which we gained entry. This is a small landing right here.

Q. Though it is not in the picture, show the jury where the front of the house is just so that they can get a ---

A. The front of the house would be over here.

Q. Okay. State's Exhibit 4?

A. This is the backyard, the back door was right here.

Q. And this(displaying State's Exhibit 5)?

A. That is the back door.

Q. If you could skip to State's Exhibit 8, tell us what this is a picture of.

A. This is the -- the front door is right here. There is an enclosed screened-in porch area in front of the front door.

Q. Did you also try to gain entry in through that way?

A. Yes, ma'am.

Q. Why could you not get entrance in through that way?

A. it was locked.

Q. Skipping to State's Exhibit 10, what is that a picture of?

A. It's the front door.

Q. State's Exhibit 11?

A. This is the side of the house with the side door.

Q. Is that the door that you broke into?

A. Yes, ma'am.

Q. Twelve (State's Exhibit 12)?

A. That's just another view of the side, the door that we gained entry through.

Q. I am going to show you State's Exhibit 14. Tell us what that is?

A. This is that side door and this would be the laundry area.

Q. So was that the first part of the house that you saw as you came in?

A. Yes, ma'am.

Q. State's Exhibit 16, please.

A. This was the kitchen area.

Q. Where is the entry way that we just saw, so that we can ---

A. It's over in this direction.

Q. State's Exhibit 17, please. Tell us what that is.

A. Coming in through the kitchen and dining area, that would be the living room area.

Q. And where did you located the body of Ms. Kathy Chrastina?

A. I believe it was behind this table.

Q. State's Exhibit 18?

A. I believe that the kitchen is back in this direction (indicating left side of photograph), and there is an office area, looks like an office area.

Q. State's Exhibit 19?

A. That's the same area, same picture.

Q. And, again, if you could show in that photograph where the body was located?

A. (Indicating), behind this, this table structure.

Q. And, lastly, State's Exhibit 20?

A. That's the front door and the table would be over here (indicating right side of photograph), and the body would be here (indicating middle area of photograph).

Q. Okay. Thank you. Now, what did you do next to secure the crime scene?

A. We exited the residence, had everybody leave and go outside the residence until we had a chance to get a search warrant. We taped off the area and started a crime scene log.

Q. Were you there when the forensics unit arrived?

A. Yes, ma'am.

Q. Were you there when the coroner arrived?

A. Yes, ma'am.

SOLICITOR WILLIAMS: Court's indulgence?

THE COURT: Yes.

SOLICITOR WILLIAMS: (Sidebar with Ms. Dixon), -- please answer any questions that the defense may have.

THE COURT: You may cross-examine.

MR. GROEBER: I have no questions for this witness.

THE COURT: Thank you, sir. You may come down. Thank you, sir.

(WITNESS STEPS DOWN)

THE COURT: Call your next witness, please.

SOLICITOR WILLIAMS: The State would call Dean Kokinda.

(WITNESS TAKES STAND)

DEAN KOKINDA, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Where do you work, Lieutenant Kokinda?

A. I am employed with the Berkeley County Sherriff's Office.

Q. And what are your duties at Berkeley County?

A. I am the lieutenant that is assigned to the forensic services division.

Q. How long have you been employed there?

A. Since 1989.

Q. What do you do in the forensics department?

A. I supervise the day-to-day operations of the forensics unit. I also go to crime scene, process crime scenes. I also process evidence as needed. Analyze finger-prints and compare.

Q. Do you have specific training with regard to those duties?

A. Yes, I do.

Q. What is that training?

A. In regards to crime scene, I graduated from the South Carolina Criminal Justice Academy in 1990; then the Detective Level One course in 1991; completed the crime scene processing school with the Police Technology Management at the University of North Florida; and, most recently as far as crime scene processing, I completed the crime scene processing school at West Virginia

University.

Q. And were you working this capacity o October 15th, 2011?

A. Yes, I was.

Q. Did you respond to a call involving this case?

A. Yes, I did.

Q Where was that call?

A. Our central dispatch advised me to respond to [redacted] in the Moncks Corner area. It's in the county portion. It's not in the town or city, but it is between Moncks Corner and Highway 176.

Q. So is it kinda of out in the country?

A. (Affirmative nod), this was a subdivision with larger lots, like one, two or three acres.

Q. And what did you observe when you arrived at the location?

A. When I arrived, the responding deputies had advised that they'd found a deceased woman inside the residence. They had secured the scene using barrier tape and on-scene detectives wanted to get a search

warrant before we processed the house.

Q. When you arrived at the scene, did you see any signs of a struggle?

A. Inside the residence?

Q. Yes.

A. No.

Q. What did you do when you got there?

A. Once the search warrant was procured, when we executed it, I photographed the residence, looking for any kind of damage from forced entry. Once inside we documented everything that was inside the residence: the body, everything inside the interior of the residence that we collected.

Q. Are you the only one who processed that scene?

A. No. Crime Scene Technician Spence was also there.

Q. Did you arrive first or ---

A. Yes, I arrived first. It was at approximately 7:00 o'clock in the evening.

Q. Ultimately were any prints developed, were any fingerprints developed from the scene?

A. From the interior of the residence,

seven latent lifts were recovered. They were compared to the defendant.

Q. What were the results of those?

A. May I look at my report?

Q. Yes.

SOLICITOR WILLIAMS: May I approach, Your Honor?

THE COURT: You may.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. (Tendering report to witness).

A. (Upon review), of the first seven lifts the first latent lift was not identified with the defendant, David Penn.

The second latent lift actually had two areas of ridge detail that weren't sufficient enough to make an analysis.

The third latent lift was not identified with David Penn; however, the area that was depicted on that lift was not depicted on the known standard of David Penn.

The fourth, fifth and sixth latent lifts didn't contain enough ridge detail to make an analysis.

The seventh latent lift was not

identified with David Penn.

Q. So what does that mean, exactly? We just didn't have enough information to match the prints to David Penn?

A. Yeah. Basically, yeah. And the one area on the known standard of David Penn, uh, wasn't -- it wasn't depicted in the area of the known standard, the latent lift, so we couldn't make an analysis.

Q. When you looked for fingerprints initially, did you know anything about the defendant's relationship with the victim?

A. No.

Q. And when you are searching for fingerprints, if you knew that he had been allowed in that house before would that have affected whether that was an important piece of evidence?

A. Well, you can't age a fingerprint. You know, they last -- it could last anywhere form a day to a week to a month. There are fingerprints that have actually lasted over fifty years. So if somebody have legitimate access to an area where you recover a fingerprint, you can't say whether it was the

fingerprint was made during legitimate access or a criminal intent. You just know that that person was there.

Q. So even if you had found a fingerprint, it could have been when he was there before? When he was allowed to be there?

A. Yes. If he had lawful access, yes.

Q. Now, you said that you took some photographs. I am going to show you ---

SOLICITOR WILLIAMS: Showing defense counsel State's Exhibit 21 and State's Exhibits 23 through 30.

MR. GROEBER: (Review).

SOLICITOR WILLIAMS: May I approach, Your Honor?

THE COURT: Yes, you may.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. Showing you photographs, (tendering). If you could go through this stack of photographs, all of them, and tell us if they accurately and fairly depict the scene as you saw it that night.

A. (Upon review), yes, they do. These are photographs that I took.

SOLICITOR WILLIAMS: At this time we would move to admit State's Exhibit 21 and State's Exhibits 23 through 30 into evidence.

THE COURT: Any objection?

MR. GROEBER: We would object to State's Exhibit 24 and 25 based on previously made arguments.

THE COURT: State's Exhibits 24 and 25 -- may I see those for just a second?

SOLICITOR WILLIAMS: (Tenders to court).

THE COURT: (Upon review), okay. State's Exhibits 24 and 25 are photographs that we previously have had discussion about, at length, concerning the evidentiary issues surrounding those. We will place the specific objection on the record at the first break, and the court's ruling on that. But subject to counsel's objections, State's Exhibits 24, 25 and -- 21, 23, 26 through 30 are admitted.

State's Exhibits 21, 23 and 26 through 30 are admitted without objection. State's Exhibits 24 and 25 are admitted subject to the objection of counsel.

(SO ENTERED AS STATE'S EXHIBIT 21)

(SO ENTERED AS STATE'S EXHIBIT 23)

(SO ENTERED AS STATE'S EXHIBIT 24
OVER OBJECTION OF DEFENSE COUNSEL)

(SO ENTERED AS STATE'S Exhibit 25
OVER OBJECTION OF DEFENSE COUNSEL)

(SO ENTERED AS STATE'S EXHIBIT 26)

(SO ENTERED AS STATE'S EHXIBIT 27)

(SO ENTERED AS STATE'S EXHIBIT 28)

(SO ENTERED AS STATE'S EHXIBIT 29)

(SO ENTERED AS STATE'S EHXIBIT 30)

SOLICITOR WILLIAMS: Thank you, Your Honor .

THE COURT: Yes, ma'am.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. State's Exhibit 21, -- there are going to be some picture behind you, Lieutenant Kokinda. There is a pointer right there next to you.

A. Okay.

Q. (Displaying State's Exhibit 21), tell us what part of the room this is and where, if you remember, the body was in relation to that portion of the victim's

home.

A. This is an area of the living room that is behind the couch. The living room was kind of divided up into a sitting area and then behind that there was a fireplace, this fireplace (indicating with pointer). There was a grill that was being assembled.

Q. Was anything tipped over or disturbed, that you would see from all the boxes that were stacked up there?

A. No.

Q. State's Exhibit 23. Tell the jury what this is.

A. This is an area in the living room that is in front of the couch. If you were sitting on the couch, there was a recliner chair that would be slightly to your right. There was a power cord, with an extension cord, into which a Dell laptop was plugged into.

SOLICITOR WILLIAMS: Your Honor, would it be possible to turn a couple of the lights off, because the others are in black-and-white.

BAILIFF: (Dims lights in

courtroom).

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. Where in relation to -- at the end of the picture, where does that cord go in relation to where the body was?

A. If you look to the far right of the picture, where the pointer is indicating, that is where the Dell laptop was plugged in. That (tracing along power cord with pointer) leads to where the victim was located.

Q. The cord that is still plugged in, is that the actual cord that was used? Was it attached to the cord that was -- how does that relate to the cord that that was on the victim?

A. The extension cord was plugged into the laptop's power supply cord, which was wrapped around the victim's neck.

Q. Tell the jury what this is a picture of?

A. Looking at the previous picture, if you look to the far right -- the left-hand side of this photograph is the end of that extension cord. The black cord in this

picture is the power supply cord.

Q. So that is the cord that goes to the cord that was used ---

A. Right. The power supply cord from the victim goes into the extension cord that is plugged into the power strip which is plugged into the wall.

Q. Did you see any other signs of a struggle with regard to just the immediate area around that body?

A. No. Right next to the victim was the recliner chair and the laptop computer. Next to that chair was a small end table. There was a long narrow vase that could have easily have been knocked down. There were remotes that were neatly sat on that table. There was nothing that appeared to be out of place or knocked over.

Q. Okay. State's Exhibit 25, please tell us what this is.

A. This is a close-up of the victim's neck area showing the Dell laptop power supply, the cord that runs to the computer, around the victim's neck.

Q. It's hard to see but can you show

the jury where the cord goes, where it loops under -- from where you are sitting?

A. The power supply is looped around twice, then goes in an overhand knot.

Q. After you photographed this area, did you also photograph other areas of the home?

A. I photographed the complete interior of the home, (affirmative nod).

Q. State's Exhibit 26, where was this?

A. This is a jewelry box that was located in the master bedroom of the residence.

Q. Where was it in the bedroom?

A. If you walk in through the -- the master bedroom was located off that area where you saw the fireplace in one of the previous pictures. When you walk into that master bedroom, there is a bed located to your left, a chest of drawers located directly in front of the door with that jewelry box open on the top of that chest of drawers.

Q. State's Exhibit 29. Is that how it was when you saw it? With the drawers open?

A. If you recall from the previous picture, each one of the drawers were slightly open; which I thought was unusual, so we took individual pictures of the drawers, showing what contents were left inside.

Q. Did you do any other documentation of the scene before you left that night?

A. I did a diagram of the floorplan of the house?

Q. Would it assist you in explaining to the jury the dimensions of the room and where everything was, to talk through that diagram and explain it through the diagram?

A. Uh, -- sure.

SOLICITOR WILLIAMS: Your Honor, I am showing defense counsel what has been marked as State's Exhibit 22.

MR. GROEBER: (Review).

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. What is that?

A. That's a diagram that I completed involving this incident.

SOLICITOR WILLIAMS: Your Honor, at this

time we would offer State's Exhibit d22.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: Without objection, State's Exhibit 22 is admitted.

(SO ENTERED AS STATE'S EXHIBIT 22)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. We have seen all these photographs in different piecemeal. If you could, describe how you walked through the home and the different parts that you processed, where the victim was laying, so forth.

A. To the right of the diagram you have what I call the side door to the residence. That is where the initial arriving officers forced entry into the residence. I entered through that door and documented the kitchen area.

Through the kitchen area, I entered the living room area -- which had an dining room area and a -- actually the house, she was doing a lot of remodeling, so there was sheetrock removed from the walls. Everything was neat. It wasn't like the sheetrock had

been removed and they hadn't, you know, they had sheetrock everywhere. You could tell that she was remodeling.

From the kitchen to the dining room area, going right to left it was the dining room area, the living room -- a great room that she had divided up into a living area with a couch area. The victim was located between a chair and a shall couch, here towards the front of the house.

The one picture that shows the boxes and the fireplace was taken fro in front of the master bedroom door looking towards the back of the great room. This room that is located above -- on the diagram, to the right of the bedroom off the living room area, is the master bedroom.

SOLICITOR WILLIAMS: Court's indulgence?

THE COURT: Yes.

SOLICITOR WILLIAMS: Please answer any questions that defense counsel may have.

THE COURT: Cross-examine.

MR. GROEBER: Yes, Your Honor. Thank you.

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. GROEBER:

Q. Good afternoon, Deputy -- or Lieutenant?

A. My rank is lieutenant.

Q. Lieutenant. I want to talk to you a little bit about the outside of the house as you -- you took all those photographs that we've seen, of the scene?

A. Yes, sir

Q. Okay. And you looked and took a picture of every single window?

A. Yes, sir.

Q. You looked at every single door?

A. Yes, sir.

Q. I'm confused. Are there two doors or three?

A. There's three.

Q. Is the third one off the back bedroom area?

A. It's -- we don't have the diagram up but it's ---

MR. GROEBER: May I approach, Your Honor?

THE COURT: You may.

CROSS EXAMINATION CONTINUED

BY MR. GROEBER:

Q. (Tendering diagram), where is the third door?

A. The rear door -- the actual rear door is to the right of this office area. It's on the back of the residence.

Q. So it is right here?

A. Correct.

Q. Thank you. And you looked at all three doors?

A. Yes.

Q. And one of those doors had been forced entry, right?

A. (Affirmative nod), the side door.

Q. And it is your understanding that was done by the officers?

A. Correct.

Q. You didn't find any evidence of forced entry at the other two doors?

A. The only thing that I found was -- it was not at any door of the residence. In front of the front door there is a screened-in porch and it looked like somebody had cut the screen on the porch, for whatever reason.

Q. Okay. And y'all dusted that area?
A. Yes.
Q. And did you get fingerprints?
A. Not from that area, no.
Q. The extension cord -- there were two cords, right?
A. (No verbal response).
Q. A white cord and a black cord.
A. (Affirmative nod), and a power strip; yes.
Q. The power strip, is that the white cord or the black cord?
A. The power strip -- the white cord is the extension cord, the black cord is the power supply and ---
Q. For the computer?
A. For the computer, (affirmative nod). Then there is a power strip with multiple outlets on it, that plugs into the wall.
Q. Okay. And the white cord, the white extension cord was still plugged into the power strip?
A. Correct.
Q. And on the other end it was attached to the computer power cord?

A. Correct.

Q. Still connected?

A. Yes.

Q. I want to talk a little bit real quickly about where you took fingerprints. From the laundry room on top of the dryer?

A. That is where one was recovered, yes.

Q. From the kitchen counter, you dusted but you couldn't get anything?

A. Nothing that we were able to identify. In other words, nothing that had enough detail, quality or quantity of ridge detail, to collect.

Q. And then the grill assembly that was being assembled in the room?

A. Yes.

Q. The picture of the jewelry box, you took that picture?

A. Yes, I did.

Q. You also collected DNA off that jewelry box?

A. Technician Spence collected the DNA.

Q. There were some other items around the home still -- sorry, that's a silly

question. I want to talk to you about some other items around the home. The computer, obviously, was still there? It was on the chair next to her body?

A. Correct.

Q. There was a stereo system that I think that I saw in one of the pictures?

A. I don't recall one offhand, but if it is in one of the pictures then it was there.

Q. There was a printer?

A. I don't recall.

Q. Okay. I am going to show you State's Exhibit 21.

A. (Review).

Q. Is that a picture of the desk?

A. Yes.

Q. Next to the fireplace?

A. Yes.

Q. On that desk appears to be a printer?

A. Yes.

Q. In one of the bedrooms there was also, stacked up against the wall, a Samurai sword?

A. I don't recall.

Q. If I showed you a picture, would that help you remember?

A. Sure.

MR. GROEBER: May I approach, Your Honor.

THE COURT: You may.

MR. GROEBER: Please mark this as defense one.

COURT REPORTER: Defendant's Exhibit 1 for identification.

CROSS EXAMINATION CONTINUED

BY MR. GROEBER:

Q. I am going to hand you what has been marked as Defendant's Exhibit 1 for identification purposes. Is that the same desk, with the jewelry box on top?

A. On a chest of drawers.

Q. Yeah, chest of drawers. And to the left of that there are several things stacked up against the wall?

A. Yeah, looks like a pair of putters, golf putters.

Q. Do you see that red strip thing?

A. Yes.

Q. Did you take a look at?

A. If I did at the time, I don't recall right now. The only thing that I recall from this room that was a weapon was a baseball bat that was next to the bed.

Q. Okay. I want to talk to you a little bit about pictures. One of the important things about being a crime scene technician is documenting what you see. Correct?

A. Right.

Q. And to do that is to take pictures?

A. Right.

Q. You take them inside the house?

A. Yes, sir.

Q. Outside the house?

A. Yes, sir.

Q. And you want to document anything that you think might be relevant?

A. Yes, sir.

Q. And you are very thorough about that?

A. I try to be. Yes, sir.

Q. Okay. Do you remember taking a picture of the blue truck in the back of the house?

A. Yeah, I know that there was one vehicle, maybe two vehicles, back there.

MR. GROEBER: May I approach, Your Honor?

THE COURT: You may.

CROSS EXAMINATION CONTINUED

BY MR. GROEBER:

Q. I want to show you what has been marked as State's Exhibit 5. Did you take that picture?

A. Yes, I did.

Q. That truck was in the back of the house?

A. Yes.

Q. And it's got some stickers on the back window of it?

A. Yes, sir.

Q. I looks like the middle one says something and then it says -- right in the middle.

A. I can't tell, because this picture was taken kind of far away.

Q. Okay. What is the bottom left sticker in that window?

A. It looks like it is probably a Confederate flag.

MR. GROEBER: No further questions.

THE COURT: Redirect?

SOLICITOR WILLIAMS: Just briefly, Your Honor.

REDIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Was there any jewelry in the jewelry box?

A. There were one or two pieces, I believe, that were left in there. It wasn't nothing really significant. It was mostly empty.

Q. Would it refresh your memory to look at it?

A. The pictures, (affirmative nod).

SOLICITOR WILLIAMS: May I approach, Your Honor?

THE COURT: You may.

REDIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. I am showing you State's Exhibits 30, 29, 27, 28 and 26.

A. (Upon review), it looks like there were a few coins and one piece of jewelry.

SOLICITOR WILLIAMS: Thank you.

THE COURT: Recross?

MR. GROEBER: Nothing further, Your Honor.

THE COURT: You may come down, Lieutenant Kokinda.

(WITNESS STEPS DOWN)

THE COURT: Call your next witness.

SOLICITOR WILLIAMS: The State calls Neil Croft.

(WITNESS TAKES STAND)

NEIL CROFT, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Good afternoon, Mr. Croft.

A. Good afternoon.

Q. Did you know Kathy Chrastina?

A. Yes, I did.

Q. How long did you know her?

A. Probably since '06 or '07.

Q. How did you meet her?

A. She and her husband at that time, Lannie, came to our church. They continued to visit for a while and we became friends,

at church as regular friends.

Q. Where you friends with her after her husband died, as well?

A. Yes, ma'am. I was.

Q. Did you know her well?

A. I think I did. Like I said, we knew her from church. Lannie contacted (sic) cancer and we spent a lot of time with her at the hospital. In fact, I was with them the day that he died. Yeah, I would say that I knew her pretty well. Yes.

Q. Was she a confrontational type person?

A. Not to me. Not that I ever saw. No, ma'am.

Q. Was she a racist?

A. No, ma'am.

Q. Do you have any personal experience that would tell you that she wasn't?

A. Yes, ma'am. In fact, I have two grandchildren that are biracial. She knew them. She didn't treat them any different than anybody else. She did not treat my daughter's husband any differently than anybody else. No, she was not racial at all.

Q. Did you talk or visit with Kathy any time close to the time that she was murdered?

A. Yes, ma'am, I did.

MR. GROEBER: I object to the phrasing of the question.

THE COURT: I will allow the phrasing, did he talk to her.

DIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Did you talk to Kathy ---

A. As I said, I was -- I am a deacon at the church and part of my job is to check on people periodically. I happened to go by -- I am not sure whether it was Monday or Tuesday, the same week that she died. I talked to her that day. Her back door is at the end of her driveway. I pulled up in my truck and she came to the back door and we talked for a few minutes.

Q. Did she discuss the defendant, David Penn, with you at all?

A. She discussed one of her employee, David. Said that she was concerned and that she didn't know what was going to happen.

Q. Did she tell you how she felt about

him?

A. She was afraid of him. I told her, I said, 'Kathy, I am just around the corner if you need me for anything. Just give me a call.' We live about a mile from where she lived.

Q. Was that the last time that you spoke to her?

A. That was the last time that I spoke to her.

SOLICITOR WILLIAMS: Thank you, sir.

THE COURT: Cross examine?

MR. GROEBER: No questions, Your Honor.

THE COURT: Thank you very much. You may come down.

(WITNESS STEPS DOWN)

THE COURT: Call your next witness.

SOLICITOR WILLIAMS: The State calls Darrell Hackney.

(WITNESS TAKES STAND)

DARRELL HACKNEY, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Do you know David Penn?
A. Yes.
Q. How do you know him?
A. He painted a small job with me.
Q. So you employed him?
A. I employed him for a couple of days.
Q. Do you see him here in the courtroom?
A. Yes, I do.
Q. Can you tell us what he is wearing, for the record?
A. He is wearing a cream colored shirt, glasses.
SOLICITOR WILLIAMS: Your Honor, please let the record reflect that the witness has identified David Penn.
THE COURT: It so reflects.
DIRECT EXAMINATION CONTINUED
BY SOLICITOR WILLIAMS:
Q. So did you -- the time that he was employed with you, about when was that, do you remember?
A. October a couple of years ago.
Q. Could it have been October 2011?
A. Yeah, that's probably right.

Q. Do you remember speaking with Mr. Penn sometime around that period of time?

A. Yes.

Q. Tell us the circumstances of that?

A. He called me up -- are you talking about social talking or ---

Q. When was the last time that he worked for you during that time?

A. It was like the 17th or 18th of October. I would have to go back and look at my statement to get the date.

Q. Do you remember speaking with him before he was arrested?

A. Yes.

Q. Okay. Tell us the circumstances of that conversation.

A. Okay.

Q. Would it help you to refresh your memory by looking at your statement, Mr. Hackney?

A. No, I'm good.

Q. Okay.

A. I just don't know where you want me to start at.

Q. Just the truth.

A. He called me up on the phone and there was a lot of anger, there was a lot of remorse, there was a lot of crying. He was messed up on alcohol or drugs, whatever it was. He said something about his family won't help him, nobody won't help him. Said, "Nobody will help me and now I've done it. I got some bad stuff."

I said, "Man, chill out. I got your money. Let me get you your money."

He said all right.

So we met over at -- he was over in the Hardee's parking lot. I was over in the Sphinx parking lot, vice versa.

Q. What town was that?

A. Moncks Corner, downtown Moncks Corner.

Q. Okay.

A. I said, 'you know the truck, just watch for me when I come down.' Anyway, he spotted me. He was on foot. I walked over. We were between Sphinx and Hardee's, on one or the other side. That was two years ago.

I gave him his two hundred dollars ($200) and I was like, 'Man, you all right?'

He said, "Man, I messed up -- bad."

I said, "What's going on?"

He said, "I'm messed up for the rest of my life."

I said, "Aw, come on, man, what you do mean you messed up the rest of your life?" Thinking, you know, that maybe I can help the guy out.

He said, "I murdered somebody last night."

I said, "All right." You know, basically I said 'we're done here.'

He said that he understood and we parted ways.

Q. What did you do next?

A. I drove down to the gas station on the right-hand side, I'm trying to remember, the Sunoco? I called the Moncks Corner Police. I said, 'I have a fellow who is telling me that he murdered somebody last night.'

Q. Did he tell you anything about somebody spitting at him?

A. No.

Q. Did he say anything about somebody

calling him the N-word?

A. No.

SOLICITOR WILLIAMS: Thank you. No further questions.

THE COURT: Cross examine?

MR. GROEBER: Yes, sir, thank you.

CROSS EXAMINATION

BY MR. GROEBER:

Q. Good afternoon, Mr. Hackney. How you doing?

A. You'll have to speak up a little bit?

Q. How you doing?

A. I'm doing alright.

Q. You met Mr. Penn because he was a painter, right?

A. (Affirmative nod).

Q. And he has painted for you?

A. Right.

Q. And you met him that day because you wanted to pay him back -- or to pay him for what he had done?

A. I have a reputation of paying my people, always, no matter what.

Q. And when he called you, that's what

led you to say, 'I am going to pay you now.'

A. (Affirmative nod).

Q. And when he called you on the phone, he was upset?

A. Yeah.

Q. He said that he had done some drugs?

A. (Affirmative nod).

Q. I am going to have to ask you to respond verbally so that the court reporter can take your answer. Okay?

A. He said that he had done some bad things. He didn't really specify whether he's smoked heroin or crack or weed, but I could tell by the conversation where it was going, he was upset and that he'd been using drugs and/or alcohol.

Q. Okay. And you had trouble understanding on the phone what he was saying?

A. (Affirmative nod).

Q. "Yes?"

A. (Affirmative nod).

Q. So you met him at the gas station?

A. Right.

Q. He still looked distraught?

A. (Affirmative nod).

Q. He told you that he had messed up his life?

A. (Affirmative nod). Yes.

Q. And I want to ask you specifically -- you remember talking to me last week on the phone?

A. Yes.

Q. I want to ask you, because I think it is important -- today you testified that he said "I murdered somebody." That was your testimony today. Right?

A. (Affirmative nod).

Q. Do you remember speaking with me last week and saying that he said, "I killed someone."

A. Same thing.

Q. Well, I guess my question is, do you remember if he said one or the other?

A. No.

Q. If I showed you a printout of your 911, what you told them, would that refresh your recollection?

A. It probably would.

MR. GROEBER: May I approach, Your Honor?

THE COURT: You may. Have it marked.

COURT REPORTER: Defendant's Exhibit 2 for identification.

CROSS EXAMINATION CONTINUED

BY MR. GROEBER:

Q. (Tendering), handing you what has been marked as Defendant's Exhibit 2. I direct you to the second page and ask you to read what that says.

THE COURT: Read it to yourself.

MR. GROEBER: I apologize.

CROSS EXAMINATION CONTINUED

BY MR. GROEBER:

Q. Please read that and then look up when you're finished.

A. "Me and..." ---

Q. I'm sorry.

THE COURT: No, sir, don't read it out loud. Read it to yourself. Then he is going to ask you a question.

WITNESS: (Upon review), okay.

MR. GROEBER: May I approach?

THE COURT: You may.

CROSS EXAMINATION CONTINUED

BY MR. GROEBER:

Q. Does that refresh your recollection

about what you told 911 that he said?

A. Yes.

Q. And he said that he had killed someone?

A. (Affirmative nod).

THE COURT: Was that a "yes", sir?

WITNESS: "Yes." Yes, sir.

THE COURT: Thank you.

MR. GROEBER: May I have one moment, Your Honor?

THE COURT: Sure.

MR. GROEBER: (Sidebar with defendant), no further questions.

THE COURT: Redirect?

SOLICITOR WILLIAMS: No, sir.

THE COURT: Thank you. You may step down, sir, and you are excused.

(WITNESS STEPS DOWN)

THE COURT: Ladies and gentlemen, at this point we will take a recess and let you take a break. Do not begin any deliberations, do not discuss this case among yourselves. We will be with you in about ten minutes or so. Thank you. You may retire to your jury room.

(JURY OUT @ 3:44 P.M.)

THE COURT: All right. Before we recess, we admitted -- there was the objection to State's Exhibits 24 and 25. Your objection -- our discussion, as I recall, is that you think that it exceeds some relevance but you think that the probative value was outweighed by the prejudicial aspect of it. Is there anything else?

MR. GROEBER: No, Your Honor. That's all.

THE COURT: The reason that you believe that it is more probative than prejudicial is what, Ms. Williams?

SOLICITOR WILLIAMS: We believe the picture are probative that there was no struggle, that it took time for the defendant to take the cord and wrap it three times her neck, that she was no longer fighting. There was slack in the cord, so it shows that it was still plugged into the wall. For those reasons -- also that it is knocked in the back, which means that he was behind her when he pulled it tight. So for those reasons we

think that it is more probative than prejudicial.

THE COURT: Anything else, Mr. Groeber?

MR. GROEBER: No, Your Honor. Thank you.

THE COURT: The court, on reviewing -- originally the State was going to introduce colored photographs, which the court did require the State to make the photographs black-and-white, which is what was admitted; which I think focuses on -- while it certainly shows the deceased, it focuses on the issue for which it is admitted, that is the presence of the wire, how it was in relationship to the larger photograph that show it is relation to the room. I think it goes directly to the issues of whether there was a struggle or not, whether it was use before, during or after. For those reasons, the court believes that it would have more probative value than prejudicial. I believe that we indicated that in our conference.

Anything else before we recess? From the State?

SOLICITOR WILLIAMS: No, sir.

THE COURT: Do you want to address this

case now or ---

SOLICITOR WILLIAMS: I would like to address it now just because -- do we have any witnesses that would testify -- (sidebar with Ms. Dixon). Yeah.

THE COURT: I've read the case. I'm trying to figure out what it is that you think the statement opened that created -- because in this case, the case that you gave me, *State v. Dunlap*, 353 SE 539, a 2003 case where the Supreme Court is affirming my colleague and classmate who apparently in his decision -- Judge Schuler allowed -- found that the testimony that Judge Floyd admitted was proper because of the opening statement. In that particular case the defendant apparently was charged with basically possession with intent to distribute and he argued in this opening statement that he was a drug addict. What was in the statement was that he admitted -- basically he's charged with grand larceny, that's the crime. So he basically admitted that. He didn't challenge anything.

SOLICITOR WILLIAMS: No. I'm talking

about something different. We think that the jewelry goes to the murder because we think that he robbed her and murdered her. He said in his opening statement that he didn't rob her. He did. He took her jewelry.

THE COURT: He admitted to taking the car. He admitted it in his statement. So, thank you very much. You are trying, again, Ms. Williams -- I'm ruled.

In this case if he'd said, "I didn't steal anything', then fine. But you already have that he -- I assume that testimony is coming in, since when he was arrested they found property that belonged to her. Obviously he had to steal it. It is already there.

The case that you have chose to try is the stealing of the van. That's what he is on trial for. He may have stolen a lot of things but he is not on trial for that. That is my ruling. Thank you. Appreciate it.

SOLICITOR WILLIAMS: Thank you, Your Honor.

THE COURT: You're welcome. It protects the record, too. We will be at-ease

for a few minutes.

SOLICITOR DIXON: Your Honor, we do have a video coming up and we just want to make sure that we have it cued up.

THE COURT: Okay, we'll be at ease for few minutes. Let me know if you need more time.

(BRIEF RECESS)

(DEFENDANT PRESENT)

THE COURT: Let the record reflect that Mr. Penn is present. Anything from the State before we bring in the jury?

SOLICITOR WILLIAMS: No, Your Honor.

THE COURT: Anything from Mr. Penn.

MR. GROEBER: No, sir, Your Honor. Thank you.

THE COURT: Bring in our jury, please.

(JURY IN @ 4:00 P.M.)

THE COURT: Thank you very much, ladies and gentlemen. We are ready to continue. You may call your next witness.

SOLICITOR DIXON: Thank you, Your

Honor. The State calls Nitesh Patel.

(WITNESS TAKES STAND)

NITESH PATEL, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR DIXON:

Q. Mr. Patel, where do you work?

A. Economy Inn in Moncks Corner.

Q. What do you do there?

A. I am the manager.

Q. Were you working there in October 2011?

A. Yes.

Q. Where is that business located?

A. 421 Highway 52 North.

Q. Can you tell us maybe some businesses that are ---

A. Across from the Pizza Hunt, the Sphinx, Money Man Pawn.

Q. In October of 2011, did you encounter the defendant, David Penn?

A. Yes.

Q. And can you tell us how you came to encounter him?

A. It was at checkout. He was checking out of the room and we were about to clean it and we got into a discussion then.

Q. Okay. Do you know what day that he checked into your hotel?

A. I think that it was three days prior.

SOLICITOR DIXON: Your Honor, I am showing the witness what has been marked as State's Exhibit 32.

THE COURT: Okay.

SOLICITOR DIXON: Permission to approach the witness?

THE COURT: You may.

SOLICITOR DIXON: Thank you.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Mr. Patel, do you recognize that?

A. Yes.

Q. Can you tell the jury what that is, please?

A. It's the registration form.

Q. Whose name is on that registration form?

A. David Penn.

Q. Is that the registration form that you use at your hotel?

A. Yes.

Q. Does it appear to have been altered in any way?

A. No.

SOLICITOR DIXON: Your Honor, at this time we would move State's Exhibit 32 into evidence.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: State's Exhibit 32 is admitted without objection.

SOLICITOR DIXON: Thank you, Your Honor.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. That receipt, what date does it indicate that the defendant checked into your hotel?

A. October 12th.

Q. Does it tell how he paid?

A. Cash. It doesn't say whether it is credit card or cash but it was cash.

Q. Do you know how long that the defendant stayed?

A. I think that it was three days.

Q. And you were with him when he checked out?

A. Yes.

Q. What, if anything, did he say to you when he checked out of the hotel?

A. He talked about life, mentioned that he was a killer and that he wanted to turn himself in.

Q. At some point did you speak with law enforcement regarding this case?

A. (Affirmative nod), after that.

SOLICITOR DIXON: That's all that I have. Thank you, Mr. Patel.

THE COURT: Cross examine?

MR. GROEBER: Briefly.

CROSS EXAMINATION

BY MR. GROEBER:

Q. Mr. Patel, he also told you that day that he had a drug problem ---

A. Yes.

Q. --- and that he needed help?

A. No, he just said that he had a drug problem and that he was going to turn himself in.

MR. GROEBER: No further questions, Your Honor.

THE COURT: Redirect?

SOLICITOR DIXON: No, sir.

THE COURT: You may step down.

(WITNESS STEPS DOWN)

THE COURT: Call your next witness.

SOLICITOR DIXON: The State calls James Price.

(WITNESS TAKES STAND)

JAMES PRICE, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR DIXON:

Q. Mr. Price, where do you work?

A. I work at Walgreen's.

Q. How long have you worked there?

A. I have been with the company since 2007.

Q. What are your job duties at Walgreen's?

A. I am Assistant Manager.

Q. In October of 2011, which Walgreen's were you working in?

A. I was working at the Walgreen's in Moncks Corner.

Q. Were you working on October 15th?

A. Yes, ma'am.

Q. Can you tell the jury what shift that you were working that day?

A. I was working third shift.

Q. At some point did you encounter the defendant, Mr. Penn?

A. Yes, ma'am.

Q. Did you speak with law enforcement regarding this case, Mr. Price?

A. Yes, ma'am.

SOLICITOR DIXON: Showing the defense what we have marked as State's Exhibit

MR. GROEBER: (Review).

SOLICITOR DIXON: Permission to approach, Your Honor?

THE COURT: You may.

SOLICITOR DIXON: Thank you, Your Honor.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Mr. Price, do you recognize this CD?

A. Yes, ma'am.

Q. How do you recognize it?

A. This is the video of the store at the time, with my initial, "JRP."

Q. Have you had a chance to review this?

A. Yes, ma'am.

Q. Is that an accurate copy of the surveillance video from that day?

A. Yes, ma'am.

SOLICITOR DIXON: Your Honor, at this time we would move State's Exhibit 31 into evidence.

MR. GROEBER: No objection.

THE COURT: Without objection, State's Exhibit 31 is admitted.

SOLICITOR DIXON: Thank you, Your Honor.

(SO ENTERED AS STATE'S EXHIBIT 31)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Mr. Price, while we load that video, can you tell us -- did you have a conversation with the defendant?

A. Yes, ma'am.

Q. Tell the jury what that conversation was about.

A. The conversation is based on that I

was called up to register by the cashier at the time. A man was asking for, basically, money because all that he had was -- he wanted some type of form of -- using a check, to get money from the register. We told him 'no, we can't do that.' You can't buy nothing or get money for anything above the amount of purchase.

Q. And did the defendant indicate why he needed money?

A. He told me that he was going to Tennessee, that he needed money to get there.

Q. After you told him that you couldn't cash a check larger than the purchase, did he ask you anything else?

A. He asked me -- basically proceeded that he'd left something in a Walgreen's bag, one of our plastic bags, in our trash. He asked me to go there, that he left it outside.

Q. Did he tell you what he'd left in that bag?

A. He indicated that he did not -- he indicated that it was like a debit card or some type or form of a debit card or a credit

card.

Q. And he said that he left it where?

A. He left it outside the store -- we have two trash cans, one on the right-hand side facing the store. There are two trash cans that are left out there. They had already been dumped about 10:00 or 10:30.

Q. At what time did the defendant enter the store?

A. He entered the store roughly around 6:20 in the morning.

Q. Did he tell you when he'd left that debit card in the trash?

A. He told me roughly around 2:30 the afternoon before, the day before.

Q. And when is the trash emptied outside?

A. It is emptied at the end of the second shift, which is normally between 10:00 and 10:30.

Q. When the trash from the can is emptied, where it is placed?

A. It is placed in the trash compactor at the back of the store.

Q. Is there a way for you to access

that compactor?

A. The only access is a chute that you basically put the trash in, where it compresses the trash to the trash compactor. There is no other way than the waste industry company that retrieves the trash that is dumped in there.

Q. Did you inform the defendant of that?

A. Yes, ma'am.

Q. How did he respond?

A. He basically was a little aggravated about it, but didn't show too much of, uh, trouble with it. He kept on, 'is there any other way that we can get in there?' I said, 'No, sir, I can't physically go in there myself. I physically can't. If it is in arm's length, possibly, but we can't go in there at all.

Q. Were there any suggestions that you gave to the defendant?

A. Yes. I told him, 'If you have a check, why don't you go to your bank' -- which it was a Saturday, it was a weekend and a lot of credit unions are starting to be

open on Saturday for a period of time. I said, 'Just go to your bank and just write them a check or withdraw from your account.' He specifically told me that it was the South Carolina Federal Credit Union, if I am not mistaken.

Q. After you had this conversation with the defendant, did he leave?

A. Thereafter, yes.

Q. And did you encounter him again?

A. Yes, he wanted to proceed to go into the trash can that was outside. He pointed to the actual trash can that he said that he put it in. I did let him open the trash can and look in there. Of course there was nothing in there but a fresh trash bag.

SOLICITOR DIXON: Your Honor, at this time, I beg the court's indulgence. We are just trying to get the video to play.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Mr. Price, I may have neglected to ask you this. What date was it that you saw the defendant?

A. It was October ---

Q. What day of the week was it?

A. It was a Saturday morning. It was about two hours before the end of my shift.

Q. Do you remember what the defendant was wearing when you encountered him?

A. He was wearing a pair of blue jeans, a white top and I want to say maybe a hat but I'm not quite sure.

Q. Would it refresh your recollection if you saw your statement, as to the date that you saw the defendant?

A. Yes. Please.

SOLICITOR DIXON: Permission to approach, Your Honor.

THE COURT: Yes, ma'am. Have it marked, please.

DEFENDANT: State's Exhibit d56 for identification.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. If you would just read it over, (tendering). Don't read it out loud, but just look it over.

A. (Upon review), okay.

Q. Does that refresh your recollection

as to the date?

A. Yes, ma'am.

Q. And what date was it that you saw the defendant?

A. It was October the 15th.

Q. Do you recognize this video, Mr. Price?

A. Yes, ma'am.

Q. (Video playing) -- can you tell us what this video is of?

A. As you can see, this is the front door of the Walgreen's, to your left is the front register. Can you tell us what the time code ---

Q. Can you tell us what the -- I know that it is kind of hard to see, but on the left side of the screen, what time does that indicate?

A. This is 1500 Hours, so it's is going to be -- basically the first is 6:00 o'clock, and it ends at 7:00 o'clock. One hour increments is how we do our videos. Right now this is showing 6:15 that morning.

Q. Can you watch that video and indicate to us when the video enters the

store?

A. Yes, ma'am.

Q. (Video playing) -- is that the defendant, Mr. Price?

A. No, ma'am.

Q. (Video playing) -- Mr. Price, I know that kind of came up pretty quickly. Do you remember watching this video before?

A. Yes, ma'am.

Q. Do you remember telling us before that that was the defendant entering the store?

A. When we were watching it, there were two people that came in. One was who I thought was the person, but he basically came from this side right here.

Q. Do you remember if the defendant entered the store more than one time?

A. He entered it -- I want to say maybe twice.

Q. We will just continue watching the video. (Video playing) -- let us know when you see yourself on the video, Mr. Price.

A. Yes, ma'am.

Q. (Video playing) -- while we are

waiting, at some point did you speak with law enforcement regarding this case?

A. I did.

Q. (Video playing) -- when was that?

A. That was the, uh, -- basically Saturday night.

Q. (Video playing) -- what were they wanting?

A. They wanted a surveillance video from a certain time and also some of the debit transactions from earlier that afternoon of that same day, the 15th. I retrieved the video for them, for law enforcement.

Q. (Video playing) -- is that you, to the left of the screen?

A. That is me. Yes, ma'am.

Q. (Video playing) -- what are you doing right there.

A. At the time of the requests, the cashier called me up for change. I was getting change from the safe and bringing it to the drawer. Also at the same time, she had a customer asking about the money -- Mr. Penn asking about the check, getting money

back from writing a check.

Q. (Video playing) -- so at this time you are having a conversation with the defendant?

A. Yes. He's right to the left of that. I was mistaken earlier. That was him walking in.

Q. (Video playing) -- do you remember how long your conversation with the defendant was?

A. It didn't last no more than about between ten minutes, from the time inside the store and outside when I came back in, which will be coming up soon.

Q. (Video playing) -- at 6:22, is that the defendant leaving the store?

A. That is the defendant leaving the store. Yes, ma'am.

Q. (Video playing) -- okay. Thank you. Mr. Price, other than the surveillance video, did law enforcement ask you for anything else that day?

A. They also requested to go into the trash compactor.

Q. Were they able to do that?

A. Yes, ma'am.

SOLICITOR DIXON: No further questions.

THE COURT: Cross examine?

MR. GROEBER: Yes, sir, Your Honor, briefly.

CROSS EXAMINATION

BY MR. GROEBER:

Q. You told the jury that on the video we saw there that you were getting change for the cashier?

A. Yes.

Q. How much money did you have?

A. I want to say probably a hundred fifty ($150), probably.

Q. And that is what was in your hands?

A. Yes. I had some rolled coins and some tens ($10), ones ($1) and fives ($5).

Q. Okay. I am little confused and I want to try to figure this out about the cashing of the check. Did the defendant speak with you about the cashing of a check? Or was that to a different worker in the store?

A. It came up from the cashier that was

up there.

Q. So he didn't ask to talk to you, ever, about cashing a check?

A. Yes, he did. He asked me about writing the check, asked 'Can I write a check for over the amount?' I said no. I said, 'We can't cash anything for checks because it is against policy.'

He went on further to ask me about that basically he had the debit card that he'd left in a bag that he'd thrown away in our trash can. That's where it got to an open-ended conversation about him going to his bank on Saturday and getting the money.

Q. Okay. You talked with the officers that day, right?

A. It was that night, (affirmative nod).

Q. I think that you talked with Sergeant Alteri?

A. Sounds familiar.

Q. Okay. You gave a written statement, correct?

A. Correct.

Q. And you reviewed that written

statement ---

MR. GROEBER: May I approach, Your Honor?

THE COURT: You may.

CROSS EXAMINATION CONTINUED

BY MR. GROEBER:

Q. State's Exhibit 56, you reviewed that a few moments ago. You read the whole thing?

A. Yes, sir.

Q. Okay. And when you talked with Sergeant Alteri, you knew that it was important to give him all the details about what happened. Right?

A. Yes, sir

Q. And you didn't want to leave anything out. Right?

A. Correct.

Q. Because you knew -- this was an important deal, a big deal; correct?

A. Right.

Q. In your statement, did you write that statement?

A. I did not write that statement.

Q. Did the officer write it for you?

A. He did not.

Q. Who wrote the statement?
A. I did.
Q. So you wrote down the statement? State's Exhibit 56, that is your handwriting?
A. Yes, sir.
Q. You signed it at the bottom?
A. Right.
Q. And on the second page, too?
A. Yes, sir.
Q. Nowhere in there do you talk about the defendant asking you to cash a check?
A. I did not.
Q. And in the video, he didn't have a checkbook or a check in his hand; did he?
A. No, he did not have anything in his hand showing a checkbook or anything. No.
MR. GROEBER: No further questions. Thank you.
THE COURT: Redirect?
REDIRECT EXAMINATION
BY SOLICITOR DIXON:
Q. Did he indicate to you which bank that he used?
A. Yes, he did.
Q. Which bank was that?

A. That was South Carolina Credit Union.

SOLICITOR DIXON: Nothing further.

THE COURT: Recross?

MR. GROEBER: No, Your Honor.

THE COURT: You may step down, sir. Thank you.

(WITNESS STEPS DOWN)

THE COURT: You may call your next witness.

SOLICITOR DIXON: The State calls Deputy Amanda Jones.

(WITNESS TAKES STAND)

AMANDA JONES, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR DIXON:

Q. Deputy Jones, where do you work?

A. Berkeley County Sherriff's Office.

Q. How long have you worked there?

A. Since 2004.

Q. What do you do at the sheriff's department?

. I am a corporal in the uniformed

patrol division.

Q. What does that mean?

A. I work the night shift. I patrol the county. I am the person that responds to any 911 calls that citizens have. I also patrol, look for crime, try to prevent crime.

Q. Were you working for the sheriff's office on October 15th, 2011?

A. I was.

Q. And did you receive the call in this case?

A. I did.

Q. Tell us what that call was about?

A. Central dispatch dispatched me to go meet with Chief Hoover at the dyke, which is off of Black Oak Road and DuBois Street in Bonneau in reference to that he had located a van out there.

Q. Did you know what that van was related to at the time?

A. Not at the time of dispatch, no.

Q. Did you respond to the scene?

A. Yes, I did.

Q. Did you see a van upon your arrival?

A. I did.

Q. Was anyone else there?

A. Chief Hoover was there. I don't recall anybody else being there. There was nobody around the immediate vicinity of the van.

Q. Did you approach the van?

A. I did.

Q. Did you notice anything about it?

A. It was locked. I didn't -- I looked in just to make sure that it was not occupied. I left it there.

Q. When you arrived at the location, did you learn what the van was in relation to?

A. When I got there, yes. Dispatch had also dispatched other deputies, to try to make contact with the registered owner of the van.

Q. And at some point did you learn who that registered owner was?

A. Yes.

Q. Who was that?

A. I cannot remember her name at this point, but --- (pause).

Q. Did you at any point enter the van?

A. No, it was locked.

Q. And did anyone else enter the van while you were there?

A. No.

Q. Did anyone else arrive at that location?

A. Crime scene forensics came there. Afterwards the tow truck came, loaded the van up. I followed it back to the forensics unit.

Q. Was the van at any time ever out of your sight?

A. No.

Q. Where was the van transported to?

A. To the Berkeley County Sherriff's Office forensics impound.

SOLICITOR DIXON: Nothing further.

THE COURT: Cross examine?

MR. GROEBER: Nothing, Your Honor.

THE COURT: You may step down.

(WITNESS STEPS DOWN)

THE COURT: You may call your next witness.

SOLICITOR DIXON: The State calls Detective Chrystal.

(WITNESS TAKES STAND)

CHRYSTAL SPENCE, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR DIXON:

Q. Where do you work?

A. Berkeley County Sheriff's Office, in the forensics service unit.

Q. What is your title?

A. Forensic tech.

Q. How long have you worked in forensics?

A. Since September of 2000.

Q. Did you work anywhere else before working for Berkeley County?

A. At the detention center for Berkeley County.

Q. Do you have to have any training to work in forensics?

A. They send us to the Criminal Justice Academy for certain classes: photograph, latent fingerprint processing, uh, -- that's about all.

Q. As a forensic technician, can you

tell the jury what some of your duties are?

A. To process evidence that is turned in by the detectives or the deputies. Log in all the evidence that is turned in by the detectives or the deputies. Transport evidence to SLED in Columbia and transport evidence to Charleston County, who does IBIS, which is for gunshot casings, projectiles and things like that.

Q. Were you working in forensics on October 15th, 2011?

A. Yes, I was.

Q. Did you receive a call relating to this case?

A. Yes, I did.

Q. Where were first dispatch?

A. To DuBois Street in Bonneau.

Q. What was located there?

A. A Chevy Venture, blue-in-color van.

Q. I am showing you what has been previously marked as State's Exhibits 33, 34 and 35. If you could look at all three of those photographs.

A. (Review).

Q. And what are those photographs of?

A. These are photographs of where the van was located. I took photographs of the area and of the van.

Q. Does that accurately represent the van as you saw it?

A. Yes, it does.

SOLICITOR DIXON: Your Honor, at this time we would move State's Exhibits 33 through 35 into evidence.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: Without objection, State's Exhibits 33 through 35, each being a photograph, is admitted.

(SO ENTERED AS STATE'S EXHIBIT 33)

(SO ENTERED AS STATE'S EXHIBIT 34)

(SO ENTERED AS STATE'S EXHIBIT 35)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. I know that this is kind of dark, but -- that is State's Exhibit 33, can you tell the jury what that is?

A. The back driver's side angle of the vehicle.

Q. State's Exhibit 34, what is that a

picture of?

A. The license plate to the vehicle.

Q. Do you know if that license plate was run?

A. I do not.

Q. Do you know, after you photographed the van there, where the van was transported?

A. It was followed by Deputy Jones to the forensics services building.

Q. Do you know if the van was locked at that point?

A. It was locked at the scene and continued to stay locked at our buildings.

Q. At some point did you process the van?

A. Yes, I did.

Q. Can you put up State's Exhibit 35, (displaying). When was that?

A. On the 17th of October.

Q. Who all was present when you processed the van?

A. Corporal Gary Lipski.

Q. State's Exhibit 35, can you tell us what that is a picture of?

A. That is a picture from the open

driver's side door, looking into the vehicle.

Q. When you first processed the van, can you just tell us briefly how you went about doing that?

A. First you photograph from all angles outside, from all angles inside, and then fingerprint and then DNA.

Q. Did you do any DNA swabbing inside this van?

A. Yes, I did.

Q. Can you tell us where swabs were taken from?

A. One was taken from the steering wheel, one from the gear shift, the inside and outside of the driver's door, and the inside and outside of passenger front door. Both front doors.

Q. Now, I know that you said earlier that the van was locked. How did you gain access into the van?

A. When evidence was turned in by Detective Fenton, it was discovered that the keys were in his property, the suspect's property.

Q. And that would be Mr. Penn?

A. Yes, ma'am.

Q. Okay. Now, let's talk specifically about the DNA swabs that you took from the steering wheel. Tell the jury how you go about collecting those swabs.

A. You use fresh gloves. There are two swabs in a container, Q-tips. You break the seal on those swabs, you put distilled water onto the tips of the swabs and then you swab your area and then seal them in a cardboard box.

Q. Where is that box stored?

A. At the forensics building, in Evidence.

Q. Who has access to that building?

A. There are four of us that have access to the office area, three of us who have access to the evidence locker.

Q. To your knowledge, were those swabs ever sent off for processing?

A. Yes, they were.

Q. I know that I skipped ahead to the 17th, but let's back up. After you left the van to be transported on the 15th, where was the next place that you responded?

A. To the victim's residence on Horres Court.

Q. What did you do when you got there?

A. Lieutenant Kokinda was photographing. I waited for him to get done photographing. Then we moved inside to process the inside of the scene.

Q. When you say "process", what do you mean?

A. Fingerprint and DNA.

Q. After you finished processing the defendant's home, did you do anywhere else with regard to this case?

A. Yes, I did.

Q. Where was that?

A. The next place we went was the Economy Inn and searched the dumpster at the hotel.

Then we went to Pauline Drive and did a search warrant at a residence that we believed Mr. Penn lived at.

Then the next morning we went to Walgreen's.

Q. Let's start with the Economy Inn. Showing you State's Exhibits 37 and 38. Can

you identify these pictures for us, please?

A. These are of the dumpster located at the hotel.

Q. Is that an accurate reflection of how it looked that evening?

A. Yes, ma'am.

Q. And what is the other picture of?

A. A note that was found inside the dumpster when we were looking for evidence.

Q. Were you present when that note was found?

A. Yes, I was.

Q. Is that an accurate reflection of how it looked that evening?

A. Yes, ma'am.

SOLICITOR DIXON: Your Honor, at this time we would move to admit State's Exhibits 37 and 38.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: Without objection, State's Exhibits 37 and 38 are admitted, each being a photograph.

(SO ENTERED AS STATE'S EXHIBIT 37)

(SO ENTERED AS STATE'S EXHIBIT 38)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. I am also showing you what has been previously marked as State's Exhibit 39. Can you identify that for us?

A. This is the handwritten note that we found in that dumpster.

Q. Is that how it looked that evening?

A. It was folded up and we unfolded it, (affirmative nod).

Q. But ---

A. Everything else looks the same.

Q. No alterations to the writing?

A. No, ma'am.

SOLICITOR DIXON: Your Honor, at this time we would move State's Exhibit 39 into evidence.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: Without objection, State's Exhibit 39 is admitted.

(SO ENTERED AS STATE'S EXHIBIT 39)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Deputy, you said that after you wen

tot the Economy Inn that you responded to-- where next?

A. To Pauline Drive.

Q. Where was that?

A. In Bonneau.

Q. Why did you respond to that address?

A. It was an address given to the detectives as a possible residence where Mr. Penn lived.

Q. Did you find anything at that residence?

A. No, ma'am.

Q. The next place that you responded to was, where?

A. After that, we -- I was let go. The next morning, on the 16th, I responded to Walgreen's.

Q. Did you know what you were looking for at Walgreen's?

A. I was told that there was property of the victim's that was thrown away in the trash.

Q. Were you able to did into the Walgreen's compactor?

A. We did after the person came and

unlocked the fence for us.

Q. And did you recover any items from that compactor?

A. Yes, we did.

SOLICITOR DIXON: Showing defense State's Exhibit 41.

MR. GROEBER: (Review).

SOLICITOR DIXON: Permission to approach, Your Honor.

THE COURT: Yes.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Can you identify this picture for us?

A. It's a black trash bag that contained contents from the victim.

Q. And is that an accurate reflection of how it looked that day?

A. Yes, ma'am.

SOLICITOR DIXON: Your Honor, at this time the State would move 41 into evidence.

THE COURT: Without objection?

MR. GROEBER: Correct, Your Honor.

THE COURT: Without objection, State's Exhibit 41 is admitted.

(SO ENTERED AS STATE'S EXHIBIT 41)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Is that the garbage bag that you saw that day?

A. Yes, ma'am.

Q. Is that where you collected items belonging to Ms. Chrastina?

A. Yes, ma'am.

Q. Can you tell the court, if you remember, what kind of items that you collected?

A. There were credit cards, a cell phone, a checkbook register, a bracelet and miscellaneous papers, I believe.

Q. Did those items get turned into evidence?

A. Yes, they did.

SOLICITOR DIXON: Your Honor, I am going to show the witness State's Exhibits 42, 43 and 44.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Do you recognize those items, Ms. Spence?

A. Yes, I do.

Q. And where were those items received from?

A. I'm sorry. I didn't hear you.

Q. Where were those items retrieved from?

A. The black trash bag.

Q. Can you tell where what those items, beginning with the first number, what are those items in the bag?

A. Item A is the cell phone that we found in the trash bag.

Item B is a bracelet inscribed with "Lannie" on it.

Item C is the checkbook register, the checkbook and the credit cards.

Q. Can you identify them again using the State's exhibit numbers?

A. The cell phone is State's Exhibit 41.

The bracelet inscribed with "Lannie" is State's Exhibit 44.

The checkbook, credit cards and papers is State's Exhibit 43.

Q. Is that how you found them that day

in the dumpster at Walgreens?

A. Yes.

SOLICITOR DIXON: Your Honor, at this time we would move those into evidence.

THE COURT: Any objection?

MR. GROEBER: No objection.

THE COURT: Without objection, State's 42, 43 and 44 are admitted.

(SO ENTERED AS STATE'S EXHIBIT 42)

(SO ENTERED AS STATE'S EXHIBIT 43)

(SO ENTERED AS STATE'S EXHIBIT 44)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. The credit cards and checkbook in that last bag there on the right -- I can't remember that number, uh, -- do those credit cards have names on them?

A. Yes, they do.

Q. And whose names are on them?

A. Kathy Chrastina.

Q. Now, I believe, Ms. Spence, that you also testified that you check evidence in; is that correct?

A. Yes.

Q. Did you receive evidence from other

officers in this case?

A. Yes, I did.

Q. When they turn that in, how does that happen?

A. They fill out a chain of custody from them to the forensic building.

Q. Then what happens to that?

A. It stays on a shelf until needed for court. If the case is disposed of, then it gets disposed of.

Q. Showing you State's Exhibit 45. Ms. Spence, do you recognize this item?

A. Yes, I do.

Q. What is that?

A. That is a lunch bag.

Q. Where did you get that from?

A. From Deputy Fenton.

Q. And was it checked in related to this case?

A. Yes, it was.

Q. And where has that item been stored since it was checked into evidence?

A. In the evidence locker.

SOLICITOR DIXON: Your Honor, at this time I would move State's Exhibit 45 into

evidence.

THE COURT: Is there any objection?

MR. GROEBER: I would object at this time as to the chain. I think that the State

SOLICITOR DIXON: We have another witness that we can introduce it through.

THE COURT: Very well. Then your offer to introduce is withdrawn at this point?

SOLICITOR DIXON: Yes, sir. Thank you, Your Honor.

THE COURT: It has just been identified as State's Exhibit 45.

SOLICITOR DIXON: The State has no further questions of Deputy Spence.

THE COURT: Cross examine?

MR. GROEBER: Briefly, Your Honor.

CROSS EXAMINATION

BY MR. GROEBER:

Q. Were you the only one who swabbed for DNA, at either scene?

A. Yes, sir.

Q. And you swabbed the jewelry box ---

A. Yes, sir.

Q. --- at Horres Court?

A. Yes, sir.

MR. GROEBER: No further questions.

THE COURT: Redirect?

SOLICITOR DIXON: Nothing, Your Honor.

THE COURT: Very well. You may come down. Thank you.

(WITNESS STEPS DOWN)

THE COURT: Next witness?

SOLICITOR WILLIAMS: Permission to approach?

THE COURT: Yes, ma'am.

(OFF RECORD BENCH CONFERENCE)

THE COURT: All right, at this point, ladies and gentlemen, we are going to finish a little early. Please, while you will be free to leave, please remember that you are not at liberty to talk about this case nor discuss this case among yourselves. Nor are you at liberty to talk about it with anyone that might be at home. I would imagine that if there is that the first question might be 'what are you doing, what is the case about?' If you started talking about it, you would have commenced your deliberations and violated the oath that you have taken. You will be able to talk about this case once it

is completed, with anyone, including persons at home, but right now talk about something else.

Don't discuss the case, don't conduct any independent investigations, please remember that you're not at liberty to let anybody talk about this case in your presence or talk to you about serving on this case.

I'd ask you to report to your jury room, please, by -- let me check, but I don't think that I have anything in the morning -- 9:30 in the morning. We will resume the trial at that time.

Have a good evening. You are free to leave.

(JURY OUT @ 4:25 P.M.)

THE COURT: Anything from the State before recessing?

SOLICITOR WILLIAMS: Just one small point, Your Honor. Mr. Groeber has asked two witnesses now if they swabbed the jewelry. The jewelry box is where the jewelry that was stolen from the victim was ---

THE COURT: So what?

SOLICITOR WILLIAMS: Because it goes to murder. It goes to -- it's ---

THE COURT: If you could please refrain from trying to win this battle, explain to me how that goes to murder any more so than stealing the car.

SOLICITOR WILLIAMS: I will try. If you put the statement aside -- the jury gets to decide whether the statement is voluntary and all kinds of issues with the statement.

Him having the victim's jewelry in his possession shows that he was in her home, it shows that he took her jewelry, ---

THE COURT: So does the car.

SOLICITOR WILLIAMS: So you are saying that it is cumulative?

THE COURT: I'm saying that it doesn't do any -- it's not any more so than the car. You have evidence that he put it there. What is the issue?

SOLICITOR WILLIAMS: Well, the jury is being left with the implication that he didn't steal the jewelry.

THE COURT: No. You want to have some -- you want to have -- tell me what the

testimony is of this witness about the jewelry, about how special that it is.

SOLICITOR WILLIAMS: It is her sister. She knows ---

THE COURT: Precisely the point. No, ma'am. No, ma'am. Thank you. It's nothing more than -- you want me to tell you some other reason? It goes to the prejudice, to get the jury angry. I am not going to allow it. Thank you, Solicitor.

You keep fighting the battle, Solicitor. You're a lawyer. I don't fault you for it. Thank you. You're doing what you're supposed to do.

SOLICITOR WILLIAMS: Thank you.

THE COURT: I'm doing what I am supposed to do, keep this a level playing surface and make this -- this case, if you get a conviction -- case not be returned for ---

SOLICITOR WILLIAMS: I understand.

THE COURT: Thank you.

SOLICITOR WILLIAMS: I respect that.

THE COURT: Thank you very much. Anything further from the defendant?

MR. GROEBER: Nothing, Your Honor.

THE COURT: Thank you. We will be at-ease until 9:15. Please be here at 9:15 in case we need something. Thank you.

(COURT IN RECESS)

(TRANSCRIPT CONTINUED NEXT PAGE)

OCTOBER 1, 2013 9:15 A.M.

(DEFENDANT PRESENT)

THE COURT: Let the record reflect that Mr. Penn is present. Good morning to you, sir.

DEFENDANT: Good morning, Your Honor.

SOLICITOR WILLIAMS: We have six witnesses left, Your Honor.

THE COURT: What about the next case?

(OFF RECORD DISCUSSION RE: DOCKET AND SCHEDULE FOR WITNESSES)

THE COURT: Anything before we bring in the jury?

MR. GROEBER: Could we talk briefly, because I think one of the remedies might come out through one of their witnesses?

THE COURT: All right. We can take a minute.

(BRIEF RECESS)

(COUNSEL CONFER)

SOLICITOR WILLIAMS: What we have agreed is that in closing argument, I will not argue that the -- I will keep my argument

to pointing out the difference between the voice mails and the recording statement to police.

Then in addition to that, the other thing that we worked out is that Joan Ramiriz, sister of the victim, was going to testify that she sold the van for $2,500 when she got the keys from law enforcement. Mr. Groeber has graciously agreed to stipulate that the van was -- that the value of the van was $2,500 and that the family got the keys from law enforcement.

THE COURT: Okay. Let me just say this -- because obviously this is where we could have shortened -- and I hope that in some ways we are going to incorporate some of the things from the civil side into the criminal side, so that we can streamline trials. This is the classic case for that, in my opinion.

After Mr. Groeber's opening statement, which I commend -- I think from a trial strategy that it is a proper approach to it, as a lawyer. There is a directed verdict in that the jury cannot find him not guilty in this case. He is either guilty of murder or

he is guilty of voluntary manslaughter, based on the defense's opening statement.

In the civil setting, plaintiff's counsel could have moved for a directed verdict as to liability. The only issue would have been damages. Clearly here -- no question he is guilty of a crime.

I've dictated a verdict form, and I think that it is the first one that I've had since we've gone to -- it makes sense, that not only do you have to prove grand larceny but you have to prove the value. So I was going to put in a question, 'Did you find that the State proved the value of the vehicle to be greater than two thousand dollars $2,000?' Yes or no. That's an element that is critical to any sentence imposed.

Based on your stipulation do you agree that the court does not -- that if he is found guilty of grand larceny that there is no question -- well, the potential sentence would be five years. The maximum sentence?

MR. GROEBER: Yes, Your Honor.

THE COURT: So I don't need to put hat question in if you've ---

MR. GROEBER: I don't believe so.

THE COURT: So they can find grand larceny, if they believe it, because we all agree the evidence supports that.

MR. GROEBER: If they find grand larceny?

THE COURT: Yes. I'm not suggesting that you agree that he is guilty of grand larceny.

MR. GROEBER: Correct.

THE COURT: And there is no dispute as to the value?

MR. GROEBER: Right. No, sir.

THE COURT: Fine, then I won't put that on the verdict form.

SOLICITOR WILLIAMS: Thank you, Your Honor.

THE COURT: Thank you very much, I appreciate it. That stipulation does not need to be disclosed to the jury. Does everyone agree with that? It'll just be for purposes of governing the trial going forward. Is that correct?

SOLICITOR WILLIAMS: So that element, will it be in the jury instructions?

THE COURT: I will just charge grand

larceny. Instead of saying property with a value of "x", I'll just say that he has to take property but we won't deal with the value -- if that's agreeable with everyone.

MR. GROEBER: Yes, Your Honor. We agree that it was over two thousand dollars ($2,000).

THE COURT: You won't have to argue that. What else?

MR. GROEBER: And the other part of the stipulation, that the sister got the keys from law enforcement. I think law enforcement testified to that but I will stipulate that she got the keys from law enforcement, who got them from ---

SOLICITOR WILLIAMS: Just so that there is no confusion that she got them as part of the estate, that she did get them from law enforcement because the defendant had them.

THE COURT: Okay. Whatever you want me to read or if you want to tell the stipulation(s) at the end of the case, we can do that. I'll be happy, if you want me to, -- at that time I will write it down and I can wing it, whatever you want me to do.

Okay?

SOLICITOR WILLIAMS: Yes, sir.

THE COURT: Are we ready for the jury now?

SOLICITOR WILLIAMS: The State is ready, Your Honor.

MR. GROEBER: We're ready.

THE COURT: Let the record reflect that Mr. Penn is present this morning, has been present during this discussion, all the conversation concerning the witness in Canada. Mr. Penn has been present and he is present now, for the purposes of this proceeding. Okay. Bring the jury in.

(JURY IN @ 9:42 A.M.)

THE COURT: Good morning, ladies and gentlemen. Thank you for your patience this morning. We have been taking up some matters of law that have arisen. Rather than having to excuse you this morning, we went ahead and deal with those issues and that keeps you from having to -- keeps things flowing. Sorry you had to wait a little bit before we brought you in. We are now ready to continue and I ask you to give your attention to the

next witness.

Solicitor, you may call your next witness.

SOLICITOR WILLIAMS: Thank you, Your Honor. Good morning. Thomas Blair. This witness is in a wheelchair.

THE COURT: Not a problem.

(WITNESS TAKES STAND)

THOMAS BLAIR, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Good morning, Mr. Blair. Can you hear me okay?

A. (No verbal response).

Q. Are you a little hard of hearing?

A. I am deaf in my right ear.

Q. If you have any trouble hear me, at all, just let me know and I will try to talk louder. Okay? And I will try to talk into the mic.

A. Okay.

Q. Mr. Blair, do you know -- did you know Kathy Chrastina?

A. Yes, ma'am.
Q. Do you know David Penn?
A. Yes, ma'am.
Q. How do you know David Penn?
A. I know David through my sister.
Q. How was that?
A. (No verbal response).
Q. What was that relationship?
A. They were boyfriend/girlfriend.
Q. And how did you know Kathy Chrastina?
A. Okay. I met Ms. Kathy in 1999 when they lived next door to where I used to work. I've known them every since.
Q. Who did she live with at that time?
A. Ma'am?
Q. Who did Kathy live with at that time?
A. She lived with her common law husband, Lannie.
Q. How did she meet David Penn?
A. I believe that she met him through reference as a job, for a job, you know.
Q. Did she also know Penny?
A. She knew my sister, too; yes, ma'am.

Q. And during the course of your relationship with her, did you have dealings with her business?

A. Did I ever ---

Q. Did you have any dealings with Kathy Chrastina's business, her painting business?

A. I knew that they were painters, that they did a lot of work on the islands and for different people.

Q. Did you ever help her arrange workers for her house or for her business?

A. Okay, I -- the last time when I talked to her, she wanted me to do some work in her house on her windows, some trim work.

Q. When was the last time that you talked to her?

A. It was on a Sunday.

Q. Okay.

A. Then I talked to her that Tuesday.

Q. Before that time, did you ever help arrange to have people to do jobs?

A. Yes.

Q. Did you have a chance to see how she operated her business?

A. Oh, yeah.

Q. How did she pay people?

Q. How did she pay people?

A. She'd pay by cash, then at the end of the year she wrote a 1099.

Q. Did she pay Mr. Penn with cash? If you know.

A. I am not for sure on that. I know she always paid by cash, paid everybody by cash.

Q. When you were talking with her on Sunday and Tuesday, what was the nature of that discussion about her house?

A. We talked about doing the trim on the windows and everything. She advised me she would be going to the bank on Tuesday to get the money to buy all the trim and everything, for me to get back in contact with her on Wednesday.

Q. So she was going to get cash?

A. She said that she was going to the bank and draw the money out to go buy the materials to do the windows.

Q. And this was the Tuesday before she died?

A. Yes, ma'am.

Q. Now, were you supposed to get back in touch with her and help her with any of that work?

A. Yes, ma'am.

Q. Okay. When were you supposed to get back in touch with her?

A. On Wednesday.

Q. During the course of your relationship with her, did you ever have chance to see how she dealt with people in a conflict situation?

A. She was pretty understanding. I mean, you know, she -- she wouldn't argue with you.

Q. What would she do?

A. She would just turn her back and walk away.

Q. Do you feel like you knew her well enough to know that about her, you observed her on many occasions?

A. I faced her a few times on occasions like that and she just, you know, -- she wouldn't argue with you.

Q. Did you try to get back in touch with her on Wednesday?

A. Yes, ma'am.

Q. When?

A. I called Wednesday morning and -- I called her cell phone Wednesday morning and her phone was answered but nobody said nothing. Then I -- I addressed myself to her, "Miss Kathy, this is Tom." As soon as I said that it was Thomas, the phone hung up. So I assumed maybe she was working on the island and in a bad reception. So, you know. I wasn't really sure what had happened.

So I waited about an hour, then I went over to her house. There wasn't nobody there. The vehicle was gone. So I figured that she was working.

Q. So then what happened? When was the next time that you tried to contact her?

A. I went over again that evening, Wednesday evening, and the van -- and it was late when I went over and I know she is always in her house by dark time, you know. The van still was not there. I knocked on the door. Nobody answered the door. I really couldn't see in the house or nothing, but the door was locked. So, you know, I

assumed that she was gone.

I went the next night, too. Thursday night and Friday night. Because Saturday I got busy, so I couldn't go over there Saturday.

Q. Was the van there?

A. There was nobody there all week. The vehicle was not there all week. So I assumed that, you know, maybe she went to Georgia to see her sister or, you know, something like that.

Q. When did you ultimately find out about her death?

A. I found out Sunday. Sunday.

Q. Did you go over to her house a lot?

A. What was that?

Q. Were you familiar with the layout of her house?

A. Oh, yeah.

SOLICITOR WILLIAMS: Can you put State's Exhibit 22 up? Your Honor, I am going to show this witness what has previously been marked as entered as State's Exhibit 22.

THE COURT: Okay.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. I don't know if you can swing your (wheel)chair around, Mr. Blair, but there is a diagram behind you. Is that a diagram of the inside of her home as you recognize it?

A. That's the setup inside the house.

Q. If you look at where the dining room is ---

A. What's that?

Q. Do you see the dining room table?

A. Yeah, you went in the kitchen, then there was the dining room and living room.

Q. About how far was the dining room table to the middle of the living room?

A. The dining room table?

Q. Yeah.

A. It was no more than ten or fifteen feet.

Q. So if you go from where the table is over to in front of this couch (indicating), ---

A. What is that now?

Q. From where this table is to ---

A. (Affirmative nod), that's the dining

room, living room, ---

Q. --- right in front of this couch, how far is the distance between the dining room table and ---

A. To the middle of the living room?

Q. Yes.

A. Ten or fifteen feet.

Q. Thank you. Now, what was her husband's name?

A. Ma'am?

Q. What was her husband's name?

A. Lannie.

Q. I am going to show you a piece of evidence, what has been previously marked as State's Exhibit 44. Can you tell me if you recognize what this is?

A. Yeah, that's Lannie's bracelet.

Q. And when you say Lannie, you are talking about who?

A. Ma'am?

Q. Who is Lannie?

A. (No verbal response).

Q. Who is Lannie?

A. Common law husband.

Q. Of Kathy?

A. Ma'am?

Q. Of Kathy?

A. (No verbal response).

Q. Kathy's husband?

A. Yes, ma'am.

Q. And where did she keep that bracelet?

A. She kept it in a jewelry box.

Q. How big of a woman was Kathy?

a. Ma'am?

Q. How big was Kathy?

A. Maybe five-five, five-six, but I don't think she weighed a hundred twenty pounds.

SOLICITOR WILLIAMS: Thank you. Nothing further. Please answer any questions from the defense.

MR. GROEBER: Briefly, Your Honor.

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. GROEBER:

Q. Mr. Blair, just a few questions. Is it fair to say that Kathy helped David? Isn't it?

A. Sir?

Q. Is it fair to say that Kathy helped David?

A. He worked for her.

Q. She gave him a job.

A. Yes, sir.

Q. And she paid him good money?

A. She paid him, yeah.

Q. She even loaned him money?

A. (No verbal response).

Q. She loaned him money?

A. Do what now?

Q. She loaned him money?

A. (No verbal response).

Q. She let him borrow some money?

A. Oh, yeah. To my understanding she loaned him money to go to Chattanooga for some reason. Chattanooga, Tennessee.

Q. And he is from Tennessee?

A. Sir?

Q. He is from Tennessee, originally?

A. I understood that he never paid her back.

Q. My question is that Mr. Penn is from Tennessee, right?

A. From Tennessee, (affirmative nod).

To my understanding, yes.

Q. And he worked for Kathy for a few years?

A. I think about three, three or four maybe.

Q. Okay.

A. He started working for her after her common law husband passed away.

Q. Okay.

MR. GROEBER: One moment, Your Honor?

THE COURT: Yes, sir.

MR. GROEBER: (Sidebar with Mr. Schwacke), no further questions.

THE COURT: Redirect?

SOLICITOR WILLIAMS: Just one.

REDIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. He wasn't working for her anymore, was he?

A. To my understanding he wasn't doing nothing for her, for a while. I don't know if she was slow on work or something. I don't really know, but I know that he wasn't working for her.

Q. Isn't it true that she didn't want

him to work for her anymore? MR. GROEBER: Objection.

THE COURT: Sustained.

WITNESS: That, I have no idea.

THE COURT: Excuse me. No, sir. No need to answer that.

SOLICITOR WILLIAMS: Nothing further.

THE COURT: Recross?

MR. GROEBER: No, Your Honor.

THE COURT: The witness may be excused.

(WITNESS STEPS DOWN)

SOLICITOR WILLIAMS: The State calls Patty Cobb.

(WITNESS TAKES STAND)

PATTY COBB, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Good morning, Ms. Cobb.

A. Good morning.

Q. Where are you employed?

A. Let me think -- Murphy's Express USA, gas station.

Q. Are you a little nervous?

A. Yes.

Q. It's okay. Just take a deep breath. Do you know David Penn?

A. Yes.

Q. How do you know him?

A. He was seeing my sister. They were living together.

Q. How long ---

A. --- did they live together? Five or six years, maybe.

Q. And during the course of your acquaintance with him, did he ever live with you?

A. Yes.

Q. How many times?

A. Twice.

Q. During that time did you have occasion to collect money from him for rent?

A. Yeah.

Q. Did he have a checking account?

A. No.

Q. Did you ever know him to have a checking account?

A. No.

Q. Who paid the bills?

a. My sister gave the rent when it was due. The arrangement was that they would tally together, but she paid either me or my husband.

Q. Where was he from, originally? If you know?

A. All I know is that he was from Tennessee, some part of Tennessee.

Q. Did you know Kathy Chrastina?

A. Yes.

Q. What did you know about the relationship that she had with Mr. Penn?

A. It was a working relationship. He worked for her.

Q. How would he get to work?

A. She would pick him up from time to time when he worked.

Q. Did he always work regularly?

A. No.

Q. Did he always have access to money?

MR. GROEBER: Objection, calls for speculation.

THE COURT: Sustained.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. Was there a time when -- where was Penny living the last time that she lived with Mr. Penn?

A. In Bonneau.

Q. And did that situation change?

A. Yes.

Q. Where did she move next?

A. With me.

Q. How did she get there?

A. I went and got her.

Q. Do you remember about when that was?

A. In July, I'd say of 2011.

Q. After that, did she start seeing someone else?

A. Yeah.

Q. How did Mr. Penn react to that?

MR. GROEBER: Objection. Personal knowledge.

THE COURT: You need to lay the foundation for that, please.

WITNESS: Excuse me.

SOLICITOR WILLIAMS: I will ask -- I am going to take that question back.

THE COURT: Thank you. Without laying a foundation, I would sustain it under 602.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. Were you around your sister or Mr. Penn to observe his reaction, either a voice reaction or a physical reaction, to the fact that she had left him and was with another man?

A. Yeah.

Q. And what was that reaction?

A. Just upset, and just like that she wasn't supposed to be.

Q. Do you remember about the time that Kathy Chrastina was murdered?

A. Yes.

Q. During that time, where was Penny living?

A. With me.

Q. During that time, did you witness any calls that she got from Mr. Penn?

A. Yeah.

Q. Did you hear any voicemails?

A. Yes.

Q. Was that coming in on her phone, your phone?

A. Both.

Q. During that time did you actually ever hear his voice or have a conversation with him yourself?

A. Yes.

Q. Tell us about that.

A. I was at an Avon -- I was an Avon dealer at the time. He'd called my phone and said that he had done something bad. Then he was -- he was crying. I said, 'you need to tell somebody, I don't want to get in the middle of it.' He said, 'tell your sister to call me.' I said, 'David, no.'

He was blowing up her phone, saying 'I need to talk to you, I've done something bad.'

Then a day or two after the initial call he called and he said that he had hurt somebody. He called my sister back. I heard the phone, the phone call. I picked up the phone because, of course, we're twins and I didn't want her to have any calls. He said that he had killed Miss Kathy and then he said "maybe it should have been your sister, then you."

SOLICITOR WILLIAMS: No further

questions.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. GROEBER:

Q. This last conversation that you were just speaking about, were you speaking with Mr. Penn?

A. No, I heard the call. It was on my sister's phone. She was there and I had her put it on speakerphone.

Q. So you didn't -- you didn't speak with him then?

A. No.

Q. You were around your sister a lot during the time that you found out that Miss Chrastina had been killed; right?

A. Yes.

Q. And you saw her interaction with the police?

A. My sister's?

Q. Right.

A. Yes.

Q. And you were there when Penny gave her statement, right?

A. Yes.

Q. And you did not give a statement at

that time?

A. No, they didn't ask me nothing. So -- (pause).

Q. But you didn't speak to them, didn't tell them anything?

A. Just what she was going through. Just, you know, the pain and everything that she was going through.

Q. But you didn't write a statement, at all?

A. No.

MR. GROEBER: One moment, Your Honor?

THE COURT: Certainly.

MR. GROEBER: (Sidebar with Mr. Schwacke), no further questions.

THE COURT: Redirect?

SOLICITOR WILLIAMS: No, Your Honor.

THE COURT: You may come down. Thank you.

(WITNESS STEPS DOWN)

THE COURT: Call your next witness.

SOLICITOR DIXON: The State calls Lieutenant Will Rogers.

(WITNESS TAKES STAND)

WILL ROGERS, having been sworn to tell

the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR DIXON:

Q. Lieutenant Rogers, where do you work?

A. I work for the Berkeley County Sherriff's Department.

Q. How long have you worked there?

A. Twenty-one years for Berkeley.

Q. What do you do for Berkeley County?

A. I am a shift lieutenant, road patrol.

Q. What does that mean?

A. That means that I am in charge of, supposedly, fifteen men that are supposed to answer calls.

Q. Were you in that position on October 15th, 2011?

A. Yes, ma'am, I was.

Q. Did you receive information regarding the murder of Kathy Chrastina?

A. Yes, ma'am.

Q. Based on that information, did you take any action?

A. Yes, ma'am. I went to the scene. I spoke to two of my units that were at the scene and they had determined that it was a homicide. I received information over the radio, and the phone, as to the possible location of the person involved.

Q. What did you next?

A. Based on the information that I'd received by phone and radio, I went to the town of Moncks Corner and looked near the railroad tracks, where I was told that the subject might be. I didn't find him there. I went to two motels, one of which I got information that he'd just left and they gave me a description.

Q. And after you got that description, what did you do?

A. I proceeded to ride around the town of Moncks Corner. He had only been gone from the motel for approximately twenty minutes, so I rode around looking for him.

Q. And did you find him?

A. I spotted somebody who matched the description fifteen minutes later.

Q. Did you stop that person?

A. Yes, ma'am. I did.

Q. Did he have anything with him when you stopped him?

A. He had like a children's tote sack, which is what the manager of the motel had told me that he had, over his shoulder.

Q. Showing you what has previously been marked for identification as State's Exhibit 45. Do you recognize that?

A. Yes, ma'am, that would be what he had over his shoulder.

Q. And did you collect that when you took him into custody?

A. I put him into handcuffs with it still over his shoulder.

Q. Did you take anything out of it and change it in any way?

A. No, ma'am.

Q. If you could look in the side pocket of that lunch tote, ---

SOLICITOR DIXON: I'm sorry, Your Honor. At this time we would move State's Exhibit 45 into evidence.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: Without objection, State's Exhibit 45 is admitted.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Was that head scarf in the tote when you collected it?

A. I never looked in the tote.

SOLICITOR DIXON: I have no further questions, Your Honor.

MR. GROEBER: Yes, briefly.

THE COURT: Sure.

CROSS EXAMINATION

BY MR. GROEBER:

Q. Lieutenant Rogers, the reports that came in was about a black male walking around WalMart?

A. No, sir, never to -- never heard WalMart.

Q. Or a black male walking around a gas station?

A. No, sir.

MR. GROEBER: No further questions.

THE COURT: Redirect?

SOLICITOR DIXON: No, Your Honor.

THE COURT: You may step down.

(WITNESS STEPS DOWN)

THE COURT: Call your next witness.

SOLICITOR DIXON: The State calls Sergeant Geno Alteri.

MR. GROEBER: May we approach Your Honor?

THE COURT: Yes, sir.

(OFF RECORD BENCH CONFERENCE)

(WITNESS TAKES STAND)

GENO ALTERI, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR DIXON:

Q. Good morning, Sergeant Alteri. Where do you work?

A. Berkeley County Sherriff's Office.

Q. How long have you worked for Berkeley County?

A. Approximately seventeen years.

Q. What do you currently do for the Berkeley County Sherriff's Office?

A. I work for the forensics department.

Q. Were you recently transferred there?

A. Yes, ma'am.

Q. What were you doing on October 15th,

2011?

A. I was a sergeant in the criminal investigation department, over the persons unit.

Q. And in the crime investigations division, can you just tell the jury briefly what your duties were there?

A. Yes, we followed up on cases involving assaults, homicide, anything that had to do with property. Stolen stuff was for the property people.

Q. Did you receive information relating to this case?

A. Yes, ma'am.

Q. As a result of that information, what did you first do?

A. I received a phone call from one of my detectives, Detective Fenton. He advised me that there was a homicide that that he needed me to respond to Horres Court in reference to the incident, possible incident, location.

Q. Did you respond to that location?

A. Yes, ma'am.

Q. While there, did you receive

information regarding the defendant?

A. Yes, ma'am.

Q. And what was that?

A. That they had just picked him up and needed me to go up and interview him.

Q. Did you go to the sheriff's office?

A. Yes, ma'am.

Q. Did you encounter the defendant?

A. Yes, ma'am.

Q. Was he in custody at that point?

A. Yes, ma'am.

Q. Do you remember approximately what time that was?

A. It was approximately 8:30.

Q. Did you have an opportunity to speak with the defendant?

A. Yes, ma'am.

Q. Can you tell us where -- where were you, at the sheriff's office, when you spoke with the defendant?

A. It was at one of our interview rooms that we have for doing interviews, in the back of the building.

Q. Can you describe that room for us, please?

A. Yes, ma'am. It's a small, square room, probably six feet by five feet or seven feet. I am not quite sure of the measurements. It's got soundproofing. It's got audio/video recording capability. It's got some chairs and a table.

Q. Before you began speaking with the defendant, did you advise him of his rights?

A. Yes, sir.

Q. How did you do that?

A. With a *Miranda* form that we use.

SOLICITOR DIXON: Your Honor, I believe that form has been entered.

THE COURT: Has it been entered through this?

COURT REPORTER: No, sir. It will be State's Exhibit 57 for identification.

THE COURT: Okay.

SOLICITOR DIXON: Permission to approach.

THE COURT: You may.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Sergeant Alteri, do you recognize this?

A. Yes, ma'am.

Q. Can you tell us what that is, please?

A. That is a *Miranda* advisement form.

Q. Is that the form that you used with the defendant when you questioned him?

A. Yes, ma'am.

Q. Has there been any alteration to it?

A. Other than the (exhibit) sticker, no, ma'am.

SOLICITOR DIXON: Your Honor, at this time we move State's Exhibit 57.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: Without objection, State's Exhibit 57 is admitted.

(SO ENTERED AS STATE'S EXHIBIT 57)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Sergeant Alteri, if you could, please describe how you go about giving somebody their Miranda rights.

A. Yes, ma'am. First, we bring them into the room, sit them down and explain to them that we have to go over the Miranda, for

their protection and ours. Then we -- shall I go ahead and read it

Q. Sure.

A. We advise them that we have to read them their rights, and they are numbered one through five, (reading):

1. You have the absolute right to remain silent and do not have to answer any questions or give a statement and this fact cannot be used against you.

2. If you do answer questions or give a statement, anything that you say can and will be used against you in a court of law.

3. You have the right to consult with a lawyer of your choice before you answer questions or give a statement, and also the right to have him present while you are being questioned.

4. If you wish to talk to a lawyer and have him present but are unable to afford to hire a lawyer, one will be appointed to represent you free of charge.

5. If you decide to answer questions or to give a statement without

having a lawyer present representing you, you have the absolute right during this interview to stop answering questions and remain silent.

Q. Did you read him those rights, Sergeant?

A. Yes, ma'am.

Q. All five of those?

A. Yes, ma'am.

Q. Did he indicate that he understood those rights?

A. Yes, ma'am.

Q. How did he indicate that?

A. Once I complete, I ask them to initial next to each number of each warning if they've understood them.

Q. Did the defendant initial?

A. Yes, ma'am.

Q. Did he sign that document?

A. Yes, ma'am.

Q. Did he defendant indicate whether or not he wished to speak with you without an attorney present?

A. He just said that he wanted to talk to us.

Q. Did it appear to you that you understood the rights as you read them to him?

A. Yes, ma'am.

Q. Did you make any threats or promises to the defendant?

A. No, ma'am

Q. Did it appear to you that the defendant was under the influence while you were questioning him?

A. No, ma'am.

Q. Did you get any information as to whether or not he had used drugs or alcohol that day?

A. Yes, ma'am.

Q. And what was that information?

A. He stated that at approximately 3:00 o'clock, or somewhere around that area, that he had smoked some crack.

Q. Did he say whether or not he was being affected by that?

A. He said at that time that he was not. He said that he felt fine enough to talk about what was happening.

Q. You mentioned earlier, Sergeant,

that the rooms were audio and video recorded.

A. (Affirmative nod)

Q. Was there a recording made of this interview?

A. Yes, ma'am.

Q. Was there a recording made of this interview?

A. Yes, ma'am.

Q. I show you what has been previously marked as State's Exhibit 49. Can you identify this CD?

A. Yes, this is a recording of the interview.

Q. How do you know that's the recording?

A. It has my initials and the date on it.

Q. Were you able to review that CD?

A. Yes, ma'am.

Q. Is that a true and accurate copy of the statement that the defendant gave that day?

A. Yes, ma'am.

Q. Any alterations made to it?

A. No, ma'am

SOLICITOR DIXON: Your Honor, at this time we would move for the admission of State's Exhibit 49 into evidence.

THE COURT: Any objection?

MR. GROEBER: Yes, Your Honor, on the previous -- previous grounds -- previous ---

THE COURT: Very well. The ruling(s) previously made on -- what is it? State's 49?

SOLICITOR DIXON: Yes, Your Honor.

THE COURT: State's Exhibit 49, as previously stated, -- subject to those objections is admitted.

(SO ENTERED AS STATE'S EXHIBIT 49)

THE COURT: Do you wish to publish it?

SOLICITOR DIXON: Exhibit 49-A, Your Honor.

THE COURT: Okay.

SOLICITOR DIXON: We would also ask to admit.

MR. GROEBER: Same objection.

THE COURT: Okay. Exhibit 49 will not be published, but 49-A will be published?

SOLICITOR DIXON: Yes, Your Honor.

(SO ENTERED AS STATE'S EXHIBIT 49A)

THE COURT: Ladies and gentlemen, I am aware that this item will take about an hour to review. We will take a break at this time and let you stretch for a little bit. We'll be back with you in about ten to fifteen minutes. Please retire to your jury room but do not begin your deliberations.

(JURY OUT @ 10:10 A.M.)

SOLICITOR DIXON: Your Honor, with the court's permission, I will have Sergeant Alteri step down.

THE COURT: That's fine. During this break -- you don't need to talk to him, do you?

SOLICITOR DIXON: No, sir.

THE COURT: I'd ask you not to have any communications with any of the attorneys, Sergeant. Thank you. We will be at-ease for about ten to fifteen minutes.

(BRIEF RECESS)

(DEFENDANT PRESENT)

THE COURT: Is the State ready?

SOLICITOR WILLIAMS: Yes, sir.

THE COURT: Is the defendant ready?

MR. GROEBER: Yes, Your Honor.

THE COURT: Bring in the jury.

(JURY IN @ 10:38 A.M.)

THE COURT: Thank you, ladies and gentlemen. We are now ready to proceed. This witness has identified State's Exhibit 49-A, which is now going to be played for the jury.

(STATE'S EXHIBIT 49-A, VIDEO PLAYED)

THE COURT: All right. Sergeant Alteri, please return to the stand. I would remind you that you are still under oath.

SOLICITOR DIXON: Your Honor, may I approach?

THE COURT: Yes, ma'am.

(WITNESS, GENO ALTERI, RESUMES STAND)

THE COURT: You may continue with your examination.

SOLICITOR DIXON: Thank you, Your Honor.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR DIXON:

Q. Sergeant, I show you what has been marked as State's Exhibit 53 for identification. Can you identify that for us, Sergeant?

A. This is the drawing that we saw in the interview, that I asked him to draw.

Q. Was that drawn by the defendant, or he instructed you how to draw it?

A. Yes.

Q. Is that his signature?

A. Yes.

Q. Is that an accurate reflection of how it was drawn that day during the interview?

A. Other than the sticker.

SOLICITOR DIXON: Your Honor, at this time we would move to admit it?

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: Without objection, State's Exhibit 53 is admitted.

(SO ENTERED AS STATE'S EXHIBIT 53)

SOLIC DIXON: Thank you, sir. No further questions.

THE COURT: Cross examine.

MR. GROEBER: Briefly, Your Honor.

THE COURT: Sure.

CROSS EXAMINATION

BY MR. GROEBER:

Q. Who is Fuda?

A. Pardon?

Q. Who is Fuda?

A. He is the chief of police for Bonneau.

Q. And that is who he was talking about on the video there?

A. I believe so.

Q. The chief of police in Bonneau?

A. Yes.

Q. You went through that you read the defendant his Miranda rights, correct?

A. That's right.

Q. And he understood every single one of those?

A. Yes, sir.

Q. And you also told him that he was being videotaped?

A. Yes, sir.

Q. And recording audibly?

A. I advised him that the room was being recorded, (affirmative nod).

MR. GROEBER: Nothing further.

THE COURT: Redirect?

SOLICITOR DIXON: None, Your Honor.

THE COURT: Thank you. You may step down.

(WITNESS STEPS DOWN)

THE COURT: Call your next witness.

SOLICITOR WILLIAMS: The State calls Penny Blair.

(WITNESS TAKES STAND)

PENNY BLAIR, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Where are you employed?

A. Family Dollar, Moncks Corner.

Q. How long have you worked there?

A. Six years.

Q. Did you know Kathy Chrastina?

A. Yes, ma'am.

Q. How did you know her?

A. She was a friend of mine.

Q. At any time, did she ever offer to let you live with her?

A. No.

Q. And you know David Penn?

A. Yes.

Q. How do you know David Penn?
A. I lived with him for eight years.
Q. And how did David Penn meet Kathy Chrastina, if you know?
A. Through me.
Q. What was his relationship like with her?
A. She was his boss.
Q. And is that where -- how long did he work for her?
A. Approximately four years.
Q. Do you know when that relationship ended?
A. 2011.
Q. Did end before her death, to your knowledge?
A. Shortly before.
Q. And when you lived with David Penn, did he ever have a checking account?
A. No, ma'am.
Q. Did he ever have a checking account at -- he had no checking account?
A. No, ma'am.
Q. When was the last time that you lived with him?

A. July 2011.
Q. Where was that that y'all lived?
A. Bonneau Beach.
Q. Were you supporting the two of you at that time?
A. We were supporting each other.
Q. Were you both involved with drugs?
A. Yes.
Q. How did he feel about you leaving?
MR. GROEBER: Objection.
THE COURT: I will allow is.
WITNESS: Like any man, he didn't want me to go.
DIRECT EXAMINATION CONTINUED
BY SOLICITOR WILLIAMS:
Q. Did you begin seeing another man shortly after?
A. Yes.
Q. How did he feel about that?
A. He wasn't happy.
MR. GROEBER: Objection.
THE COURT: I will allow it. Overruled.
DIRECT EXAMINATION CONTINUED
BY SOLICITOR WILLIAMS:

Q. Now, during the period of time before Kathy Chrastina's death, did you hear from the Defendant?

A. Yes.

Q. How did you hear from him?

A. I talked to him on the phone.

Q. Did he ever leave messages for you?

A. Yes, ma'am.

Q. What kind of phone did you have at that time?

A. A green slide cellular phone.

SOLICITOR WILLIAMS: Showing defense counsel what has been marked as -- (tenders to counsel).

MR. GROEBER: (Review).

SOLICITOR WILLIAMS: May I approach, Your Honor?

THE COURT: Yes, you may.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. What is that a picture of?

A. My telephone.

Q. Is that the one that you had when he left the message?

A. Yes, ma'am.

SOLICITOR WILLIAMS: Your Honor, at this time we would move to admit State's Exhibit 52 into evidence.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: State's Exhibit 52 is admitted without objection.

(SO ENTERED AS STATE'S EXHIBIT 52)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. At some point did police officers come and process that phone?

A. Yes.

Q. Did they remove voice mails from it?

A. Yes, that I know of. Yes.

Q. Why was -- was the defendant's -- what was the defendant's relationship with your sister?

A. (No verbal response).

Q. Did he know her?

A. Yes.

Q. Were they friends?

A. Yes.

Q. Was he upset with her?

A. From time to time.

Q. Did he express that he was upset with her in the calls?

A. Yes.

Q. And you don't know why.

A. Because I lived with her and not with him.

SOLICITOR WILLIAMS: Your Honor, I show defense counsel what has been marked as State's Exhibit 50.

THE COURT: All right.

MR. GROEBER: (Review).

SOLICITOR WILLIAMS: May I approach?

THE COURT: You may.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. What is this?

A. (No verbal response).

Q. Have you seen this before?

A. Yes.

Q. Okay. Did you listen to it?

A. Yes, I did.

Q. What is on there?

A. Voicemails from David.

Q. Are these the voicemails that were on your phone?

A. Yes, ma'am.

Q. How do you know that this is the tape of the voicemails?

A. It has my signature on it.

SOLICITOR WILLIAMS: Your Honor, at this time we would offer State's Exhibit 50 into evidence.

THE COURT: Any objection?

MR. GROEBER: Yes, Your Honor. Previous ground.

THE COURT: Based on the rulings previously made, the court will overrule that objection and admit State's Exhibit 50 -- subject to the objections of counsel previously made.

(SO ENTERED AS STATE'S EXHIBIT 50 OVER OBJECTION OF DEFENSE COUNSEL)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. On this tape, does it give the time and the date of messages?

A. Yes.

SOLICITOR WILLIAMS: Your Honor, at this time we would ask to publish State's Exhibit 50?

THE COURT: You may do so.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. (Exhibit 50 played for jury) --

SOLICITOR WILLIAMS: No further questions.

THE COURT: Cross examine.

MR. GROEBER: Yes, sir, Your Honor. Briefly.

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. GROEBER:

Q. You and David knew each other for a long time, right?

A. Yes, sir.

Q. Y'all went through a lot together?

A. Yes, sir.

Q. Y'all were even homeless at one point?

A. Yes, sir.

Q. And you both really struggled with addiction?

A. Yes, sir.

Q. And that was to crack cocaine?

A. Yes.

Q. When he was on crack, he acted differently?

A. Yes, he did.

Q. When he got paid for working, what did he use his money for?

A. Drugs.

Q. Did you help to support each other's drug habit?

A. Yes.

Q. But he also contributed towards your rent and that kind of stuff?

A. Yes.

Q. You were battling a drug problem, too?

A. Yes.

Q. But you are doing better now?

A. Yes, I've been clean for three years.

Q. A lot of -- there were several times when you and David would stay with your family?

A. Yes.

Q. You would stay with Thomas Blair?

A. No, we did not stay with Thomas.

Q. With Patty?

A. Yes, and my brother David.

Q. And your family knew about your drug problem?

A. Yes, sir.

Q. And they knew about David's?

A. Yes.

Q. Mr. Penn's drug problem?

A. Yes.

Q. And it was difficult for them to take you and him in?

A. They did it out of love.

Q. Now, I want to talk to you about October 14th and 1th. David had been calling you those two days, right?

A. Yes, sir.

Q. Numerous times?

A. Yes.

Q. And he had been texting you?

A. Yes, sir.

Q. You most -- for the most part you were ignoring those?

A. For the most part, yes.

Q. But sometimes you did make a response?

A. Yes, I did.

Q. Either through text or through speaking?

A. Yes.

Q. And at one point you talked to him, on the 15th?

A. Yes.

Q. And he was sobbing?

A. Yes.

Q. He was upset?

A. Yes.

Q. And he told you that he had hurt someone?

A. Yes, he did.

Q. Ms. Blair, you've heard those voicemails?

A. Yes.

Q. Did you believe that David would hurt your sister?

SOLICITOR WILLIAMS: Objection. Speculation.

THE COURT: Sustained.

MR. GROEBER: May we approach, Your Honor?

THE COURT: You may.

(OFF RECORD BENCH CONFERENCE)

THE COURT: We will do that off the record. I sustain the objection and put my ruling on the record at the first break.

MR. GROEBER: I have nothing further.

THE COURT: Redirect?

SOLICITOR WILLIAMS: Nothing further, sir. Thank you, Your Honor.

THE COURT: You may step down, Ms. Blair.

(WITNESS STEPS DOWN)

THE COURT: Call your next witness, please.

SOLICITOR WILLIAMS: The State would call Dr. Erin Presnell.

THE COURT: Ask Ms. (Penny) Blair to remain, please. Outside.

BAILIFF: Yes, sir.

(WITNESS TAKES STAND)

ERIN PRESNELL, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Dr. Presnell, where are you employed?

A. I work in Charleston at the Medical

Q. Are you a licensed physician?

A. Yes, I am licensed to practice in the state of South Carolina.

Q. How long have you been licensed jury in your profession?

A. I received my permanent medical license in 1994 when I was in Pathology training.

Q. Do you specialize in a particular field of medicine?

A. Yes, I am a pathologist. I will just kind of go briefly through the background of how I got to be a pathologist. The background is that I went to Clemson for my undergraduate, majored in microbiology. Then I went to MUSC for medical school, which is four-year process.

After medical school, I had to decide which specialty I wanted to go to: pediatrics, surgery, Family medicine. I chose pathology, which is a five-year training program that you go through.

After pathology residency, I took the board for the American Board of Pathology.

It's a national certification agency. I passed the boards for general pathology.

After that, I did one year of specialize training in forensic pathology, which is a subspecialty of pathology. I have taken those boards, as well. So I am board certified in both pathology and forensic pathology.

Q. Thank you. As part of your training and also part of your job, do you perform autopsies?

A. Yes. Forensic pathology, that is pretty much what makes up -- is pretty much what forensic pathology is.

Just to give you a little bit of background, when people hear "pathology", a lot of times these days they think of autopsy, but a pathologist -- a general pathologist, the majority of their job is diagnosing disease.

If you go to your family doctor and have a skin biopsy or a pap smear, anything that a physician takes from you that gets sent to a pathologist, they look at it grossly, meaning with their eyes, and they diagnose whether or

not it is disease. Is it cancer? Is not cancer? Is it infectious or not infectious? Did they get all the cancer out or didn't they?

So I trained for that. Then the subspecialty of forensics is -- we look for disease but we also look at trauma and evaluate trauma. We are not just looking at a piece of tissue that comes off of someone. We're looking at the whole individual/person. That process is the autopsy.

Then ultimately we put everything together to determine the cause and manner of death.

Q. How many autopsies would you say that you've performed in your career?

A. It's an estimate, over two thousand.

SOLICITOR WILLIAMS: Your Honor, at this time the State would move to have Dr. Presnell qualified as an expert in the field of Pathology.

THE COURT: Do you care to examine her?

MR. GROEBER: No, Your Honor, we have no objection.

THE COURT: Very well. She will be

permitted to render opinions in pathology.

SOLICITOR WILLIAMS: Thank you, Your Honor.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. During October of 2011, were you working in your present capacity?

A. Yes, I was.

Q. Did you perform an autopsy on October 16th?

A. I did.

Q. Who was the subject of that autopsy?

A. The decedent was Kathy Chrastina.

Q. Did you perform a forensic autopsy report from that examination?

A. Yes.

Q. In that report do you document the victim's weight?

A. Yes. Her remains were ninety-eight pounds (98).

Q. And do you describe the evidence of the injury?

A. Yes.

Q. Can you tell us what that is?

A. Well, just to back up, when we are

doing an autopsy, we do an entire external exam. Then we do an internal exam. We also do, typically, in all cases toxicology.

On Ms. Chrastina, her external exam is remarkable for decomposition. She had started the decomposition process, which kind of obscures, sometimes, trying to evaluate for more superficial injury.

So with that in mind, the major injury that we found at autopsy was a computer cord wrapped three times around her neck.

Reflecting the inside of the body, we found some hemorrhage -- what we could tell what definitely some hemorrhage in the muscle area of the neck. With that, the constriction around the neck, we did deduce that the cause of death was ligature strangulation.

Q. What are the factors that you consider when determining how long it takes someone to die?

A. We are mechanism when you wrap -- when you put some kind of compression around the neck. When you're talking about compression of the neck, it really isn't

compression of the airway such that you can't breathe. It's compression of the blood vessels that are going from your heart to your head. If you press hard enough to close off the carotid arteries going from your neck to your head, you'd expect a loss of consciousness in around the ten to fifteen-second range. If you continue to prevent the blood from getting to your brain, then the estimate is that in minutes, four minutes or so, you would expect death.

In this case, with the computer cord for the ligature wrapped tightly around the neck, that would have been expected to occlude her vessels and fall into that pattern.

Q. I am going to pose a hypothetical to you. If this victim were choked, manually, and then dragged to another room about ten away, could the choking have caused unconscious before the cord was wrapped around the neck?

A. We -- just to clarify terminology. To a forensic pathologist, "choking" is like choking on a grape or something that you would inhale. We'd refer to that with

strangulation, manual strangulation, using the hands to compress the neck. If both of arteries were occluded or compressed, then a person could have lost consciousness and then been dragged to another location.

Q. There is no way for you to tell that at this point, is there?

A. I can't tell that there were any marks on the neck at the time of autopsy.

Q. And there's no way for you to tell that because of the condition of the body?

A. Correct.

Q. And there is really no way to tell, for that reason, just how long it took her to die.

A. Right. When I was referring early to the complete occlusion of the vessels, that is if the compression is continuous. If here is a struggle or if the pressure is intermittently released, then a struggle could go on indefinitely.

Q. Is it common for people who are strangled to become unconscious before they die?

A. Yes, usually if you -- if you

compress the blood vessels to your brain, you would lose consciousness and subsequently die.

Q. Now, did you do a toxicology as part of this examination?

A. Yes. I believe that we tested her liver.

Q. Were there any foreign substances, any drugs or alcohol in Kathy Chrastina's system?

A. She showed caffeine, and that was it.

Q. As part of your examination, did you remove the ligature or cord?

A. Yes, I did.

Q. Can you explain to the jury just how you did that in this particular case?

A. Well, the cord was wrapped three times around the neck and was also looped through itself. So what I did was to try to loosen it up and -- it was not tied off in a knot. I tried to loosen it up and then slipped it back over her head.

Q. So you took it off the same way that it was on the neck?

A. The same configuration, yes.

Q. Then did you photograph that?

A. I did.

Q. Can you illustrate to the jury the way that I was tied?

A. I was trying to practice it the other hand and it looks funny with me doing my hands around like this, so if I could -- I can show you -- I brought a piece of cord. I can show you the configuration of the ligature, if it is allowed.

Q. It would help you to illustrate that to the jury if you could use the ---

A. I think it would. That is the clearest way that I could come up.

SOLICITOR WILLIAMS: Permission that she may step down.

THE COURT: Dr. Presnell, while you are there, keep you voice elevated, please.

WITNESS: Yes, sir. Remember, it was three loops. (Demonstrating with cord), that's the first loop, that's the second loop, and then there is actually a loop down here with the end of the cord going through here.

And I will demonstrate again down here (along jury rail): here is the first loop, the second loop, the loop down at the edge there, and the third final loop around the neck and the end of the cord through that loop.

SOLICITOR WILLIAMS: Thank you.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. Did you do any research about knots, different kinds of knots and what kind of knot that could be? D

MR. GROEBER: Objection. Out of the scope of expertise.

THE COURT: I would sustain the objection. You may rephrase

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. Just as part of doing background, in researching this case and that ligature, did you do the kind of research that an average person would do to figure out what kind of knot that was? Did you obtain any knowledge about that?

MR. GROEBER: Same objection.

THE COURT: Overruled.

WITNESS: I am going to have to explain that this is a little out of my area of expertise. It is not something that I researched. This is something that I was trying to figure out last night, so I don't know that I had a lot of time to research it. I don't feel comfortable ---

SOLICITOR WILLIAMS: Okay.

THE COURT: She has described it. She doesn't need to name it.

SOLICITOR WILLIAMS: Okay.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. I am going to show you what has been previously marked as State's Exhibit 47. Can you tell us what this is?

A. This is a photograph of the computer cord that I took at the time of autopsy.

Q. Is that the way that it appeared around the victim's neck when you did the autopsy?

A. Yes.

SOLICITOR WILLIAMS: At this time, Your Honor, we would move State's Exhibit 47

into evidence.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: Without objection, State's 47 is admitted.

(SO ENTERED AS STATE'S EXHIBIT 47)

SOLICITOR WILLIAMS: May we publish?

THE COURT: You may.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. If you could just kind of show the jury.

A. Okay. Her is the battery charger and here is the free end, that was not around her neck, it was pulled into another plug. Here is the loops that I was talking about: one, two, and one down there and then the third loop through.

SOLICITOR WILLIAMS: Thank you. No further questions.

THE COURT: Cross examine.

MR. GROEBER: Yes, sir.

CROSS EXAMINATION

BY MR. GROEBER:

Q. Dr. Presnell, you don't the status

of that cord before it was used on Ms. Chrastina, do you?

A. No, I do not.

Q. So you don't know if there were loops or knots in the cord before it was placed on her neck?

A. I do not know.

Q. Okay. I want to talk to you about petechial. Can you tell the jury what petechial is?

A. Well, petechial are little pinpoint hemorrhages, look like little dots that are actually hemorrhages.

Q. You often find those in ligature/strangulation cases?

A. In types of strangulation cases, in particular manual strangulation cases, we usually find petechia around the facial area. If you like, I could explain why.

Q. But you also find it the eyes, right?

A. Right. We call it the peri-eye area, around the eyes and in the whites of the eyes.

Q. Explain a little bit more. You said

that they were hemorrhages, but specifically in the eye, why is it that you would see in the eye?

A. Petechial in the eye are little red dots.

Q. And if someone were choked in a way or, I should say, strangled in such a way that the blood flow is cut off, with consistent pressure, would you be able to see petechial in the eye?

A. If the compression occludes the arteries as well as the veins, then I would not expect to see petechial in the eyes.

Q. When you say occludes the arteries, that means that they were blocked; right?

A. Correct.

Q. And you examined Ms. Chrastina's eyes?

A. I did.

Q. And you found no petechia in her eyes?

A. There was no petechia in her eyes.

Q. If you were to -- if someone -- in contrast to a strangulation where there is a definite blockage of the arteries, if you

were, say, manually strangled, is it more likely that you would see petechiae in the eyes?

A. Yes. With manual strangulation, the majority of the cases have petechiae.

Q. And that is because of the intermittent pressure?

A. Right. Well ---

Q. It could be?

A. It could be. I'll take this opportunity to explain.

Q. Okay.

A. The reason that you get petechiae, and this may help to explain the reason that you don't see it in this case, -- well, we don't see it in this case.

You have two types of vessels in your neck. You have your carotid arteries going up. You have two arteries. The main ones are the carotid arteries going up, taking oxygen and blood to the brain. That is under very high pressure. It's coming directly from the heart that is pumping it, so that's a high-pressure system and the walls are thick.

Then you have the blood -- the brain has used up all the oxygen and now the blood is coming back to the heart, to go to the lungs to get some more oxygen. It's coming back through veins. Veins are thin and they are easy to compress.

So when you compress the neck, it's -- it doesn't take much pressure to compress those veins. But the arteries, remember those are still taking the blood up to your head. So if the veins are compressed, blood is still going up to your head but can't get out, that pressure starts to build and eventually those little tiny capillaries, little pinpoint vessels, will burst. That's what makes those little petechaie.

If you compress the neck hard enough to cut off both arteries and -- if you compress both arteries and the vessels, you don't necessary to expect to get petechial hemorrhage before you aren't getting blood to the head. So the pressure doesn't build up and it doesn't matter that it is not getting out. You won't have that pressure to cause those vessels to burst and create those

little pinpoint hemorrhages.

Q. So that's why if you have pressure, then not pressure, pressure, then not pressure, there is the ability for the body to create petechiae.

A. Correct.

MR. GROEBER: May I have one moment, Your Honor?

THE COURT: You may.

MR. GROEBER: (Sidebar with Mr. Schwacke), no further questions. Thank you, Doctor.

THE COURT: Redirect.

SOLICITOR WILLIAMS: Yes, sir.

REDIRECT EXAMINATION

BY SOLICITOR WILLIAMS:

Q. Is decomposition sometimes an obstacle to detecting petechial?

A. It is. Although in this case -- her face was discolored so it would be hard to assess whether or not there was any on her face. But in her eyes, the whites of her eyes, it was pretty obvious there were no petechial hemorrhaging.

Q. In this case you can't rule out that

there was any manual strangulation before the cord was wrapped around her neck?

A. No, I can't say whether or not there was or wasn't some compression to her neck prior to the cord being wrapped around it.

Q. And Mr. Groeber asked you about the condition of the cord after you removed it from the neck. What did you do with the cord after you removed it from the neck?

A. I laid it out and photographed it, then transferred it over to the officer that attended the autopsy.

Q. I am going to show you what has been previously marked as State's Exhibit 48. Can you tell the jury what this is?

A. It appears to be the computer battery cord that we removed at autopsy, and it does have our autopsy label on it.

Q. After you were done with this, what did you do with it?

A. Transferred it to law enforcement.

SOLICITOR WILLIAMS: Your Honor, at this time we would offer State's Exhibit 48 into evidence?

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: Without objection, State's Exhibit 48 is admitted.

(SO ENTERED AS STATE'S EXHIBIT 48)

SOLICITOR WILLIAMS: Thank you.

REDIRECT EXAMINATION CONTINUED

BY SOLICITOR WILLIAMS:

Q. Mr. Groeber asked you about the condition of the cord before. When you saw it on the neck of the victim, was it pretty tightly wound around her neck?

A. Yes, it was.

SOLICITOR WILLIAMS: Nothing further. Thank you.

THE COURT: Recross?

MR. GROEBER: Nothing further.

THE COURT: Thank you. You may step down, Dr. Presnell, and you're free to leave, as well. Okay?

(WITNESS STEPS DOWN)

THE COURT: You may call your next witness.

SOLICITOR WILLIAMS: Your Honor, at this time the State rests.

THE COURT: Ladies and gentlemen, at

this time there are some matters of law

that I need to take up out of your presence. The timing is also at the beginning of the lunch break, as well. I am going to ask you to go to lunch and be back in your jury room, please, by 2:00 o'clock. Do you begin your deliberations. Do not discuss the case among yourselves. While you are out, do not permit anyone to talk to you about this case or to talk about this case in your presence. Have a nice lunch and I will see you at 2:00 o'clock.

(JURY OUT @ 12:40 P.M.)

THE COURT: The resting, I assume, was subject with the publication of the stipulations?

SOLICITOR WILLIAMS: Yes, Your Honor.

THE COURT: I don't think that there is any question about that.

SOLICITOR WILLIAMS: And there is one more stipulation that we will be happy to submit to the court.

THE COURT: That's fine. Any Motions from the State at this point?

SOLICITOR WILLIAMS: None from the State?

THE COURT: Any Motions form the defense?

MR. GROEBER: Judge, if I may be heard on one thing, the ---

THE COURT: You're exactly right. We had a break, had a sidebar concerning the objection during Ms. Blair's -- is Ms. Blair still here? Do you wish to proffer any testimony?

MR. GROEBER: Yes, Your Honor.

THE COURT: Have Ms. Blair return.

Ms. Blair, I need for you to come back up just for a moment. I'm sorry to detain you. Defense counsel wants to ask you some questions. I remind you that you are still under oath. Appreciate your patient with us, ma'am.

(WITNESS TAKES STAND)

PENNY BLAIR, having been previously sworn, testified as follows:

Q. Ms. Blair, I will try to ask similar questions or do my best to ask my questions in the same way. I'll do my best. You heard the voicemails from Mr. Penn. Right?

A. Yes, sir.

Q. And to the extent that he said that he wanted to hurt your sister, or your boyfriend -- or, uh, your boyfriend -- or your family, do you remember that?

A. Yes.

Q. And my question to you is, did you believe that he was serious when he said those things?

A. With him saying them, yes. I thought he was serious, but I didn't think he was capable of doing it.

MR. GROEBER: All right.

THE COURT: The objection was made and basically we had a sidebar. That's the extent of your proffer, I would assume?

MR. GROEBER: It is, Your Honor.

THE COURT: And I understand your dilemma, because there is no way to lay a foundation of her assessment of him at that particular time. As I understand from the witness' previous testimony, they'd had been separated for some time and had not been together. While I believe in the light most favorable to you that it doesn't call for an expert opinion, it calls for her assessment,

under 701 -- assuming that if it could come in under 701, it has to be based on a rational perspective and her observation. He had not seen him. The call wasn't even directed to her, she was really listening to a voice message. For that reason, I do not think it would be allowed under 701. Probably, just in an abundance of caution, I am not even sure that an expert is capable of taking the -- the question that you asked her, the witness' answer shows that she doesn't really know. So I think that basically there is a 602 issue involved as well in that. Thank you very much.

Thank you, Ms. Blair.

Now, do you have any objection to Ms. Blair being excused?

MR. GROEBER: No, Your Honor.

THE COURT: Thank you. You are free to leave, Ms. Blair. Again, I apologize for detaining you.

(WITNESS STEPS DOWN)

THE COURT: Now, any Motions by the Defendant?

MR. GROEBER: Yes, Your Honor. We

would move at this time for a directed verdict. The basis for our Motion goes to the two elements of the crime of murder.

THE COURT: Yeah.

MR. GROEBER: One is malice and the second is aforethought. We don't believe that the State has established any evidence to show that this was a planned, premeditated crime. There was no thought beforehand. That is one ground on which we would ask for a directed verdict.

The second is that malice is -- I am familiar with the law of malice, and we believe that there is no evidence that shows an intent, ill will or -- I mean, malice is tough in voluntary manslaughter cases because sometimes we talk about malice can apply also, I think, to voluntary manslaughter. So it is sort of confusing.

But all the evidence shows that this was a heat-of-passion killing and that there was no malice and no prior thought of the killing, especially towards the victim.

THE COURT: It just popped in my head -- and it seems like a long time since

I've charged the old law. It seems like the old law was that was one of the things that we said about manslaughter, was the absence of malice.

Clearly in this particular case, to address the malice, malice can be inferred from what was done: wrapping of the cord three times, or -- or vice-versa, manually strangling her long enough to cause her to lose her life. But that act is further supported by the defendant and his remorse, over and over and over again, that he was angry; that he wasn't angry at her, that he shouldn't have done what he did and that he is sorry. Clearly someone could infer that he intended to do what he did, the question is -- and this is where we get -- in a civil trial, -- what I am going to charge on voluntary manslaughter, really and truly, if I were in a civil trial, I would direct a verdict as to murder, for this reason, (reading): "Words alone, however vulgar and insulting are not enough to be legal provocation."

That sentence will be charged,

because that's the law. All we have here are words. I understand the words because are horrific. I am going to charge it to the jury and the jury is going to make the determination. But if this were a civil trial, they wouldn't.

The Supreme Court may reverse it, but that's what I'm going to say. I don't think that there is any question -- I think that there is sufficient evidence for manslaughter, clearly. I'm going to charge voluntary manslaughter because there were the statements about him losing control. I will charge as well because that is an integral part of the provocation.

MR. GROEBER: I really don't want to get into a charge conference but ---

THE COURT: We might as well, we're almost there.

MR. GROEBER: I am not -- I can give you a couple of cases where spitting has been charged as also being a part of adequate provocation, spitting and words.

THE COURT: There is no question that I am going to charge it. There's got to

be some act and that's where you can argue the spitting. Words alone are not sufficient provocation.

MR. GROEBER: Sure.

THE COURT: They must be accompanied by some overt act, which I assume that they have concluded spitting to be.

Some threatening act, which could have produced the heat of passion.

MR. GROEBER: Yes, sir.

THE COURT: So I understand it. I just think that it is high time that we define that. I hope and pray that there will be case when that comes up. It probably won't happen.

That is the beauty of the civil side. When we rule on it, the court then has to address sit. In these cases, we never do because we have to submit it to the jury at all times.

I think the day that we can start doing that, we will start framing the criminal law. That's just my pontification on criminal law, for what it is worth. But be that as it may, I am absolutely, unequivocally going to

charge voluntary manslaughter and I will charge that aspect as well.

But for those reasons, I think that the State has met its burden of proof in this particular case and I must respectfully deny your Motion.

Any additional Motions at this point?

MR. GROEBER: The only other issue is that it was my -- I need to see that other stipulation?

SOLICITOR WILLIAMS: Yes. And we are going to have another charge that we are going to ask for, Your Honor. I don't know if this is the appropriate time.

THE COURT: Well, let's get through this part of it and then we will move to that.

MR. GROEBER: I apologize. That's the only Motion that we have at this time.

THE COURT: Have you discussed with your client whether he wishes to testify or not, Mr. Groeber?

MR. GROEBER: I have. I would like a few more minutes to speak with him.

THE COURT: Why don't we do this? The

jury is coming back at 2:00. Let's -- do you anticipate any witnesses if he does not testify?

MR. GROEBER: If I could have one second?

THE COURT: Yes, sir.

MR. GROEBER: No, Your Honor, I don't anticipate any other witnesses.

THE COURT: All right. Then that would mean that we would be prepared to move directly into the closing.

Let's plan to be back at 1:30. That will give you -- you will start to prepare any way.

We are off the record now. Are there any specific charges?

SOLICITOR WILLIAMS: Your Honor, we would ask that you charge felony murder. We've passed up a case that we've offered before, *State v. Clifford Jackson Hicks*, 3257 South Carolina 279.

THE COURT: I would love to read it, but the last one that I read said that we don't have it in South Carolina. I'd be delighted to read it but -- are you telling

me that they changed that law?

SOLICITOR WILLIAMS: I am telling you that a very competent person just gave me this case, and we've been thinking about it and ---

THE COURT: I've been thinking about it, too. The last time that I did research, I -- I'm delighted to find it. So maybe they've redone the law. 1971, I don't think that's what it says. But certainly I am -- I am not a scholar, but I will read it during lunch.

SOLICITOR WILLIAMS: It is not necessarily a felony murder, it is a felony murder charge about malice being inferred if there is a felony committed during ---

THE COURT: That is felony murder. I mean, we can talk about that all we want but the State of South Carolina adopted, the legislature adopted ---

SOLICITOR WILLIAMS: I just didn't want to misrepresent to the court.

THE COURT: I appreciate that but I think the last time that I looked at that -- it's solid law, we all studied the law in law

school. There's no question about it, but the bottom line is that, for whatever reason, the last case that I read the Court said "we do not recognize felony murder." It specifically says that.

So if we don't recognize it, it seems to me that logically -- and I am not the most logical person in the world -- that any principle of a felony murder can't be given.

I don't -- again, this is again one of those things where you may be right but to protect this case, I am going to refuse to charge that. It's not the case to do it on.

I mean, you've got the admission of a person and you've got him before a jury. I don't know what more than you want.

But, thank you. I'll look at it -- I'll read your case. I really that it is going to come up sooner or later, but I'm not willing to create that in this case. I don't think that it is worth it.

SOLICITOR WILLIAMS: Thank you. This is the stipulation hat Mr. Groeber has written, it's actually three in one. May I

approach?

THE COURT: Sure.

SOLICITOR WILLIAMS: (Tenders), thank you for reminding me about the stipulation.

THE COURT: That's not a problem. I wasn't going to reopen the case for that. Not a problem.

MR. GROEBER: Just a few things.

THE COURT: Yes, sir.

MR. GROEBER: Do you want to hear them now or ---

THE COURT: Yes. That's fine.

MR. GROEBER: And I don't have anything -- I guess we're off the record? We are going to request that you do not charge the inference of a deadly weapon.

THE COURT: I am not going to charge that. Well, the only time that you do not charge that -- why would that not be charged?

MR. GROEBER: Because, first of all, we'd argue that it was not a deadly weapon.

THE COURT: There is a portion of that that says "any instrument that can be

used to effect death."

MR. GROEBER: I understand that, Your Honor. We are just going to move for that.

THE COURT: Well, let me be sure. The only time that I'm familiar with, at this point, where it is not charged is when self-defense is an issue. That is the only one that I am not familiar with. They've made it clear. I understand the rationale for that. But in this particular case, that's not an issue.

MR. GROEBER: Well, I think that I would read *Belcher* more broadly.

THE COURT: I am sure you would.

MR. GROEBER: But I think that the quote from *Belcher* is that there should be no inference, (reading): *"There should be no inference from the use a deadly weapon where evidence exists to produce the murder."*

THE COURT: I will look at it during lunch.

MR. GROEBER: Thank you, Your Honor. And I can give you the case for the charge that we requested on spitting and ---

THE COURT: I would love to do that, but -- but what you're going to have to do for me to do that is to get the Constitution changed, because it is a charge on the facts. That is my rationale for not giving that charge.

MR. GROEBER: Okay.

THE COURT: I want -- let's get it and we will put it in, because we need to frame that issue. I am one that believes that we ought to move to the Federal side where we can charge on specific cases that can deal with it. I think that it is helpful to the jury. Obviously the concern that any one of us has, and that I had as a lawyer, is that if the jury reads that, then they have to conclude in this case that spitting is therefore legal provocation, and that's not what it says. It says that it may be considered an act.

You can argue that. I don't have any problem with that, because it is an overt act. What is an overt act? You can give the definition of that. But under our Constitution, we cannot charge on the facts.

I think that it's -- I think that would be a charge on the facts, personally.

MR. GROEBER: Thank you. I understand. I will draft ---

THE COURT: If you want to put it together, I will be happy to consider it.

MR. GROEBER: Thank you, Your Honor.

THE COURT: But I don't argue with your position at all, legally. Okay?

SOLICITOR WILLIAMS: The only other one that we have, Your Honor, is that voluntary intoxication is not a defense.

THE COURT: I will include that. That is a legitimate charge given his statement that he was under the influence at the time. Okay. Anything else?

The door is not closed. During lunch, if you think of something, let me know. Thank you. Have a good lunch.

(LUNCH RECESS)

(DEFENDANT PRESENT)

THE COURT: Let the record reflect that Mr. Penn is present. Did you have the opportunity to discuss with your client whether or not he wishes to testify?

MR. GROEBER: I have, Your Honor.

THE COURT: And has he made a decision?

MR. GROEBER: I believe so.

THE COURT: And what is that decision, sir?

MR. GROEBER: That he will not testify.

THE COURT: Mr. Penn, you may remain seated, sir. You have had an opportunity to discuss with your attorney your right to testify or not to testify; is that correct?

DEFENDANT: Yes, sir.

THE COURT: And you've been able to ask them any questions concerning that right, is that correct?

DEFENDANT: Yes, sir.

THE COURT: You also discussed with them strategies, and one of the strategies that accompanies presenting cases that you have a right to close, you have the last argument if you offer no evidence.

DEFENDANT: Yes, sir.

THE COURT: And you have discussed

that as well?

DEFENDANT: Yes, sir.

THE COURT: You know that you have the right to testify?

DEFENDANT: Yes, sir, I do.

THE COURT: And you understand that if you chose to exercise that right that you would be subject to cross examination just as every witness that has appeared in this case?

DEFENDANT: I understand that.

THE COURT: Having -- have you had sufficient time to reflect on that decision, sir?

DEFENDANT: Yes, sir.

THE COURT: Whether or not to testify in this matter?

DEFENDANT: Yes, sir.

THE COURT: And you heard me, of course, tell the jury when we first started that they shouldn't look to you to prove anything at all, that in fact you didn't have to say anything at all. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: And I will continue to instruct them that they cannot reach any inference or discuss the fact that you didn't testify in this matter. Your lawyer has explained that to you, as well?

DEFENDANT: Yes, sir.

THE COURT: But having said that, you still have the right to testify; do you understand that?

DEFENDANT: Yes, sir.

THE COURT: It is your decision not to testify, sir?

DEFENDANT: Yes, sir.

THE COURT: Are you under the influence of any alcohol or any drugs here today, sir?

DEFENDANT: No, sir.

THE COURT: Do you feel comfortable to think about what your lawyers have said and made a conscious decision for yourself?

DEFENDANT: He advised me that it is in my best interest, so I'll take his advice.

THE COURT: I understand that, but

you've had a chance to reflect on that advice -- and every client that I every represented, we did what lawyers are supposed to do. We give you our opinion. But I'd tell my people -- and I am not trying to be flippant here, but I had the pleasure of representing persons accused of criminal offenses, just as you have been in this case. The bottom line, and it really comes to that, because I don't know what the sentence is going to be now. But I sure, as a lawyer, didn't know what it was going to be. But I would tell them that the ultimate decision has to be yours, 'because I am not the one that is going to serve the punishment, you are.' This is your decision. Is that correct?

DEFENDANT: Yes, sir.

THE COURT: Anybody threatened you in any way or forced you to make the decision that you have made?

DEFENDANT: No, sir.

THE COURT: I find that Mr. Penn has had the benefit of very competent counsel. He's indicated that he's had the opportunity to discuss with them his right to

testify or not to testify. Are you satisfied with the manner in which they have discussed this, concerning this?

DEFENDANT: Yes, sir.

THE COURT: And he has indicated that he is satisfied with their advice concerning the issue to testify or not to testify. He understands the various strategies involved, as he has already demonstrated by his response.

I find his decision not to testify to be one that he makes freely, voluntarily, knowingly and intelligently.

Mr. Penn, at this point when the jury returns and I give the stipulation -- then the State will -- I will turn to Mr. Groeber and say, 'Does Mr. Penn wish to offer any testimony for the jury's consideration?' I'm assuming that he is going to tell me no; therefore, the defense rests.

If at any point between my statement and his response you should change your mind, let your lawyers know and I would excuse the jury and we would revisit this issue. But if I don't hear from you, I'm going to assume

that you stand by your decision not to testify. Is that fair, sir?

DEFENDANT: Yes, sir.

THE COURT: Thank you. I assume from our conversation prior to the recess that it is your position not to call any additional witnesses, Mr. Groeber; is that correct?

MR. GROEBER: That's correct. Your Honor.

THE COURT: I have read the cases that you gave me. I haven't look at *State v. Norris*. Let me pull that one up pretty quickly. You didn't give me that one.

LAW CLERK, BRIAN WEST: I've got it.

THE COURT: (Upon review), yeah. That is the case that said what I said. This case keeps getting cited when -- it is precisely -- it's not a complaint on my part, just an observation. It's just one of the thing that I said, that as a judge we have to work very difficult (sic) to frame the issues sometimes so that they have to address the question. Sometime they find a way not to necessarily address the question. It's clear

in one of the exceptions that they were objecting to the felony murder charge.

Interestingly enough, their response -- as I read the case -- is 'well, we have already ruled on the indictment and therefore we are going to allow it.'

I don't see that as saying that all the predates State v. Norris -- and you saw the admonition as well as I did in that case.

SOLICITOR WILLIAMS: Yes, sir.

THE COURT: It says, 'We remind the bench bar that we are a common law murder.' Therefore -- therein lies the issue.

The legislature can define the issue if they want. I don't remember studying -- it's been a long time since I took criminal law in law school but I believe that's a statutory provision, as I recall. It's certainly a part of the penal code in most states.

So if we want to adopt it, we can, but -- at this point, I have your request to charge but I respectfully decline to give it.

SOLICITOR WILLIAMS: Thank you.

THE COURT: I don't fault you for asking it. I think it -- and there may come a day that I will do it notwithstanding my opinion but not here.

Any other requests to charge that you have thought of? You said that you were going to put one together for me.

MR. GROEBER: I wasn't able to do that. I can read you the -- but I'm sure that you will define it. It is the charge on spitting, on the facts. It is from *State v. Gallman*.

THE COURT: What is the cite on that.

MR. GROEBER: It is 79 SE 229. It's an old case.

THE COURT: Let me just read it.

MR. GROEBER: I can pass it up.

THE COURT: You have it?

MR. GROEBER: (Tendering), it is exception seventeen (17), page six (6).

THE COURT: (Upon review), I love it.

MR. GROEBER: It's an old case.

THE COURT: Yeah, but bottom

line, like this case, you read that part and it omits a lot of the case. It talks about all kinds of things. Let's see what it says, (reviewing). I don't want to -- yeah, I love it but the -- the bottom line is that I would love to do that. The court doesn't address anything other than to say -- I've been told by my brother and sisters on the bench that have moved on to that higher position, 'we try to find every way that we can to affirm you.' I think that is what they are doing here.

I don't know whether they argued the Constitutional issue or not, because it simply is not addressed.

I don't quarrel with that that judge decided to do that. This judge declines to do that. We will make this case, uh, -- the cite that he is referring to is from the case of *State v. Gallman*, 79 SC 229, 60 SE 682, a 1908 case, Supreme Court case. It is the charge and the language that is contained in that case that you are asking me to charge?

MR. GROEBER: It is, Your Honor.

THE COURT: Very well.

MR. GROEBER: And I'm sorry, just a couple of more authorities if I may.

THE COURT: Sure.

MR. GROEBER: One is 144 SE 452 (phonetic), a 1928 case. I will just read the language if that is all right, Your Honor?

THE COURT: That will be fine.

MR. GROEBER: This is language from the charge given at the trial language, (reading):

"What is sufficient legal provocation? Now, words under the law, it does not make any difference what matters because no words, no matter how harshly one person may speak to another, will constitute sufficient legal provocation; words that are not accompanied by some effort or attempt to do harm or injury to another person. It must be some act that a person is killed and in which a man of ordinary prudence and courage could create a higher degree of passion, such as to spit in a man's face, hold his ears or knock him off the street or some smart indignity that might in some different ways incite a

higher degree of fighting in a man. The law says that while acting under the influence of passion and he strikes and kills the other, then it cannot be murder, it would be manslaughter."

THE COURT: All right. If you -- let me just give you a for-instance where I probably would charge it.

I don't even use the examples that we used to when we say assault. I don't even say that when somebody struck somebody. I don't give that. That's in every charge that I have ever seen printed. I think that that is a charge on the facts. It's for that reason.

Therefore, I read -- unless that case goes on to say that 'we've considered the restriction in the Constitution that prohibits a judge from charging on the facts, and we do not believe that to be a charge on the facts.' Then I don't have any problem with it.

But given that is exactly what we have in this case, I think that it is a charge on the facts and I would therefore

decline. I understand that you want me to charge specifically that language so that we're framing it for the purposes of review should that become necessary. That you've asked me to give examples of what -- to include what occurred in this case. If we didn't have spitting in the face in this case, I may do it. But we do have.

Now, if you want me to give something other than spitting in the face, I will be happy to consider that.

I am charging, in essence, the language that you're asking for. What we have come up with is that it was an overt act. Now, if anybody wants to give me a quick definition of an overt act, that would be good.

SOLICITOR WILLIAMS: Well, it definitely is not spitting.

THE COURT: No. It could be, might be, might not be.

Again, I think that is the reason why we don't. It might be spitting, accompanied by some other things. But just spitting alone -- clearly that case seems to

suggest, and I don't argue with you. We'll let the Court determine it.

MR. GROEBER: Thank you, Your Honor. The other thing is the use of -- we would object, and I will be arguing against precedent, to the use that "words alone are not enough."

THE COURT: Okay.

MR. GROEBER: We think that in this factual scenario, words alone should be enough. I know that is against precedent. I would site a couple of case in support of that, though, that found the use of that term essentially to be "fighting words." I understand the court is going to rule against that but ---

THE COURT: I rule against it from the standpoint of charging on the law. As long as your argument is not couched that the law believes that it is fighting words but, rather, that there are persons or people who believe that alone is a fighting word -- I don't think anybody is going to argue -- you can argue anything that you want to argue. I don't think anybody is going to -- I wouldn't

argue with that at all. But from the standpoint of charging it as a matter of law, I think that I -- I would be reluctant to do, so I decline not to include that in my charge. I think that is an inappropriate statement of the law.

MR. GROEBER: The only other questions that I have is whether or not Your Honor was going to charge inference based on deadly weapon, via Belcher, or not. We would object to charging inference from a "deadly weapon."

THE COURT: Thank you.

MR. GROEBER: I'd also point -- there is another case, *Stanko*. The defense raised there was insanity. They said that, again, that there should be no inference to the use of a deadly weapon in that context. I can give you that cite, Your Honor. I have the case, the *Stanko* case.

THE COURT: Yeah. You have the *Stanko* case?

MR. GROEBER: I do.

THE COURT: Do you have the *Belcher* case, too?

MR. GROEBER: I do. They are highlighted, but -- (tendering).

THE COURT: Thank you. I have read *Belcher* but I don't think that I have read *Stanko* -- that's the death penalty case? Yeah, okay.

What is the State's position on this request? I didn't ask you that.

SOLICITOR WILLIAMS: Your Honor, our position is that whether it is charged or not that we can still argue it. We think that you can charge it, but I think that the Court, in *Belcher*, makes it clear that even though the court doesn't charge it that the State can still argue it.

THE COURT: Which is exactly what I just said.

SOLICITOR WILLIAMS: Right.

THE COURT: One of the requests -- and I didn't -- there was a request and I didn't respond to it, but it was about losing evidence and a charge on basically removing evidence or making it unavailable. From what I've read, that is a legitimate argument, that you don't charge on the facts.

I would agree with you that the language here, "where we return to the rationale underlying..." -- and I am quoting fro the case, Page 611 of this -- this must be the South Carolina cite, 385 SC 611, the Court says, (reading): "*We return to the rationale underlying...*", Labelle and Jackson, each the cases cited. "*...and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide or assault and battery with intent to kill caused by the use of a death weapon the jury shall not be charged malice.*"

I think clearly that is justified, because it would be reducing. Malice is not an issue. Therefore, I decline to charge that. Thank you very much for that argument.

MR. GROEBER: Thank you, Your Honor.

SOLICITOR WILLIAMS: Thank you.

THE COURT: But, again, I think you're free to argue that.

SOLICITOR WILLIAMS: Thank you.

MR. GROEBER: The last thing would be that if you're going to charge circumstantial evidence that we would ask for

a charge on ---

THE COURT: I charge it. I charge it sort of convoluted. I don't use that -- I still include that and talk about more the clarification of -- it goes back to what I talked about first, and that's the reason that I do it, that the preponderance of the -- that somebody being probably guilty is not enough. I just simply say that the inference has to be more than probably being guilty. It doesn't have to exclude every other reasonable hypothesis. That's stuff has been stricken.

For circumstantial evidence, I just charge that it may be circumstantial, that it may be direct, and that's about the extent of it. But I do say that it has to be more than "might be" or that you're suspicious of it or probably guilty, that it has to be proof beyond a reasonable doubt that he is guilty.

I probably will include that. Are you -- do you not want me to charge circumstantial or do you want me to ---

MR. GROEBER: Well, ---

MR. SCHWACKE: The new charge is *State v. Logan*.

MR. GROEBER: Yeah, *Logan* is the new one.

THE COURT: Which says what? I should have it (using computer).

MR. GROEBER: I don't think that there is a cite yet on it. They actually list the charges out that they suggest.

THE COURT: It's an August decision?

MR. GROEBER: It is. August the 14th, I believe, Your Honor.

THE COURT: I am pulling it up right now in the advance sheets.

MR. GROEBER: Trial of August 14th.

THE COURT: I will look at it and see how that compares.

MR. GROEBER: Thank you, Your Honor.

THE COURT: I will comply with whatever that case says. Is it a Supreme Court decision?

MR. GROEBER: Yes, Your Honor.

THE COURT: Okay.

MR. GROEBER: It's Page 31 of that

Opinion.

THE COURT: I'll be there in a second, (reviewing). Roger did this case.

Okay. See what they said? They talk about it but they go back to the old charge of excluding everything else. It says, (reading): "*Accordingly the trial court did not err in providing a circumstantial charge consistent with* Grippon."

So basically it talks absence of evidence and that sort of thing, which is clearly what I talk about in the lack of evidence; may be established by absence or lack or evidence.

They cite that part of the charge that is in every one of my charges, what he charged in his case. It seems to me that the discussion -- and I read it hurriedly, but it goes back to that part that to be delete or exclude every other reasonable hypothesis, because then you get into a burden shifting situation. I think that is the rationale, as I recall from that. So I don't have that in mine. I will continue to look at this case

and if I -- but the part where they said that they -- they affirmed Judge Young on his charge. So think that it is probably okay.

SOLICITOR WILLIAMS: And, Your Honor, just for the record, the State's position is for you to use the standard charge that you ordinarily use.

THE COURT: That is what it looks like Judge Young is using in his, that I use from my charge book.

Let me read what Justice Pleconis said ---

MR. GROEBER: Well, I guess, Your Honor, ---

THE COURT: What is it? Because they affirmed his charge. Affirmed the conviction.

MR. GROEBER: Well, they said -- I mean, on page four (sic), (reading): "*We hold that the trial court should provide the following language as to a circumstantial evidence charge in addition to proper reasonable doubt instruction, when so requested by a defendant.*"

And then the last sentence of forty-

one is that, "*We modify* Grippon *and* Cherry *(phonetic) to prove the additional language provided above if requested by a defendant.*"

THE COURT: Are you saying that I can't give it unless you request it?

MR. GROEBER: I think that it's -- I can't remember my grammar well enough to know the term, but I think that it is "if requested."

THE COURT: What page are you reading from?

MR. GROEBER: Forty-one (41), last sentence.

THE COURT: Well, what they say above is exactly what I say, which is the *Grippon* charge. It is referring to what is cited above, that, (reading): "*Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either.*"

That is what they're saying is okay and that's precisely what I say.

MR. GROEBER: Okay. I think that the language that we -- I am not sure that this is in your charge but -- (reading):

"These circumstances merely portray the defendant's behavior as suspicious of …" ---

THE COURT: That is what I just said.

MR. GROEBER: Okay.

THE COURT: It's got to be more than being suspicious of the crime, more than probably guilty, it has to be proof beyond a reasonable doubt. That's all that is. They just took -- to get to that last part, then what -- what led that is that they have to prove every circumstance beyond a reasonable doubt and all those circumstances, taken together, must conclusively point to the guilt of the defendant.

Then it went into that the inference has to be more that mere suspicion, that it has to be more than probably, that it has to be more than -- I delete the first part and include the last part, so I think what they are saying is okay.

I'll look at it in greater detail but I don't see a problem, unless you tell me 'I am not requesting a circumstantial evidence.' I say there is circumstantial

evidence inferences that could be drawn from certain things that are there, so it really is an appropriate charge. But I don't think that you get to be the sole judge in that respect of what that charge -- I think either side can request that. I don't read this case as being that it is only limited to the defendant.

MR. GROEBER: I agree. I think what the case says that if we request that charge, that it is given. If Your Honor intends to request (sic) it, that's fine.

THE COURT: I will charge my circumstantial evidence, which I think is in compliance. But if you read something -- I am going to read this very closely. I am going to see what Justice Pleconis -- he is the judge that -- he's like the Supreme Court now, 'I concur in the result and this is my opinion.'

I would say that circumstantial evidence would say that it was because of something just recently, but since I've known him forever and since he's been in that position long before anything was released,

at least of recent vintage, I think it is probably just consistent with who he is. Anything else?

MR. GROEBER: That is it from us regarding jury instructions.

THE COURT: Thank you. Anything from the State?

SOLICITOR WILLIAMS: Nothing from the State, Your Honor.

THE COURT: All right, let's invite the jury to return.

SOLICITOR WILLIAMS: Do you have all the stipulations? They were kind of given to you piecemeal.

THE COURT: I don't have -- I have this and I have three on yellow sheets, and then I have the two that you have -- one dealing with what the note said and the other dealing with SLED DNA.

SOLICITOR WILLIAMS: Thank you.

THE COURT: If I fail to read one, just let me know.

SOLICITOR WILLIAMS: Yes, sir. Thank you.

(JURY IN @ 3:22 P.M.)

THE COURT: Thank you very much, ladies and gentlemen. The State has advised that they are offering no further testimony. There is one thing that we need to share with you. A stipulation -- and it is not uncommon in any of these disputes for the parties to stipulate to certain facts that a jury may consider in their deliberations rather than having a witness come testify to these facts. I am going to share with you several stipulations which the parties have agreed upon. I am going to read these to you, and these are facts that you may consider along with all other factors when you evaluate this case and assess this case:

With regard to State's Exhibit 39, which reads, and that's the note which was offered into evidence, quote, *"I didn't mean it, I promise. I am a sick person. I need help. D. Penn."* The State and the defense stipulate that this note was written by the defendant, David Penn.

The State and the defense stipulate that DNA Analyst Adrianne Heafney from the South Carolina Law Enforcement Division, also

known as SLED, would testify that a partial Y-STR DNA profile developed from the swab from the steering wheel of the victim's vehicle matches the Y-STR DNA profile of David Penn. Paternal male relatives of David Penn cannot be excluded as contributors of this profile. This profile is found 3,777 times in a population data base of 22,544 individuals.

The defendant and the State further stipulate, as follows: that the value of the van was twenty-five hundred dollars ($2,500). Joan Rivera, sister of the victim, received the keys to the van from Chrystal Spence, who is a forensic technician for the Berkeley County Sherriff's Office. That none of the victim's credit cards or checks were used from October 12th to October 15th, 2011.

So you may now consider those as additional factors for consideration and evaluation when you're instructed to begin your deliberations in this case.

Anything else from the State?

SOLICITOR WILLIAMS: Nothing from the State, Your Honor.

THE COURT: Ladies and gentlemen, as I told you when we started, Mr. Penn has absolutely nothing to prove or disprove in this matter, doesn't have to present any evidence or to say anything at all. But a person accused of a criminal offense has the right to present any witnesses that they wish for you to hear. At this point, Mr. Groeber, does Mr. Penn wish to present any additional witnesses for the jury's consideration?

MR. GROEBER: No, Your Honor. The defense rests.

THE COURT: Very well. All right, ladies and gentlemen, that concludes the evidentiary portion of this proceeding. As you will recall, I told you that there were two remaining portions, that the attorneys have two opportunities to speak to you.

For the record, while there would be a normal -- while I would normally excuse you, we've discussed this in advance and I anticipated that that would probably be the response. But there would normally be -- you would be excluded and we would -- we'll just place on the record that the Motion was

timely made that would have followed the closure of all evidentiary portions. I'll allow you to restate that after the jury begins its deliberations.

MR. GROEBER: Thank you, Your Honor.

THE COURT: But it is noted for the record that it is timely made -- without objection from the State; is that correct, Ms. Williams?

SOLICITOR WILLIAMS: That is correct, Your Honor.

THE COURT: Then we move into that portion when the attorneys have their second opportunity and their last opportunity to speak to you. As you know, their remarks, just as my remarks that will follow their closings, is not to be considered evidence.

But their remarks will be extremely helpful to you when you begin analyzing this case, evaluating the evidence you've heard through the testimony of the witnesses and the stipulations, and then apply the law as I give it to you to the facts as you have ultimately determined them.

Please give them attention now as

they make their closing arguments. Following that, I will give you the charge on the law. Thank you for your attention thus far. I ask that you give that continued attention during the closing remarks. Ms. Williams.

SOLICITOR WILLIAMS: Thank you, Your Honor. May it please the Court?

THE COURT: Yes.

SOLICITOR WILLIAMS: Ladies and gentlemen, if you find that there was malice aforethought in this case, then it is murder. It is that simple.

If you find that there was malice aforethought in the actions of Mr. Penn, this is not voluntary manslaughter, this is murder.

I would suggest to you that that is the only conclusion that you can reach, because no matter how you view the evidence, that is what the evidence supports.

Now, you heard two very different statements by the defendant. You probably noticed that they were played back to back, which really underscored the different tone.

First you heard him crying, in this confession to the police officers. Then you heard him saying things to his girlfriend -- and excuse me for using this language, it's not language that I usually use but I'm just paraphrasing what the defendant said. 'I should have got that bitch first, she's the one I should have done.' He was talking about his girlfriend to his girlfriend's sister.

"Your sister was next and then her boyfriend."

So this whole story about this ninety-eight pound woman who confronted him and called him a horrible name, provoking his passion and that's why he killed her, is just a bunch of bologna.

He tells you exactly what was going on. Those voice mail messages are hours and then minutes before he is at police headquarters, 'I should have done her first.' That's what he was really thinking.

But let's just say that you believe the other story that he told police. It is sad. He is obviously torn up about what

happened. He's done a horrible thing. But you are going to hear from the judge that words alone are not provocation. You know why? Because we live in a society where you don't get to kill somebody because they've called you a name.

Let's assume that this woman did use that word. There's no excuse for that, it's awful. Let's even assume that she spit at him. You don't get to kill somebody because they offend you.

There is a very important piece of information that you're going to hear during the judge's instructions, that I want you to think about. It's provocation that a reasonable ordinary person -- that's the standard, "that a reasonable ordinary person" would be provoked. Not David Penn, because clearly he's a mess. By the time he turns himself in to the police, god know how long he's been smoking crack for those two days. He obviously has a drug problem and that's awful. But it is not his standard, it is not his mind. The judge will tell you that is a reasonable, ordinary person. That is the

standard for provocation. Just a regular person. If a regular person was in some kind of a spat, because that's what he calls it in his statement, a spat, and a person calls them a horrible, ugly name and spits at them, is that a reasonable and ordinary person's reaction, to kill that person?

Now, the other thing that the judge is going to tell you is that malice aforethought doesn't have to thought up any particular time beforehand. In other words, you can have malice aforethought right before it happens. You don't have to plan it before you get over there.

I think that I heard Mr. Groeber talk about premeditation. That is not what we are required to prove. That's a term that we heard on television a lot, it's a term that we sometimes hear in crime novels, but premeditation is not the standard that we are held to. It is malice aforethought.

We don't have to prove that he planned to murder her. We just have to prove that he had malice, a wicked heart right before he killed her.

Now, malice is words and an action. I talked a little bit about the words and I am very sorry if I offended anybody with that words, with that language. Unfortunately you've heard a lot of nasty language in this case.

Let's talk about the action, let's talk about how evil that action was. His statement is hard to follow sometimes because it is so long, but if you listen to it he says that the argument starts in the dining room. Now, you know from Mr. Blair that the dining room is ten to fifteen feet away from the living room.

Then he says, 'I brought her into the living room', at which point he wrapped the cord around her neck.

Now, one of the things that the judge talked to you about when you came in was common sense. I would suggest to you that that is the most important asset that you bring to this process, because this case has a lot to do with common sense.

If you look at these two pictures together, State's Exhibits 24 and 23 -- it's

kinda of hard that we couldn't get it into one picture. But look at that cord around this woman. There is still slack in the line. It is still plugged into the wall. Okay? There is nothing disturbed in this room. The laptop is still on the arm of the chair. This woman was not fighting when he put that around her neck. You saw the knot: three times around, the loop and then the thing went through the loop. Do you think that if she was still awake and fighting that this wouldn't have been pulled taut? This woman was unconscious when he put that around her neck -- either that or she was just laying there, because there is no way that you can get that cord to look like that if she was moving around when he was putting that kind of knot on her neck.

What a horrible way to die. Supposedly he was just provoked and he did this horrible thing, and then he felt so sorry. If he felt so sorry, but what did he do after he kills her? He goes through her stuff. He takes her husband's bracelet from her jewelry box, he takes her credit cards,

he takes her purse. While she is laying, dying or laying cold dead on the floor, he is pillaging through her things. That's awful.

There is much ado about the fact that he didn't use the credit cards, that he threw them in he dumpster. Well, clearly he's making lots of decisions in the three days before he finally gets to the police department. And he doesn't use them because he made the decision at some point to throw them in the dumpster -- along with her phone because he is afraid that they are going to be able to track him with her phone, and he says that in his statement.

He throws them in the dumpster but at some point he wants them back. His "reason" for wanting them back is back is that he felt so bad for the family that he wanted to give her personal items back to them. But you notice that when he goes into Walgreen's he asking if he can write a check, a check for over the amount of purchase, from the South Carolina Federal Credit Union bank account. He doesn't have a bank account. He's never had a checking account. And guess

what bank? When you look at the checks and the credit cards, the victim's checking account is with the South Carolina Federal Credit Union. So I am not sure if all of her checkbooks were in that bag or not. He might have still had one. We will never know.

Another thing we will never know is just how much cash that he took from that house, because she goes to the Tuesday to get cash to buy all these materials for Mr. Blair to help her with the house. They don't find any cash at that house.

He specifically says in his statement that when he has cash that he buys drugs. They asked him,

'Well, were you doing crack before you went over there?

Nope, just right after.'

Then all of a sudden, just right after, he's got cash to check in a motel. He checked in the motel and pays for the motel room with cash. He checks in the motel on Wednesday and it is not until Saturday, when he probably runs out of drugs and he going through some kind of withdrawal, that he

starts talking and telling people stuff.

And, think about this -- if he was that sorry, why did he wait until Saturday? He let's this poor woman just lay over there and rot in her house from Wednesday to Saturday. He doesn't say a word to anybody.

He doesn't get any money from his boss until Saturday. So somewhere he got that money to check into the hotel and to buy his drugs between Wednesday and Saturday.

Now, another thing that I would just like for you to think about as you consider the evidence, about this story. Why would a ninety-eight pound woman who, by her friends account, is not a confrontational person -- but let's just say that she was a confrontational person. If she is afraid of David Penn, why would she wait until they are alone and call him the ugliest name that she can think of and spit on him. Why would you do that if you're afraid of somebody and you're all by yourself in your house. It really doesn't make any sense.

The State has the burden of proof in this case. We've talked a lot about murder.

But he is also charged with grand larceny. The State has the burden of proof that he stolen an item that value of between two and ten thousand dollars ($2,000 and $10,000). He says that he took the van. The keys were found on his person. He obviously wasn't going to return it, because he didn't leave the keys with the van, he didn't leave them in the house, he took them with him and he's found with the keys. He had the keys with him when he was arrested. His DNA was found on the steering wheel. So that's the evidence for grand larceny.

But we do have the burden and we want you to hold us to that burden as you consider the evidence. Because -- Mr. Groeber has already told you that he killed her. This is a question of malice aforethought.

Now, let's go through -- I know that you've heard a lot of evidence and although we have only been here two days, sometimes it seems a lot longer. So let's briefly go through what you've heard.

What we have to prove is, as I've

said, the unlawful killing of another.

Malice is had to define, but the way that the law defines it is that it is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief. It is the deliberate, intentional -- and this is important -- without just cause or excuse.

There is no excuse for what he did. Don't give that to him, not based on the evidence.

It is a wicked heart. In plain terms, that is what it is. It is when you do something really mean and horrible.

Grand larceny, we talked a little bit about this. This is him stealing the van. I think that there is adequate evidence of that in his own statement.

As we are talking about the statement, if you all have a question about anything that you heard in that statement and you want to hear portions of it again, you can request to hear those.

If I say anything that is different from what the Judge tells you, always defer

to the Judge. Sometimes we talk a little bit about the law in our closings, but the judge is the final authority on the law.

I believe that he will tell you that we do have to prove this case beyond a reasonable doubt. But that is not all doubt. I think he will tell you that there are very few things in life that we know beyond all doubt.

I would suggest to you that if you think that he is guilty of murder and you knew nothing about this case when you walked in on Monday, then we have proven it. It's not a coincidence that you have that belief after you've heard all the evidence.

Corporal Brent Fenton -- we will just go through the witnesses -- was the first on the scene. The doors are locked. That's another thing, he (indicating defendant) takes he time to lock the doors behind him. But for that, maybe Mr. Blair would have discovered her on Wednesday. That's a very calculated act for someone who supposedly is acting in the heat of passion. Forced entry is required and he notes that

there is no van.

Dean Kokinda processes the scene. He tells you that he tried to get some fingerprints. He probably could have gone further in getting a better standard, but basically once they realized that it was someone who had permission to be in the home, they don't go any further with that analysis. He sees the cord around her neck, no signs of a struggle and that's what I talking to you about in those pictures. Look at those pictures very carefully because they tell you a lot about what happened in that home.

Neil Croft. This was the friend of the victim. The deacon. She was a widow, she was vulnerable. That's why she was using Mr. Penn. She was scared of the defendant. Again, I ask you, if she was scared of him why would she intentionally provoke him while they were alone? She was not an aggressive person and she was not a racist.

None of us know if she was a racist. If she did what he said that she did, that was not okay. That's a horrible thing to do. But, again, I would suggest to you that you

don't just get to kill someone and that words alone are not enough.

Thomas Blair. He helped her out. The victim told him that she was going to get cash on Tuesday to buy the materials he would need, before Wednesday. He identifies Lannie's bracelet, her husband's bracelet and say that item was kept in the jewelry box.

Darrell Hackney. That's the boss of the defendant. He says to his boss, 'I killed someone' or 'I murdered someone'. What difference does it make? I don't think that David Penn knew the legal definition between "killed" and "murder." He told him that he killed somebody. He killed Kathy Chrastina.

Then he says, "I've messed up the rest of my life, I've murdered someone." If you notice, a lot of the remorse that Mr. Penn feels -- and I'm sure that he does feel bad about what he did -- is all about him:

"I've messed up the rest of my life.

I need help.

I've been to rehab before, but I need more help.

Y'all don't listen to me.

Nobody will listen to me."

Who is he worried about? You don't hear talking about Kathy Chrastina. It's all about him.

Patty Cobb. She was the sister of the girlfriend. He tells her, *"I've done something bad"*, that he killed someone. She tells you that the defendant has no checking account, so whose account was he going to write the check to Walgreen's on?

James Ryan Price was the Walgreen's clerk. He is the one that tells you that he wanted to cash a check. He also tells him something else, that he was leaving town. He keep up this fiction that he was going to turn himself in, going to turn himself in, he never turned himself in. None of us know whether he thought about it during that three days, but he kills her on Wednesday and by Saturday he still hasn't turned himself in. He tells that clerk that he is leaving town, that that's why he wants to write the check.

Again, South Carolina Federal Credit Union. Look at that check. That is the

victim's account.

And he was trying to get in that dumpster, he was desperate to get in that dumpster. He makes up this story that the reason he has to get in that dumpster is because he accidently threw out his card.

One important thing to think about is that the victim's phone was found with those items and that there is an important part in the confession where one of the detectives, 'Why did you take her phone?' He pauses and then he cries for awhile, he's very upset. Then he admits that the reason he took her phone was because he was trying to cover up the crime, because she was afraid that they were going to figure out that she had made a call for him for food stamps. She was trying to help him out. And he was frightened that they would figure that out. So at least at that point he wasn't going to turn himself in.

Again, the Walgreen's dumpster. And Lannie's bracelet, which I find to be one of the most personal things that he took, because it belonged to her husband.

Again, consider how many checkbooks that he had. If the checkbook that we know about was in the dumpster, what checkbook was he going to be writing the check on?

The hotel person, Nitesh Patel. You have the receipt here. He checks in on Wednesday and pays cash. He also tells him that he is a killer.

The DNA, you heard the stipulation that his DNA was found on the steering wheel.

Penny Blair, the voicemail messages: *"You don't know the point that I was at."* He was already at that point before he got to Kathy Chrastina's.

"Your sister was next and then her boyfriend. I should have done her first."

Much different demeanor on these tapes, yet it was within an hour -- the last conversation he has is something like 7:30 and then he is at the police station.

The defendant's statement is so long but that there were a lot things in there that I am hoping that you didn't miss. In the very beginning he sits there, rocking, saying *"There were two more people that I*

wanted to hurt." Presumably that's the ones that he said that he wanted to hurt, his girlfriend's boyfriend, new boyfriend, and her sister. So that flies in the face of his spitting story.

He talks about the girlfriend "moving on." He tells the police about how just upset that he was about her moving on. He was upset about that before he even got over to her house.

This is what he says, he is talking about being in the dining room: *"I started choking her and I didn't stop. I took her into the living room and I put the cord around her neck. And she didn't deserve what I done to her, man."*

Now, at what point do you cool off? The first time the cord goes around her neck? The second time the cord goes around the neck? How about when you make a loop, pull it through and pull it. At what point does the heat of passion subside?

Let's talk about remorse, because clearly this man is hurting. I don't doubt that. But I do think that a lot of the

remorse is that he is realizing that the consequences are coming.

He waits until Saturday to start talking.

He has not turned himself in.

He is talking about how he has ruined the rest of his life.

"I didn't mean it.

I need help.

I'm sick."

What about Kathy? He doesn't talk about her in all of this. He finally does with the police, when he is trying to find himself sympathetic. But it's really all about what's going to happen to him.

Again, the spitting story, I would suggest to you -- why would she do that? She is not a confrontational person.

And she was very kind to him. I think at one point in confession he said that she told him, *"You remind me of my husband."* That's what he says that she told him.

Thomas Blair tells you that she was the kind of person that she'd just stop talking and turn her back. I think she turned her back one too many times. She

turned her back to the wrong person. If you notice, in this picture -- where is the knot? It is right back here. That's where it was tied. You look at this picture. He was behind her.

And again I tell you, is it enough -- even if you assume the worst, and I don't think the evidence supports that she did that. But even if you assume the worse, that she said that ugly thing to him and spit at him, words alone are not provocation. You don't get to kill somebody because they offend you.

And voluntary intoxication is not a defense. You're going to hear that from the judge. The fact that he chose to get himself wasted on crack does not justify what he did. You cannot use intoxication as a defense for your behavior in the state of South Carolina.

Words are not enough.

Again, it's the standard of an ordinary reasonable person. Not the way that Mr. Penn would act but the way that an ordinary, reasonable person would act in our society.

Malice. We are not required to prove premeditation, just malice. It can exist in the instant before. I don't think you will hear from the judge that it must exist for appreciable length of time before the commission of the act. It may be conceived at the very moment that the act occurs. There must be a combination of the evil intent and the act producing the results.

What about this case, what proves malice? He drags her from one room to the other. He puts the cord around her neck three times and loops it under. She obviously wasn't fighting back. He ever said that she wasn't fighting back. There were no scratches on him, there were no injuries on him. There is no evidence whatsoever -- you didn't hear any DNA evidence, no evidence whatsoever that there was a struggle her.

He steals her things.

Then he locks the door behind him.

He takes her phone to "cover up" the crime.

Remember how angry he was before,

because that's what he tells Penny, "*You don't know the point that I was at.*"

Then he goes through her personal things while she is laying there, dying.

Then he takes her cash.

Again, you saw this diagram. Just remember the distance between the dining room and the living room was ten to fifteen feet. That is where the argument starts, where it winds up is where she is lying on the floor.

That's the cord. Go back there and look at that knot. The doctor kind of showed you the knot when she stood up here. But that's not something that happens in an instant.

"*Your sister was next and then your boyfriend.*" That really speaks volumes. That's exactly what his intent was. That is what he says that he was thinking, that he was pushed to the point and "*your sister was next and then your boyfriend.*" This had nothing to do with provocation.

When you get back there, it's going to be tempting to give in and just vote for voluntary manslaughter, because that's what

he has already said that he's guilty of. That would be easy. I'm asking you to speak the truth. I am asking you to care. I am asking you to have the courage of your convictions and to not cave in. Really think about what the evidence shows.

This matters. You are the conscience of this community. You speak the truth. You are the most important part of this process. There is no way if you look at this evidence, look at it rationally, and not find murder. So I asking you to speak the truth.

THE COURT: Thank you, Ms. Williams. Mr. Groeber.

MR. GROEBER: It's a case about emotions, it's a case about the emotion that you feel right now as you contemplate an innocent woman who didn't deserve to die. It's a case about emotion and what you felt when you saw Mr. Penn on the video in his confession.

It is a case the emotion that he felt when he tried to figure out why he had done what he had did. That's what he was

during those three days. He tried to figure out why he did what he did. That confession is a soul bare, open, raw of what he did, the grappling about why he did it. It was a soul that was -- it was a conscience that was ready to confess and that was -- he was ready to tell the truth about what happened and why he did the worst thing that he has ever done.

The Solicitor talked about a few things that I want to address. First, would she confront him if she was afraid of him? Why would she suggest these things if she was afraid of him? To suggest that he was making it up. Well, if she were afraid of how he would react, then she probably wouldn't have done those things. But she didn't think that he would react that way. That goes to show that this was not premeditated. It goes to show that it was a reaction from him that he couldn't control. And that's what he says at the end of his confession when he is sobbing. And when he is talking to her he says he is sorry, more times that we can count, and he says *"I couldn't control what I did."*

The prosecutor also wants you to think and feel bed, to use your emotions that he didn't come forward more quickly and that he let her be there a few days. She wants you to be upset with how he treated his girlfriend, what he said to her. She wants you to use that to find him guilty of murder.

But I submit that what you need to do is to weigh the evidence, to look at the evidence, to look at what people said, to look at the status of the room, go through the pictures. Where is the evidence of motive for this? If this was a crime with malice aforethought, what was the motive for it? What evidence do you have to suggest a motive for the crime?

That he wanted to steal some stuff? I don't think so. The computer was still there, the printer was still there, the stereo was still there.

He never used her credit cards, not one of them.

And she made a big deal that they couldn't find the cash that she got from the bank. How do you know that she got cash from

the bank? You know how to find that out, you go to the bank, you ask for a record of her account, you ask for the withdrawals to prove that she took cash out of the bank. They didn't do that. That is their burden. If they want to suggest that she had cash, they need to prove it. They could have easily proven that, and they didn't.

Mr. Penn had a bad drug problem. He could have traded any of those credit cards for drugs. He could have traded Lannie's bracelet for drugs. He could have traded any of the things that he had for drugs. He could have trade the car for drugs. But he didn't.

Why is that important? It is important because it gives credibility to what he said, that he wanted to get that stuff back to her family. He was ready to turn himself in, he was ready to admit what he'd done and to take responsibility for it.

What is the evidence of motive? There was no motive. She was good to him, she employed him, she loaned him money.

If -- all the facts that show that

she was good to him fly in the face that he would kill her with malice aforethought. She helped him.

The question really about malice and the heat of passion, it's not this. It's not -- well, is it malice or was he acting under the heat of passion? Which one is it? I think that it was -- I lean towards this one. That is not the question that you have to answer. The question is really, do you have a reasonable doubt that he acted with malice and that he had aforethought for that malice, that he thought about it for a period of time. That's the question.

If you have a hesitation, a reasonable doubt that he acted with malice aforethought, then you need to find him guilty of voluntary manslaughter.

What is the evidence that this was in the heat of passion? His confession.

The Judge will talk to you about the credibility of witnesses, that you get to weight that. Was that a heartfelt, remorseful confession? He told you and all the police what happened. The State wants to

pick and choose what parts of his confession to believe. They want to believe -- they want you to believe some of it but not the parts where he tells the truth about what happened.

What is the other evidence that this happened in the heat of passion? Well, the type of weapon that he used. He didn't leave and go get a weapon and come back. He didn't bring a weapon with him. He used what was there, the cord.

And the State is suggesting that he had time to "wake up", essentially, from his passion or his anger from what she had said and done to him, and that he had ten or fifteen feet.

First of all, if you listen to his statement, he doesn't necessarily say that the fight started in a certain place. He doesn't say that he took her to the living room. He doesn't say -- 'it started her', 'I pulled her there.' I'd just ask that you go listen to it. Because we -- we may disagree about it but y'all are the ones that get to decide what he said.

The State suggests that malice exists because he wanted to hurt other people. Those words of his are part of his self-evaluation. What he figured out was that he was on drugs, he was stressed from other problems in his life and when she said that vile thing to him and spit on him that he snapped. He said that *"I lost control."*

All of the evidence that the State presents to you, they argue, is malice. That he was saying these bad things about other people. All of that suggests that he did this to Ms. Kathy Chrastina, that he took her things afterwards in order to cover it up.

None of that is inconsistent with voluntary manslaughter. None of it. It is consistent with each one.

So how do you wade through the evidence for malice aforethought? Let's talk about the forethought. You don't have any text messages of threats, you don't have any evidence of phone calls of threats that he made. There is no evidence of forced entry. He is not charged with burglary, he is not charged with robbery. There are no threats

that he made to the victim.

If you have thoughts to kill someone, would you go in and do it in the middle of the day? Would you leave the weapon there?

The prosecutor talked about flight, that he left the scene, that he took her phone and her purse and her van. Well, what did he do with those things? Did he use the credit cards to fill up the van and drive it to Tennessee, where he is from? Did he try to pawn anything? Did he try to sell the credit cards? Look at the number of credit cards. There was a lot of those. Not one of them are missing. I am pretty sure that they would have called someone to testify if they were missing one.

What did the defendant say? He said he knew her, that she had been good to him, that she'd even called something in for him on his food stamp card.

He said that he didn't mess with her money, and the evidence bears that out.

He told you what he did, he said how he did it. He said -- he told them where to

get her stuff. He wasn't hiding anything. He wanted to say that he was sorry, he broke down. He said that did what he could not control.

What would a cold-bloodied premeditated murderer say if they had three days to prepare for their confession? Would that be how they would act? Would that be what they would say? Or would they say something else? *'It was self-defense. She came at me, I had to defend myself.'*

Or maybe they would say nothing. He knew that he was being video taped, he knew what his rights were, he told the truth.

This case is all about emotion, it is about the emotions that Kathy Chrastina had when she called him what she did and spit on him. It is about the emotions of David Penn when he snapped, about what he did. He lost control and he's guilty. She did not deserve it.

Finding him guilty of voluntary manslaughter does not suggest in any way that what he did was justified or that she "deserved" it. That's not a finding of

voluntary manslaughter suggests. What is suggests is what the evidence shows, that when he killed her that he was in an uncontrollable rage and that it was provoked by something, by words and an overt act.

Your job today is set aside any emotions that you might feel and listen to what the evidence has said, and what it has not said.

We're confident that when you look through that evidence to what he said in his confession and when you weigh his sincerity that you will find him guilty; but guilty of the crime which he committed, which is manslaughter. Thank you.

THE COURT: Thank you, Mr. Groeber. All right, ladies and gentlemen, if I could have your attention now it becomes my responsibility as the trial judge to give you the law, which you of course have promised that you will accept and apply fairly and impartially to the facts that you will determine when you evaluate the evidence in this case and decide what you find to be the true and credible evidence. Both the

State and the defense believe that you will, very shortly, evaluate that evidence and decide those facts, then apply the law. To that end, I will submit that then both parties will have received a fair and impartial determination in this process.

During this instruction you may hear me use the word "defendant." As I mentioned to you when we identified the case, "defendant" is simply a term that we use to designate the party against whom a claim is made. That is the sole significance of that term. It means nothing else. It's just another way to identify Mr. Penn. So if you hear that word, just know that I am referring to Mr. Penn.

He has been accused in -- as I told you when we started, these documents which I hold in my hand contain the two charge about which you have heard evidence during this trial. They are not evidence. They won't accompany you to your jury room. They merely contain the allegations and the accusations.

To the charges, Mr. Penn has rendered a plea of not guilty, which places

then on the State the burden of proving his guilt beyond a reasonable doubt. For, you see, persons such as Mr. Penn in this state and in this country who are accused or committing criminal offenses have no obligation to prove or disprove anything.

Persons so accused do not have to prove their innocence, because the law says that persons so accused are presumed to be innocent. That is an active presumption. That means that each one of you must now and throughout the entire deliberations assume that he is innocent of both of these charges. That presumption may be only set aside when, after evaluating the evidence in the case, that you have reached the conclusion that you have decided beyond a reasonable doubt that the State has met its burden as to each element of the crime.

Then, if you find that each element of the crime has been satisfied to that standard, only then may you set aside the presumption of innocence.

So, obviously, ladies and gentlemen, the fact that persons accused of committing

criminal offense(s) do not testify in his or her own behalf in a case cannot be considered by a jury in its deliberations. It can't infer anything from it, they can't even talk about it. I would instruct you that the fact that Mr. Penn did not testify in this case cannot in any way be considered by you. The assertion of the right to remain silent is an absolute right and you may not think about that. You may not discuss it. If you do, you will have violated your oath because the burden of proof in this case rests solely on the State.

The State has the responsibility to prove Mr. Penn guilty beyond a reasonable doubt.

What is a reasonable doubt? A is that doubt which would make a honest, conscientious juror searching for the truth in a case to hesitate to act or take some action. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of a defendant's guilt.

Now, there are very few things in this life that we know with absolute

certainty. The law in criminal disputes like this does not require proof that overcomes every possible doubt.

If based on your consideration of the evidence you are firmly convinced of one or more of the crimes charged, then you must return a verdict of guilty.

If, on the other hand, you think that there is a possibility that he is not guilty, then you must give him the benefit of that doubt and return a verdict of not guilty.

A reasonable doubt, ladies and gentlemen, may arise from the evidence which is in the case or the lack or absence of evidence in a case. It is up to you to determine whether or not there is any doubt in this case.

I would charge you that Mr. Penn is entitled to every reasonable doubt arising in the whole case. By that statement, I mean simply this: if upon any issue of fact which is essential to a conviction, that is a verdict of guilty, you have a reasonable doubt as to how that issue should be solved,

I would instruct you to resolve that. It is your duty to resolve that in favor of the defendant.

Now, the evidence which you are to consider consists of the testimony of the witnesses and the exhibits that have been introduced and offered during the trial. Objections that were made during the trial and my ruling during the testimony, may not be considered by you in any fashion.

In fact, ladies and gentlemen, I would instruct you that it is very proper for the attorneys to raise objections from time to time and my rulings are simply my responsibility as the trial judge. When we qualified you on Monday, I indicated that there are two judges that work together; one being the judge of the fact, which you constitute, and the other being the judge of the law, which is my responsibility. That means that I had to preside over the trial, I had to make rulings on matters of law. As officers of this court, they have a duty to raise those matters when from time to time they arise.

Please know that the probably -- one of the rulings probably illustrates how we work best. If I overrule the objection -- sustained it, and you didn't hear it, you're certainly not at liberty to consider the reason for that, or why, or what the person may have said or not said.

But if I overruled it, I allowed you to hear the question and answer. But don't put any greater weight on it simply because I overruled it and permitted the answer to the question. If you do, then you've let me invade your province and your responsibility.

Rather, it really -- at the moment I overruled it, I performed my responsibility as the judge of the law. I said as the judge of the law that I was going to permit it. Then it shifts to you as the judge of the facts and you have to decide whether or not you believe it and, if so, how strongly you may believe it.

That is how we work together. You resolve the factual issues and I am responsibility for resolving the legal issues.

I would also instruct you, as I've told you throughout, that the attorney's remarks, both in opening statements and in closing arguments, are very helpful, extremely beneficial, -- and, as officers of this court, you may certain consider them as you evaluate the evidence and assess the evidence and apply the law. But please remember that their remarks are not evidence and should never be considered by you as evidence.

If you -- if one of the attorneys in their arguments stated something in their argument that is inconsistent with your collective recollection of what a witness said or didn't say, you're instructed to go with your recollection and disregard theirs in its entirety, because you are the sole judges of the facts.

Likewise, it is my responsibility to be the sole judge of the law. If one of the attorney's statement of the law differs from what I tell you the law is, you are instructed to disregard those remarks, as well. Because, for the purpose of this

proceeding today, I am the sole judge of the law in this case.

Please remember also that nothing that I have said, either during the trial or in this instruction, should be considered by you as evidence in any fashion either.

There are two types of evidence used in presenting the case. One is direct and the other is circumstantial evidence. Either side who has a burden of prove may rely on direct evidence, circumstantial evidence or a combination.

Direct evidence is the term that when applied usually deals with a sensory perception; in other words, 'I saw something, I felt something, I heard something' or the like. If you are firmly convinced as to the truthfulness of that testimony, that would establish that particular fact.

Circumstantial evidence is when you prove several facts and you're firmly convinced of the truth of those facts and when you link them they point to another fact, either by inductive or deductive reasoning you reach a conclusion of what it

is, and you are firmly convinced of that. I would tell you that it is not uncommon to have both. Our law makes absolutely no distinction between the weight or the value to be given either direct or circumstantial evidence, nor is any greater degree required of circumstantial evidence than of direct evidence. Rather, you're instructed to weigh all of the evidence in the case and decide what you find to be credible and believable.

I would instruct you, however, that in regard to the inferences to be drawn in a case is that the circumstances brought out in a case are suspicious of guilt or the circumstances in a case are such that guilt is probable, that that would not be sufficient; that that would not be enough to sustain a suspicion. Why? Because the proof offered by the State has to be more than mere suspicion. It has to be more than someone being probably guilty. It has to be proof beyond a reasonable doubt.

How do you decide the facts in this case? Well, we know that this whole process is a common sense exercise. For you, it's

something that you have done many, many times. There are many, many factors that we rely on in our lives to assist us in making a determination of whether we believe somebody or some thing. I am going to discuss a number of them with you now, but if I don't mention a method or a factor that you've used in your life and you've found it to be reliable, please use that when you begin your deliberations and in evaluating this case.

Some of the things that you may want to consider would be:

The appearance of the witness. How did they appear to you? Straightforward or hesitant in answering questions?

How did the witness come to the facts that he or she testified to, and what was the ability of that witness to know those particular facts or circumstances?

Was the testimony of the witness consistent or was it inconsistent?

Was it strengthened or weakened by

other evidence in the case?

Is there a reason for a witness to give testimony that may be helpful to one side or the other, or that may be detrimental to one side or the other? In other words, was the witness biased or prejudiced in any fashion?

In determining the credibility or believable of the witnesses, you are given very broad discretion and very wide latitude. You have the right to believe one witness against many or many witnesses against one. You have a right to believe all of a witness' testimony, parts of a witness' testimony or none of a witness' testimony. Now, of course, you don't make these decisions arbitrarily but if there is a reason in the record of this case for taking that position, you have that prerogative because your objective from the start has been to determine the truth regardless of the source of the evidence.

During the trial a statement of the defendant was admitted into evidence. I

made certain determinations as to the admissibility of that statement but I would instruct you that you have to make the ultimate decision of whether or not the defendant made the statement.

And if the defendant did make the statement, you must determine whether the statement was made by the defendant voluntarily and of his own free will. This means that the statement was not caused by threats, fear, force, and coercion or by intimidation or by any hope or promises of leniency or reward of any kind.

In determining whether the statement was voluntary, you should consider both the characteristics of the defendant and the details of the questioning. Some of the factors that you may want to consider are the age of the defendant, the defendant's education or lack of education, the defendant's mental ability or capacity, the defendant's IQ or intelligence, the defendant's background and environment, the place and length of

the detention, the nature of the questioning and the advice, or lack therefore, to the defendant of his or her Constitutional rights, including but not limited to the right to remain silent, that any statement could be used against him in a court of law, the right to have a lawyer present and that if he could not afford a lawyer that a lawyer would be appointed for him to represent him without any costs. That he could stop making a statement at any time. You must carefully consider all the surrounding circumstances before you give any weight to the alleged statement.

The State has the burden of proving beyond a reasonable doubt that the alleged statement was voluntarily. If you determine that it was, you may give the statement any further consideration that you deem proper. You must decide what weight, if any, should be given to the alleged statement.

If you determine that the statement was not free and voluntary and not the

statement of the defendant, you should not consider the statement at all.

While you enjoy very broad discretion when it comes to determining the facts, please remember that you don't enjoy the same when it comes to the law. You've promised that you will accept the law and apply the law fairly and impartially to the facts and you determine them. That means that if you hear a principle of law with which you differ, I respect your right to feel that way.

As we talked when I qualified you and gave you opening instructions, you may hear some principle of law with which you disagree. I respect your right to feel that way. But one thing that we both have done, and I shared with you in qualifying you my peculiarity concerning the one statute (does each juror have a driver's license, a voter's registration or a Highway Department identification card). That has existed since I became a judge and I've charged it, instructed it

and used it every single time that I've qualified a jury notwithstanding my opinion. As long as it is the law, I will continue to do that. Why? Because I promised to apply the law fairly and impartially notwithstanding my personal opinion, and you must do the same thing. Your job is to be the judge of the facts and accept the law as I give it to you.

Please also remember that you're not to put any greater weight or emphasis on any one part of my charge, but rather you're instructed to consider the charge as a whole. Also the fact that I give you some instruction on a particular aspect of the law is not to be taken as a suggestion to you as to how you are to resolve factual issues; because that, ladies and gentlemen, is your sole job, your sole responsibility.

Let's look at the two charges that have been alleged against Mr. Penn. First let's look at the murder charge. In that, he was charged with killing with malice aforethought Kathy Chrastina by

meaning of strangulation and that she died as a result thereof on October 12th, 2011, in Berkeley County.

That means that the State has to prove beyond a reasonable doubt that Mr. Penn killed that person, Ms. Kathy Chrastina, with malice aforethought.

Malice is hatred, ill will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury, or under circumstances that the law will infer an evil intent.

Malice indicates a formed purpose to do an wrongful act under circumstances that exclude any legal right to do it.

Further, there must be malice aforethought, which means that the malice must have been conceived in the mind of the defendant prior to the act producing the fatal result.

The word "aforethought" is usually understood to refer to the time when the evil is conceived. The law does not

require that malice must exist for any appreciable length of time before the commission of the act. It may be conceived at the very moment an act is taken which results in the death of another.

Therefore, there must be a combination of the pervious evil intent and the act. Malice aforethought may be expressed or inferred. These terms, expressed and inferred, do not mean different kinds of malice but merely the manner in which the malice may have been shown to exist; that is, either by direct evidence or by inference from facts and circumstances which are proved.

Express malice is shown when a person speaks words or expresses hatred or ill will for another or when a person prepared beforehand to do the act which was later accomplished.

Malice may be inferred from conduct showing a total disregard for human life. If facts are proved beyond a reasonable doubt sufficient to raise an inference of

malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and you may give it such weight as you find that it should receive. You, as judges of the facts, are free to accept or reject this permissive inference depending on your view of the facts.

If malice is present in the mind of one doing the killing any length of time before doing the act, then its presence would be sufficient to render the killing murder.

If you find that the State has failed to prove beyond a reasonable doubt that the defendant committed murder, you something that we call the lesser-included offense of voluntary man-slaughter; which is included when one is charged with murder.

To prove voluntary manslaughter, the evidence must convince you beyond a reasonable doubt that the defendant took the life of another in the sudden heat of

passion based on sufficient legal provocation. Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter.

Sudden heat of passion may for a time affect a person's self-control and temporarily disturb a person's reasoning. The sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his actions and reduce the sudden uncontrollable impulse to do violence.

Sufficient legal provocation must be the type that would make a person of ordinary reason and caution to become enraged and to loose control temporarily.

The provocation needed for voluntary manslaughter must come from some act of or related to the victim. Words alone, however vulgar or insulting, are not enough to be legal provocation. Where death is -- the words must be accompanied by some overt threatening act which could have produced the heat of passion.

The exercise of a legal right, no matter how offensive it is to another, is never sufficient legal provocation for manslaughter.

If the time of passion had cooled or if there was enough time between the provocation, if any, and the killing, for the passion of a reasonable person to cool, the killing would not be voluntary manslaughter.

In deciding whether a reasonable person would have had enough time to cool off, you should consider all of the circumstances surrounding the killing. You may consider the nature of the provocation, if any; the defendant's physical and mental state; and the circumstances and relationship between the parties.

The defendant is also charged with the offense of grand larceny. I would charge you that to obtain a conviction on this crime, the State must prove beyond a reasonable doubt that the defendant took and carried away the property of another

against the will or without the consent of this other person. The slightest removal of the property or the complete possession of the property, even for an instant, by the defendant is enough to show the taking and carrying away the property.

The State must also prove beyond a reasonable doubt that the defendant intended to permanently deprive the owner of the property. Finally, the State must prove that the value of the thing was one thousand dollars ($1,000) or more.

I would further instruct you, ladies and gentlemen, that a person who voluntarily becomes intoxicated is just as responsible for the act committed while intoxicated as the person who is not intoxicated.

Criminal intent, ladies and gentlemen, is a necessary element of each of these crimes and must be established beyond a reasonable doubt. Criminal intent is always a matter that is determined by the triers of the fact,

that is you, by considering the circumstances surrounding the situation.

Though criminal intent may be inferred from the circumstances to have existed, criminal intent is a state of mind that operates jointly in the act or commission of a crime. Intent would include those consequences that represent the very purpose for which an act is done or known to be certain to result regardless of one's desire. Criminal intent is a mental state of conscious wrongdoing and it is up to you to determine what the defendant intended to do based on the circumstances that existed. I tell you that the State must prove criminal intent together with all other elements, beyond a reasonable doubt.

Throughout this matter, ladies and gentlemen, you nor I are partisans for either side and we certainly are not advocates for either side. In fact, we have no friends to reward, nor do we have any enemies to punish in this process.

No, you and I were basically -- you were handpicked, me assigned by the Chief Justice, to preside over this trial. Me as a matter of being the judge of the law and you to be the judge of the facts. One of the things that I have come to realize, knew before but it becomes very relevant to this now that I've done it for nineteen years, is that in performing the responsibilities or opportunities that we have as a judge that it is important that we, as human beings, acknowledge our humanity. By that, I mean simply this, that we have to set aside all human emotions. We can't be motivated by any human emotions. We have to use our God-given brainpower and methodically analyze and perform the tasks that we have been given.

Again, we are not here to please anyone or to get angry or upset about anything, but we are to decide the facts -- you by deciding the evidence and then applying the law. I am confident that you will do that very shortly when you

are instructed to begin your deliberations.

To assist you in your verdict, I've prepared a verdict form which I will be sending back with you. I will be sending back two verdict forms. They are very similar, one for each of the crimes. I would like to discuss it with you now.

The first one happens to be the one on grand larceny. You will note, ladies and gentlemen, that they both are captioned. The caption is just to facilitate the filing. It means nothing. You are to place no significance in it.

The body reads, *"We, the jury in the above-entitled action, find the Defendant, David Justin Penn, …"* -- and the two choices on this form are -- and I had to put them in some order. The order that I put them in means nothing. One says Guilty and the other says Not Guilty. Then there is a place for you to sign as the presiding juror and a place for the date.

What will you be saying if the first

one is your choice? You will be saying that you have evaluated the evidence and that you are convinced beyond a reasonable doubt that the State has met its burden of proof as to each of those elements that I have discussed with you; therefore, your verdict is Guilty.

Not Guilty means that you have evaluated the evidence and that you are not convinced as to each of those elements, because if the State fails on one then you must return a verdict of not guilty on that particular crime.

Unanimous consent means all twelve of you. Twelve to zero is the vote required. Eleven to one would not be sufficient.

The second one is similar except there are three choices. Again, the order in which they appear means nothing. This one deals with the crime of murder. As I told you, he is charged with murder which also includes that lesser-included offense of voluntary manslaughter.

So it says, *"We, the jury in the*

above-entitled action, find the Defendant, David Justice Penn, guilty of Murder; two, guilty of the lesser-included offense of voluntary manslaughter; or, three, not guilty."

What will you be saying if the first one is your choice. You will be saying that you evaluated the evidence and you're convinced beyond a reasonable doubt that he took the life of another with malice aforethought, remembering those elements that I have discussed with you.

Two, you will be saying that you didn't find that he committed the killing with malice aforethought, but that he took the life of another in the heat of passion. You will apply those principles regarding voluntary manslaughter that I have established or have told you about.

Three, not guilty. You're not convinced that the State have proven beyond a reasonable doubt that he killed another, either with malice aforethought or in the sudden heat of passion. That

would be your verdict, Not Guilty.

Again, it must be unanimous, all twelve of you must agree.

I know that you are anxious to get started and you're almost to the point where you're going to begin. But I need to ask the first twelve of you if you feel that you will be able to continue. If any juror feels that they cannot, please raise your hand now. (No response). Mr. Klippi, at this point it appears that the first twelve will be able to continue and complete the deliberations, so in just a moment when I excuse you and the other jurors, I ask that you not join them in the jury room. They will take you to another room and I will be in momentarily to discuss with you how long you need to remain with us.

Ladies and gentlemen, I know that you are anxious to get started with your deliberations and you are almost there. I told you that the last thing I would tell you is when you may start. I need to excuse you to discuss my charge with

the attorneys. It may be necessary to bring you back and give you some additional instruction or clarification. If so, we will return all of you to the courtroom. If there aren't any additions, then we will gather the exhibits and deliver them to you.

Madame Presiding Juror, once you receive the exhibits then you may begin your deliberations but not before.

Once deliberations commence, the only restriction that I place on deliberations is this. If any juror has to leave the table for any reason, you must stop deliberating until all twelve of you are together. Other than that you proceed as you deem fit and proper.

Thank you for your attention throughout this trial. Please retire to your jury room and await the exhibits before you begin your deliberation. You may be excused.

(JURY OUT @ 3:22 P.M.)

THE COURT: Any exception or additions from the State?

SOLICITOR WILLIAMS: Just one thing but I don't think that it matters because of the stipulation. I think that the court said one thousand rather than two thousand.

THE COURT: You've got to prove one thousand for it to be grand larceny.

MR. GROEBER: It's two thousand.

THE COURT: Excuse me.

SOLICITOR WILLIAMS: Since we stipulated to it, I don't think that it matters.

THE COURT: You're correct, I did misstate that. You're correct. Other any other exceptions other than the ones we have previously discussed?

MR. GROEBER: The only thing that I would add is that Your Honor said "an overt threatening act", and I don't think that an threatening act is required, just an overt act.

SOLICITOR WILLIAMS: That is in the charge.

THE COURT: Well, I ---

MR. GROEBER: I think that goes

again to the same argument that I made before about words and an act.

THE COURT: I appreciate that. I think that is consistent with the charge and the law, the charge of voluntary manslaughter; which may be the reason we don't say "spit" anymore. I don't know. Clearly those cases exist and clearly it is framed. I think that I read that charge, have that charge and that I have given that charge. I think that it is the law. It certainly is subject to being corrected and I acknowledge that.

The other would be the cases cited and the language that you requested that I include in the instructions, previously?

MR. GROEBER: Yes, Your Honor. Nothing other than I have ---

THE COURT: Thank you very much. I apologize for the two thousand. You are absolutely correct that it is two thousand but it is a nonissue, I think, with the stipulation.

SOLICITOR WILLIAMS: Yes, sir.

THE COURT: Thank you all for the manner in which you have conducted yourselves.

(COUNSEL APPROVAL OF EXHIBITS)

(JURY IN DELIBERATION @ 3:30 P.M.)

(NOTIFIED OF JURY QUESTION @ 3:52)

(OFF RECORD BENCH CONFERENCE)

(DEFENDANT PRESENT @ 3:53 P.M.)

THE COURT: I'm advised that we have a question from the jury. Let the record reflect that Mr. Penn is present.

Mr. Penn, prior to your arrival, I was discussing with your attorney the first note we've received from the jury. It asks if they can have the transcript of the voice mails to Penny and your confession. They exist but without agreement of the parties, they cannot have the transcripts because the actual transcript was not introduced.

It's my understanding from Mr. Groeber that it is your desire to note have them introduced into evidence. Is that correct?

MR. GROEBER: That's correct, Your

Honor.

DEFENDANT: Yes, sir.

THE COURT: Let's bring in the jury. We'll bring in the jury and I will explain to them why they cannot have it, though they can request to rehear the testimony -- review the video.

COURT REPORTER: Court's Exhibit 3.

(SO ENTERED AS COURT'S EXHIBIT 3)

(JURY IN @ 3:55 P.M.)

THE COURT: Thank you very much, ladies and gentlemen. Ms. Kinard, I have now what is Court's Exhibit 3, which is the first question from the jury. The questions are, (reading):

Can we have the transcripts to the phone calls/voicemails made to Penny, and the transcript of Mr. Penn's confession?

That's a fine -- I understand your request for that but you have what has been introduced into evidence and that's what you must consider. Of course, what was introduced into evidence, you heard the testimony and you heard the playing

of the tapes.

The transcript, while I had one, -- and I don't mind telling you that I was following along on mine. But it's not in evidence. There is nothing wrong with that. That's not an uncommon occurrence.

You may have it replayed, either all or part. Just let us know what you want to do. We cannot send the transcripts back to you. I believe -- if you need them replayed, we can bring you into the courtroom to accomplish that, and we are prepared to do that if necessary.

So I would ask you to return to your jury room. If you do wish them replayed, just send me another note. And if you'd do me this favor, not that it is any big problems, but if you will sign it as the presiding juror. You've dated it and everything is fine, but it you would just sign it.

FORELADY: Yes, sir.

THE COURT: Please retire and continue your deliberations.

(JURY IN DELIBERATIONS)

THE COURT: Any exceptions or addition to my instructions?

SOLICITOR WILLIAMS: None from the State?

THE COURT: Any exceptions or additions from Mr. Penn?

MR. GROEBER: No, Your Honor.

THE COURT: Thank you very much. Also I see these stipulations that I heard. We probably need to make those court's exhibits. Court's Exhibit 4, collectively.

MR. GROEBER: Thank you, Your Honor.

(SO ENTERED AS COURT'S EXHIBIT 4)

THE COURT: We will be at-ease until we hear from the jury.

(NOTIFIED OF VERDICT @ 4:42)

(DEFENDANT PRESENT)

THE COURT: I understand that the jury has reached a verdict. Is the State ready to receive the verdict?

SOLICITOR WILLIAMS: The State is ready, Your Honor.

THE COURT: Is the defense ready to receive the verdict?

MR. GROEBER: Yes, Your Honor.

THE COURT: Invite the jury to return. Ms. Kinard, I understand that the jury has reached a verdict; is that correct?

FORELADY: Yes, sir.

THE COURT: Please give the verdict form to Ms. Wiggins.

FORELADY: (Complies)

EVELYN WIGGINS, BAILIFF: (Tenders verdict form to the Court).

THE COURT: (Upon review), the verdict form has been property completed. I would ask the Defendant to please rise. The State of South Carolina, County of Berkeley, Indictment 12-GS-08-502, the State of South Carolina versus David Justin Penn, *"We, the jury in the above entitled action find the Defendant, David Justin Penn, Guilty of the crime of grand larceny."* Signed by Ms. Kinard as the presiding juror, dated October 1, 2013.

State of South Carolina, County of Berkeley, State of South Carolina versus David Justin Penn, Indictment

Number 12-GS-08-501, *"We, the jury in the above-entitled action, find the Defendant, David Justin Penn, Guilty of the crime of murder."* That is signed by Ms. Kinard, Presiding Juror, dated October 1, 2013.

Ladies and gentlemen, if I have accurately published your verdict in each case, please indicate that by raising your right hand. (Juror unanimously raise hands). Thank you, you may put them down.

Let the record reflect that each juror raised his or her right hand in response to the court's question.

Anything further from the jury, form the State?

SOLICITOR WILLIAMS: None from the State.

THE COURT: Anything further from the jury from Mr. Penn?

MR. GROEBER: We would request that you poll the jury.

THE COURT: Ladies and gentlemen, what will happen -- and you may be

seated, Mr. Penn. Thank you, sir. What will happen is that your name will be called and -- can we poll them collectively, as to both cases, one poll?

MR. GROEBER: Yes, Your Honor. That's fine.

THE COURT: The questions will be 'was that your verdict', in each case, and 'are those still your verdicts?' Just answer the clerk as she calls your name.

CLERK: Juror Number 86, Stephanie Kinard, is this your verdict?

JUROR NUMBER 86: Yes.

THE CLERK: Is it still your verdict?

JUROR NUMBER 86: Yes.

THE CLERK: Juror Number 70, Dylan Hoffman; is this your verdict?

JUROR NUMBER 70: Yes, it is.

THE CLERK: Juror Number 120, Autumn Morse; is this your verdict?

JUROR NUMBER 120: Yes, ma'am.

THE CLERK: Is it still your verdict?

JUROR NUMBER 120: Yes, ma'am.

THE CLERK: Juror Number 136, Glenn Ramsey. Is this your verdict?

JUROR NUMBER 136: Yes, ma'am.

THE CLERK: Is it still your verdict?

JUROR NUMBER 136: Yes, ma'am.

THE CLERK: Juror Number 152, Leonard Sims; is this your verdict?

JUROR NUMBER 152: Yes, ma'am.

THE CLERK: Is it still your verdict?

JUROR NUMBER 152: Yes, ma'am.

THE CLERK: Juror Number 100, Peter Maningding, is this your verdict?

JUROR NUMBER 100: Yes, ma'am.

THE CLERK: Is it still your verdict?

JUROR NUMBER 100: Yes, ma'am.

THE CLERK: Juror Number 55, Susan Gilmer, is this your verdict?

JUROR NUMBER 55: Yes, ma'am.

THE CLERK: Juror Number 14, Lawrence Bonderer, is this your verdict?

JUROR NUMBER 14: Yes, ma'am.

THE CLERK: It is still your verdict?

JUROR NUMBER 14: Yes, ma'am.

THE CLERK: Juror Number 84, Meghan Kassel, is this your verdict?

JUROR NUMBER 84: Yes, ma'am.

THE CLERK: Is it still your verdict?

JUROR NUMBER 84: Yes.

THE CLERK: Juror Number 41, Ashley Dingle, is this your verdict?

JUROR NUMBER 41: Yes, ma'am.

THE CLERK: Is it still your verdict?

JUROR NUMBER 41: Yes, ma'am.

THE CLERK: Juror Number 157, Mary Starnes, is this your verdict?

JUROR NUMBER 157: Yes, ma'am.

THE CLERK: Is it still your verdict?

JUROR NUMBER 157: Yes, ma'am.

THE CLERK: Juror Number 68, Stephen Hildenbrand, is this your verdict?

JUROR NUMBER 68: Yes, it is.

THE CLERK: Is it still your verdict?

JUROR NUMBER 68: Yes, it is.

THE CLERK: Judge, the jury has been polled and the verdicts stand.

THE COURT: The jury has been polled and the verdict stands.

Ladies and gentlemen, thank you very much for resolving this dispute. It's been a privilege to have served with each one of you. I am going to ask you to retire to your jury room for just a few moments. I'd like to come in and speak to you. Ms. Wiggins has certain documentation for you.

(JURY EXCUSED)

THE COURT: Anything from the State at this point?

SOLICITOR WILLIAMS: Nothing from the State, Your Honor.

THE COURT: All right. Let the record -- we failed to put on the record that we preserved that you would have renewed your Motion for a directed verdict at the conclusion when you

rested, on the grounds previously stated on the record, at the close of the State's case; is that correct, Mr. Groeber?

MR. GROEBER: It is, Your Honor. Thank you.

THE COURT: That Motion is respectfully denied and the record is preserved for purposes of review should that be necessary.

Any Motions now regarding the verdict, sir?

MR. GROEBER: We move for a, on the same basis, judgment notwithstanding the verdict.

THE COURT: Well, I will take that -- that's one of those things I don't think that I can do, but I understand what you're asking for. I think the verdict -- I think that I recited that on the record. There was an abundance of evidence that would have supported voluntary manslaughter.

Obviously there was testimony that if the jury believed that to be

sufficient legal provocation and sufficient heat of passion, it could have justified it. But there was an abundance of evidence to support the offense of murder and I would, therefore, deny that Motion as well.

Do we have sentencing sheets?

SOLICITOR WILLIAMS: We are getting it right now, Your Honor.

THE COURT: Very well. We will be at-ease for a few moments. I will speak to the jury. Thank you very much.

(BRIEF RECESS)

(DEFENDANT PRESENT)

THE COURT: Are you ready, Ms. Williams?

SOLICITOR WILLIAMS: State's ready, Your Honor. One family member would like to speak.

THE COURT: Okay. Certainly. Mr. Groeber, is there ---

MR. GROEBER: Not at this time.

THE COURT: Okay, they may come forward and if they'd just give us their name.

SOLICITOR WILLIAMS: Joan Rivera, Your Honor.

JOAN RIVERA: David, I would just like to say that you took someone from us that we loved dearly, from myself, my family, our friends.

The Lord would want me to forgive you, which I am going to do. Your final sentence is still waiting. God bless you.

DEFENDANT: Same to you.

THE COURT: Thank you, Ms. Rivera. Anything else from the State?

SOLICITOR WILLIAMS: Just his prior convictions.

THE COURT: Does he have a record?

SOLICITOR WILLIAMS: Court's indulgence just for a second.

THE COURT: Take your time.

SOLICITOR WILLIAMS: His prior record is that he has a criminal domestic violence from 2003; a purse snatching in 2004; possession of drugs, 2005, and possession of drug paraphernalia; possession of cocaine in 2005; possession

of cocaine in 2006; criminal domestic violence in 2007; and I believe that that is it, Your Honor.

We do have some other arrests in Tennessee but I cannot confirm that they are convictions. I do think that it is important that he has a robbery in Nashville, in 1997, and committed theft in 2001.

I do think that it is important for the court to know that there were at least three other arrest, two of which involved Penny, of beating women; where they decided to report. I just waned to bring that to the court's attention.

THE COURT: Okay. Thank you very much. Mr. Groeber or Mr. Schwacke, I will be glad to hear from y'all.

MR. GROEBER: Thank you, Your Honor, may it please the court?

THE COURT: Yes, sir.

MR. GROEBER: Mr. Penn was fifty-two when he killed Kathy Chrastina. He'd been in Charleston for about nine or ten years. He'd moved here with a brother of

is, got a job, in 1999. He's worked various jobs: hanging drywall, worked at Food Lion as a stocker.

One of the things that I was most impressed with about the work that he can do, is that for fun he made walking sticks. They are actually in some of the photos from discovery, though they weren't admitted into evidence. They were at his home in Bonneau. They're beautiful. They are really wonderful. He used to sell them on the side of the road. He was a skilled -- he was very good at it, very talented and clearly he had a lot of skill in that.

You know, I know that this -- I believe his remorse was shown in the video. I think that he's always been remorseful for what happened. I know that he has really sought and searched is faith and soul. I think you see some of that on the video, too.

I would -- I did talk with Penny last week. I do think that she -- you know, she still loves him. She still

thinks that he can do some good in this world. She believes that this was out of his normal character. You know, the prior CDVs, you know, we don't need to go back into those but I don't think that she was fearful of him.

I know that he wants to speak, Your Honor.

THE COURT: Certainly.

MR. GROEBER: He has actually waited a long time to speak and he -- he's written things. I know that he has something written out today, and he's shown me things that he's written as long as I've been representing him, in preparation for -- thinking about what he'd want to say. So I know that he does want to speak. I'd ask you to consider, Your Honor, that he is fifty-two. The minimum gives him hope. He was fifty-two at the time of his arrest. It gives him hope of being released. I don't know that that is a great hope but it is a hope that he would be released, so we would ask for the minimum.

THE COURT: Mr. Penn, I will be happy to here from you, sir.

DEFENDANT: First of all, Your Honor, I would like to tell Ms. Rivera that not only did she lose someone special but I did, too.

Kathy and I were real good friends. At one time we were a team as far as working. What she done, what I done, we couldn't do it without one another.

You know, we talked about the trust issue there. That small woman would get up on a forty-foot ladder and let me push her up in the air and hold her. That took trust. We worked inside these houses, side by side, small bathrooms on the island, all day long by ourselves. That took trust.

I don't think at one time Kathy did not trust me. I let myself down, I let her down, by continuing to do drugs when she gave me the job.

Addiction is a sickness, Your Honor, that I've never been able to shake. My kids, they have suffered. My grand-

children, who I will never see, they are going to suffer.

But I feel -- I'd been incarcerated about a year, not even a year, and in that year following the incident, I gave my life over to the Lord. I knew at that time that no one could help me but Jesus. I've been forgiven, I think in my heart for what I've done.

Like I said, I ask Ms. Rivera to please forgive me. And her family. I would appreciate it. She says that she does but, you know, that's -- whether anyone else does or not, you know, God is my judge. If he forgives me, then I am forgiven.

Yes, it's sad to say that I still do love Penny and she loves me. These accusations that have come up about the CDVs, nothing was ever proved on those CDVs, no hospital records or anything else. Accusation by the family because they didn't like me because I brought Penny from being put a closet and food thrown in her face to -- as you seen the

strong young lady that she is now.

As for myself, the statement was made that this was all about David. No, this was not about David. At the time it was about David's remorse and David's hurt.

I wrote about three different papers that I wanted to speak, but the good Lord told me to speak what is in my heart and that's what I am doing.

Nobody is perfect. When one of us decides that we can walk on water, we will be equal to Jesus. I don't think anybody will ever be able to do that. So nobody is perfect, I am not perfect. We all make mistakes.

I made a mistake. There are people not far away from me that make mistakes every day.

THE COURT: Sure.

DEFENDANT: Your Honor, I expected the worse the whole time but I was hoping for the best.

THE COURT: I understand.

DEFENDANT: I am prepared for what

happened. I am at peace with it although I don't agree with what I've done to myself, to my kids, my life. Thank you, Your Honor.

THE COURT: Thank you, Mr. Penn.

MR. GROEBER: The only other thing that I would add, Your Honor, that I did talk with Dr. Bill Molbry and have him evaluate Mr. Penn. Specifically as to whether or not we had defendants but also for mitigation purposes. And I would tell you that -- I am sure Your Honor is familiar with long-term drug addiction and also withdrawal.

THE COURT: I am.

MR. GROEBER: He did confirm, from David's description of what he was going through that day, that it was very consistent with, you know, long-term drug use withdrawal: irritability, lack of ability -- I don't want to say a lack of ability but a much more short tempered. Dysphoria is a term used to describe all that. So there was -- at the very least, I do believe that the drug abuse was a

big factor in all of this. In fact, I think that Penny ever testified to that, that 'he is a different person.' Thank you, Your Honor.

DEFENDANT: One more thing, Your Honor.

THE COURT: Sure.

DEFENDANT: I've been here for two years. I've seen this system. This is my opinion, this system -- I've seen it be very prejudicial and for what I am facing right now, I need to say this, because there is a case right now pending with this gentleman, he's out, a Caucasian, attempted murder, murder, just got out of prison for doing fifteen years. This came from him and -- I'm not just repeating hearsay, it come from him, out of his mouth. Because we were talking about some pleas that I got for thirty years, two pleas for thirty years. This gentleman got offered a plea of twenty years, for all of that. That is not justice. By the same lady sitting over here. That is not justice as far as

I am concerned.

Whether he gets that or not, I don't know. But at least they offered that to him. Me, I've got thirty years to life. It's not fair. I can't do anything about it but voice my opinion, and that's what I have done. If it works out for him, God bless him. But -- (negative gesture).

THE COURT: Obviously he's not pleading to murder or that couldn't have been offered to him. That's the reason for that. They couldn't have offered anything -- so there's a distinction there. Then there may be multiple other distinctions.

But, you know what, Mr. Penn? I don't need to convince you or anybody else whether the system is perfect or not, because I will tell you that it is not. As you heard me tell the jury on Monday, I don't think that this is a perfect system. Is it better than anything else that man has devised? You bet it is, just far -- hands down.

Are there injustices? Sure they are. I would love to sit here and smugly say that I haven't been a part of any. I try not to but I'm a human and I'm sure that I've made mistakes too. I try to make sure that I don't, I try to remind myself.

But I believe in the system. I believe -- as you heard me rule one time with Ms. Williams, my objective is to keep the playing surface balanced and let it be played out between the sidelines. I see it much like a football field where the game is played within boundaries on either side. We try to keep it within the boundaries.

From the standpoint of what was offered, I understand that. Quite frankly, that's one of the things that I think is a catalyst for people wanting to have sentencing guidelines. Some people would say that sentencing guidelines are good. The Federal Court has about the same opinion of it that you do, that one of the things that they should never do

is take away the discretion. If they don't trust the people that they elect to hold this position, then a computer can fashion a sentence a lot better than a human being. It can do an instant search across the nation of sentences and give ranges, you know. But the system doesn't' work that way and I am sure glad that it doesn't. I am certainly biased in my opinion.

With that being said, I will try to fashion a sentence which I think is appropriate. I couldn't agree with Ms. Blair's assessment any more, that you are a different person when you're not on drugs. It reinforces something that I heard in 1996 when I came to several seminars on drug abuse, which was just beginning in this case. I think that it is a fabulous tool, not for everybody but for some. The guy was from Florida. He said, "Do you want what you get when a person who is a drug addict is released from prison? You need a punished drug addict." You still have a drug addict.

DEFENDANT: I'm clean.

THE COURT: And therein lies the problem. The frustrating thing to Ms. Blair, all of your loved ones and maybe even to you is -- I had the great pleasure of serving on the Berkeley County Drug & Alcohol Commission for twenty-three years before I took this job. I enjoyed it immensely just for the opportunity to be a part of something that hopefully provided a service to everybody in this county.

I can tell you in twenty-three years that I know of no instance where we turned down somebody who needed help because they couldn't pay for it. You and I both know that there are lots of people who need help but they can't possibly pay a nickel. I think we as a society -- my priest talked about it Sunday and what you said brought what he said to mind. He said we are the richest -- talking about money -- he said 'I don't care where you are in this country, we are the richest country in the world.'

If you don't believe it, go outside and look and see. It's amazing. Yet we don't do enough to take care of people.

We'll go back to something that you said, that you made a choice. That was a personal choice. You and I both know that that door, which one time somebody told me, and I grew up in this area -- they used to be called funeral home fans, and I can remember in my church before they had air-conditioning that we had fans with a picture of Jesus knocking on the door. Somebody pointed out to me, I'll never forget it. Look at the door, there is no door knob on the outside. It has to be opened from the inside. That's exactly what you have done, and that's a credit to you, sir.

I don't disagree with you. In fact, one of the things that he said is that God forgives our sins and when it's gone, it's gone. It's clean. His analogy was that he tosses it in the deepest sea and then he puts a sign up that says No Fishing. That means you nor anybody else

can fish. It's gone, once and for all. I don't quarrel with what you've said at all.

But he also said something else. He said we have to be accountable, that there are consequences for our actions. That is what we are about to deal with.

I don't consider myself a judge in that respect. I am just a judge serving in this position, and I try to do the best I can with the job that is assigned to me.

I can't -- I appreciate your statements about the criminal domestic violence but actually the robberies and the -- and all of this was tied to your drugs. I understand that. That causes me to believe that a life sentence is not appropriate for you. But I can't ignore your prior sort of 'warnings.' Mr. Penn, you need help. You even said you needed help, over and over, Mr. Penn. I wish that you had gone, you could have gotten some help. Just like that door with no doorknob, that's true of you. Until you

go seek help, nobody can help you.

DEFENDANT: Yes, sir.

THE COURT: That, unfortunately, is everybody's -- unfortunate for your friend. It shows what kind of person that you are. It's a sad thing. It's a sad thing, what I do, because I am looking at a man who has wonderful qualities, great abilities, and unfortunately addiction destroyed that. I am so sorry for that. I truly mean that, sir.

The sentence of the court is -- how long has he been incarcerated?

MR. GROEBER: Since October 15th, 2011.

THE COURT: The sentence of the court, Mr. Penn, on Indictment 12-501, which is the murder conviction, is that you be committed to the Department of Corrections for a term of thirty-five (35) years. I give you credit for time served since October 15th, 2011.

The sentence of the court on 12-502 is five (5) years. It is concurrent and,

likewise, credit since October 15, 2011.

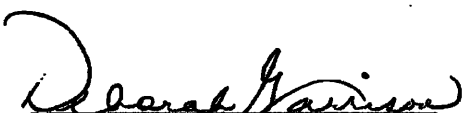
Good luck to you, sir.

(TRIAL CONCLUDED)

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF CHARLESTON)

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on September 30 and October 1, 2013; before The Honorable R. Markley Dennis, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.



Deborah Garrison

Charleston, South Carolina
November 5, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID JUDSON PENN,

APPELLANT

APPELLATE CASE NO. 2013-002146

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by instructing the jury that "an overt act threatening act" against the defendant was required to reduce murder to voluntary manslaughter since this was an erroneous instruction on the law?

2.

Whether the court erred by refusing to charge the jury on examples of legal provocations as cited in State v. Gallman, 79 S.C. 229, 240, 60 S.E. 682, 687 (1908) since this was a correct instruction on the law, the purpose of jury instructions are to enlighten the jury and lead it to a correct verdict, and the only issue in this case was whether appellant was guilty of murder or voluntary manslaughter?

3.

Whether the court erred by refusing to give the State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), instruction on circumstantial evidence since the Supreme Court held a defendant, as here, is entitled to the instruction when requested by the defense?

4.

Whether the court erred by charging the jury that words alone could never be sufficient to constitute a legal provocation since defense counsel correctly stated that certain words also can be "fighting words" know to incite violence, there was evidence in this case of the most provocative fighting word in the English language?

STATEMENT OF THE CASE

Appellant was indicted by the Berkeley County Grand Jury for the offenses of murder and grand larceny. R. p. 285 – R. p. 288. His case came on for trial on September 30, 2013 before the Honorable R. Markley Dennis, Jr., and a jury. David Schwacke and Cody Groeber represented appellant. Anne Williams and Colleen Dixon were the assistant solicitors. R. 1.

On October 1, 2013 the jury found appellant guilty on both charges. R. 275, l. 12 – 276, l. 5. Judge Dennis sentenced appellant to thirty-five years imprisonment for murder, and he imposed a five-year concurrent term for grand larceny. R. 281, ll. 17-25.

This appeal follows.

STATEMENT OF FACTS

Defense Counsel Groeber told the jury in his opening statement that the only question in this case was: "What crime did he commit? And to decide if he's guilty of murder or of manslaughter, you've got to weigh the evidence." R. 8, ll. 13-21.

Groeber told the jury that one way to think of the malice necessary for murder is "cold-bloodedness." Conversely, he argued when one kills another person in the heat of passion, on an adequate provocation, that was voluntary manslaughter. R. 10, ll. 13-25. Groeber added that the jury would "hear too what provoked him [appellant] into such a rage . . . She called my client the "N-word, perhaps the worst insult that you can use against a black person. A word so dirty and vile that we don't say it in polite conversation. I won't use that word. I don't feel comfortable using that word. Then she spit in his face." R. 11, l. 9 – 12, l. 4.

Appellant confessed to several people that he had killed his decedent employer, and he expressed remorse for his actions. R. 12, l. 5 – 13, l. 20.

Officer Brent Fenton was a Berkeley County Sherriff's Deputy. On October 15, 2011 he responded to a dispatch to check on the decedent because there may have been "a possible homicide." R. 14, l. 6 – 16, l. 6. All of the doors and windows were locked so the police eventually kicked in the door, and "we saw the body of a dead female with like a laptop power cord wrapped around her neck." R. 16, l. 5 – 18, l. 7.

Neil Croft knew the decedent from his church. R. 49, l. 11 – 50, l. 11. Croft opined that the decedent was not a racist. He maintained: "No, she was not a racial at all." R. 50, l. 12 – 51, l. 3.

Croft also said the decedent was concerned about appellant, whom she employed, and he also claimed: "She was afraid of him." Croft maintained he told the decedent, "Kathy, I'm just around the corner if you need me for anything. Just give me a call. We live about a mile from where she lived." R. 51, l. 20 – 52, l. 3.

Darrell Hackney also employed appellant who did small jobs for him in October of 2011. R. 52, l. 21 – 53, l. 25. Darrell remembered speaking with appellant before he was arrested. Appellant called him on the telephone and Darrell recalled: "There was a lot of anger, there was a lot of remorse, there was a lot of crying. He was messed up on alcohol or drugs, whatever it was." R. 54, l. 12 –55, l. 8.

Darrell met appellant in another part of Moncks Corner and gave him two hundred dollars for some past work appellant had done for him. Appellant told Derrell that he had messed up "the rest of his life." Darrell said he tried to calm appellant down until appellant told him: "I murdered somebody last night." Darrell said at that point he told appellant that "We are through here," and appellant "understood and we parted ways." Darrell called the Moncks Corner Police Department to report the confession. R. 55, l. 1 – 56, l. 21.

Nitesh Patel was the manager at the Economy Inn in Moncks Corner. R. 62, ll. 3-16. He remembered appellant checking out after about three days, and paying him in cash. R. 63, l. 4 – 64, l. 13.

Patel recalled that appellant "talked about life, mentioned that he was a killer and that he wanted to turn himself in." Appellant also disclosed to Patel that he had a very serious drug problem that had gotten out of control.[1] R. 65, ll. 5-21.

Patty Cobb knew appellant because she worked with the decedent. "She would pick him up from time to time when he worked." R. 116, l. 5 – 117, l. 17. Cobb testified appellant became upset when her sister left him after eight years of living together. Cobb said appellant left her telephone messages in which he was crying and saying "tell your sister to call me. I said, David, no." Cobb also heard a message appellant left for her sister which stated: "I need to talk to you, I've done something bad." She also remembered one message on her phone where appellant said: "that he had killed Ms. Kathy and then he said maybe it should have been your sister, then you." R. 119, l. 18 – 120, l. 24.

Lieutenant Will Rogers of the Berkeley County Sheriff's Department spotted appellant after he had checked out of the Economy Inn. Rogers arrested appellant. R. 125, l. 1 – 126, l. 15. The state entered appellant's videotaped confession, State's Exhibit 49 which is before this Court, into evidence. R. 137, ll. 1-25.

In this confession appellant told the police that the decedent had called him the "N-word and spit at him, and called him a lowdown SOB." Appellant described how she was strangled in the anger that immediately followed. (See Videotape Confession).

---

[1] The State also presented evidence that appellant's fingerprint was found inside the decedent's missing van when it was found, and that appellant had thrown the decedent's property, including her credit cards and telephones into a Walgreen's dumpster. R. 84, l. 6 – 85, l. 16; R. 95, l. 6 – 97, l. 18; R. 99, ll. 19-20; R. 108, l. 16 – 109, l. 14.

Pathologist Erin Presnell testified the ninety-eight pound decedent had a computer cord looped around her neck "three times" where she apparently was strangled. R. 153, l. 19 – 161, l. 23.

Objection to Request to Charge

Defense counsel made two requests to charge, and one objection to the charge as given, that are the subject of this appeal. The trial judge refused to give the State v. Gallman, 79 S.C. 229, 240, 60 S.E. 682, 687 (1908) jury examples of what a sufficient legal provocation in his voluntary manslaughter instructions Defense Counsel Groeber read the judge the proposed Gallman instruction:

> *"What is sufficient legal provocation? Now words under the law, it does not make any difference what matters because no words, no matter how harshly one person may speak to another, will constitute sufficient legal provocation; words that are not accompanied by some effort or attempt to do harm or injury to another person. It must be some act that a person is killed and in which a man of ordinary prudence and courage could create a higher degree of passion, such as to spit in a man's face, hold his ears or knock him off the street or some smart indignity that might in some different ways incite a higher degree of fighting in a man. The Law says that while acting under the influence of passion and he strikes and kills the other, then it cannot be murder, it would be manslaughter."*

R. 190, l. 12 – 191, l. 5. The judge responded that he believed this was a charge on the facts, and that he would not instruct it. R. 190, l. 9 – 193, l. 2.

Defense counsel also requested that the judge *not instruct the jury* that "words alone are not enough" to ever constitute a legal provocation for voluntary manslaughter. Defense counsel noted that the Supreme Court has recognized the legal concept of "fighting words." Counsel argued that there was no reason why the concept of "fighting words" should not apply to the concept of voluntary manslaughter. Defense counsel said he recognized this

request went against current "precedent" but he argued it was necessary in this case given the facts. The judge refused to modify his voluntary manslaughter instruction as requested. "I think that is an inappropriate statement of the law." R. 193, l. 3 – 194, l. 6.

Finally, defense counsel requested the State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) jury instruction on circumstantial evidence. Defense counsel noted that our Supreme Court had held that when the defense requested this circumstantial evidence instruction the judge must charge it. R. 197, l. 2 – 204, l. 5. The judge said he would read Logan very carefully but he ruled he was going to "charge my circumstantial evidence [instruction]." R. 202, l. 6 – 204, l. 5.

Additionally the judge charged that to reduce murder to voluntary manslaughter, and "overt threatening act" was required. R. 259, ll. 14-25. Counsel objected, noting that threatening language is not required. The Court left the charge as given. R. 269, l. 13 – 270, l. 20.

The Jury Instruction

The judge did not give the State v. Gallman detailing examples of prior court approved legal provocations. He also instructed that "words alone, however vulgar or insulting, are not enough to be legal provocation. Where death is - - the words must be accompanied by some overt threatening act which could have produced the heat of passion." R. 259, l. 14 – 260, l. 4.

Despite counsel's request, the judge did not charge the highly desirable State v. Logan, 405 S.C. 83, 99-100, 747 S.E.2d 444, 452 (2013) language that "to the extent the State relies on circumstantial evidence all of the circumstances must be consistent with

each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. He instructed only that:

> Circumstantial evidence is when you prove several facts and you're firmly convinced of the truth of those facts and when you link them they point to another fact, either by inductive or deductive reasoning you reach a conclusion of what it is, and you are firmly convinced of that. I would tell you that it is not uncommon to have both. Our law makes absolutely no distinction between the weight or the value to be given either direct or circumstantial evidence, nor is any greater degree required or circumstantial evidence than of direct evidence. Rather, you're instructed to weigh all of the evidence in the case and decide what you find to be credible and believable.
>
> I would instruct you, however, that in regard to the inferences to be drawn in a case is that the circumstances brought out in a case are suspicious or guilt or the circumstances in a case are such that guilt is probable, that that would not be sufficient; that that would not be enough to sustain a suspicion. Why? Because the proof offered by the State has to be more than mere suspicion. It has to be more than someone being probably guilty. It has to be proof beyond a reasonable doubt.

R. 248, l. 20 – 249, l. 22.

After his jury instruction the judge asked the defense for any other exceptions that they had not discussed previously. Defense counsel also told the judge he took exception to his instruction that "an overt threatening act" was necessary for voluntary manslaughter.

The judge responded that he had considered the requests to charge, and the case law cited in support of them previously, and that he was not going to alter his instruction. R. 269, l. 13 – 270, l. 20.

ARGUMENT

1.

The court erred by instructing the jury that "an overt threatening act" against the defendant was required to reduce murder to voluntary manslaughter since this was an erroneous instruction on the law.

The trial judge's instruction that an overt threatening act *was required* to reduce murder to voluntary manslaughter was erroneous, and was properly objected to by defense counsel. Voluntary manslaughter is the intentional and unlawful killing committed during the heat of passion aroused by a sufficient legal provocation. See State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981).

There are many legal provocations that have been recognized that are not the result of "an overt threatening act." Committing assaults such as spitting in the face or grabbing the ear and leading one around in the presence of others have been recognized as sufficient legal provocations. See State v. Gallman, 79 S.C. 229, 240, 60 S.E. 682, 687 (1909); State vs. Petit, 144 S.C. 452, 472, 142 S.E.2d 725, 733 (1928). An offense against one's property, such as a horse, has also been held to be a sufficient provocation as an assault on one's spouse. State v. Martin, 216 S.C. 129, 57 S.E.2d 55 (1949); State v. Gallman, supra.

Moreover, finding one's spouse in an act of adultery is a classic example of conduct traditionally held to be an adequate provocation. State v. Herring 118, S.C. 386, 110 S.E. 668 (1922).

The "overt threatening act" instruction given in this case was highly prejudicial because it would have allowed the jury to find that an insulting gesture such as using a

racial epitaph and spitting on someone did not rise to the level of an "overt threatening act." Insults and humiliation, as seen above, have been held to be sufficiently legal provocations, and the instruction in this case was therefore highly prejudicial.

Bearing in mind that the only issue in this case was murder versus manslaughter, the solicitor argued:

> [B]ut you are going to hear from the judge that words alone are not provocation. You know why? Because we live in a society where you don't get to kill somebody because they've called you a name.
>
> Let's assume that this woman did use that word. There's no excuse for that, it's awful. Let's even assume that she spit at him. You don't get to kill somebody because they offend you.

R. 211, ll. 1-11.

Now the jury has been told that only an "overt threatening act" is sufficient to constitute a legal provocation. Appellant should be granted a new trial given this erroneous highly prejudicial jury instruction particularly since the only issue in this case was whether appellant was guilty of murder or voluntary manslaughter which the jury had focused critical attention on from opening statements forward. See State v. Blassingame, 371 S.C. 44, 244 S.E. 2d 528 (1978).

2.

The court erred by refusing to charge the jury on examples of legal provocations as cited in State v. Gallman, 79 S.C. 229, 240, 60 S.E. 682, 687 (1908) since this was a correct instruction on the law, the purpose of jury instructions are to enlighten the jury and lead it to a correct verdict, and the only issue in this case was whether appellant was guilty of murder or voluntary manslaughter.

The trial judge erred by refusing to give the State v. Gallman, 79 S.C. 229, 240, 60 S.E.2d 682, 687 (1908), instruction giving the detailed examples that trial counsel read to him of voluntary manslaughter. These sufficient legal provocations "create a higher degree of passion, such as spit in a man's face, hold his ears or knock him off the street or some smart indignity that might in some different ways incite a higher degree of fighting in a man . . ." R. 190, l. 12 – 191, l. 5. The judge erroneously found this was a charge on the facts.

The evidence at trial determines the charge jury instruction. State v. Blurton, 352 S.C. 203, 573 S.E. 2d 802 (2002); State v. Lee, 298 S.C. 362, 380 S.E. 2d (1989). Defense counsel requested that the judge give the jury instruction from State v. Gallman. R. 189, ll. 15-24. It would have aided the jury in arriving at a correct verdict, and the purpose of jury instruction are to enlighten a jury and to aid it in arriving at a correct verdict. State v. Leonard, 292 S.C. 133, 355 S.E. 2d. 270 (1987); State v. Hewitt 205 S.C. 207, 31 S.E. 2d. 257 (1944). The jury instruction from State v. Gallman gave the jury examples of "some different ways" that might incite a "higher degree of fighting in a man." R. 190 l. 19 – 191, l. 5.

The jury instruction in this case was not a charge on the facts. A charge on the facts would have cited examples such as the decedent "used a racial epitaph, spit on the defendant

and a struggle ensued." The State v. Gallman instruction that was requested in this case did not do that, and it was not a charge on the facts. Cf State v. Hughey 339, S.C. 439, 452, 529, S.E. 2d 721, 728 (2000) (examples of a legal provocation mirrored the facts of the case, and the requested instruction was therefore a charge on the facts). [2]

The court could certainly tell the jury these were examples. Clearly this would not convey the judge's opinion, or view of the facts, which is the vice addressed by the constitutional provision.

As discussed in State v. Edwards, 297 S.C. 24, 374 S.E.2d 668, 669 (1988):

> The reasoning for such prohibition was recognized in Crenshaw v. Southern Railway Company, 214 S.C. 553, 53 S.E.2d 789 (1949). Such prohibition exists because of the ease with which a judge may, even unintentionally, influence a jury:
>
> `It has long been recognized that even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury. Vested as the trial judge is, with superior authority, disinterested, and possessing experience not available to the ordinary layman, jurors, as a rule, are anxious to **catch his view,** upon which to found their conclusions.'

(internal citations omitted, emphasis of the Court).

The proposed instruction did not violate this reasoning, and was a proper statement of the law. It was especially needed here to illustrate that **non-threatening** actions can be sufficient to reduce murder to manslaughter. See Issue I, supra.

The only issue in this case, as defense counsel conceded in his opening statements to the jury, was whether appellant was guilty of murder or voluntary manslaughter. Thus, from the outset of the trial the jury had focused critical attention on whether it would convict

[2] Overruled on other grounds Rosemond v. Catoe 383 S.C. 320, 680 S.E. 2d 5 (2009).

appellant of murder or voluntary manslaughter. The jury had focused its critical attention on those two verdicts, and the failure to adequately instruct the jury on voluntary manslaughter from Gallman was therefore reversible error under the unusual facts of this case. See State v. Blassingame, 371 S.C. 44, 244 S.E. 2d 528 (1978).

3.

The court erred by refusing to give the *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), instruction on circumstantial evidence since the Supreme Court held a defendant, as here, is entitled to the instruction when requested by the defense.

The court erred by refusing to give the requested State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) instruction on circumstantial evidence. The Supreme Court held in Logan that a defendant was entitled to this circumstantial evidence instruction when, as here, it is requested by the defense. After the defense requested the instruction and the judge stated he was going to give his own circumstantial evidence instruction.

The judge's circumstantial evidence instruction here, was little more than the State v. Gippon, 327 S.C. 79, 489 S.E.2d 462 (1997), instruction since it did not include the language that "to the extent the State relies on circumstantial evidence, *all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt.*" State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). (emphasis added).

Again, appellant requested the Logan instruction in this case, and the trial judge respectfully had no basis in law to refuse the instruction mandated by the Supreme Court, and in giving "his own instruction." His refusal to do so was highly prejudicial in this case, and appellant's conviction for murder should be reversed.

4.

The court erred by charging the jury that words alone could never be sufficient to constitute a legal provocation since defense counsel correctly stated that certain words also can be "fighting words" known to incite violence, and there was evidence in this case of the most provocative fighting word in the English language

Defense counsel correctly argued that the "fighting words" doctrine should also apply in the voluntary manslaughter context. Defense counsel requested that the judge did not instruct that "words alone, however vulgar or insulting, are not enough to be a legal provocation." The judge charged that instruction over objection. R. 259, ll. 17-25.

Further, as seen, the judge charged that these vulgar or insulting words "must be accompanied by some overt threatening act which could have produced the heat of passion." R. 259, ll. 17-25. Defense counsel correctly took exception to this instruction. R. 259, ll. 17 – 21.

In City of Columbia v. Brown, 316 S.C. 432, 436 – 437, 450 S.E.2d 117, 119-20 (Ct.App. 1994), the Court held that the defendant met the definition of fighting words, outside of constitutional protection, where he shouted obscenities and racial slurs at police officers. See, also, State v. Perkins, 306 S.C. 353, 355, 412 S.E.2d 385, 386 (1991). In the case of In re Jeremiah W., 361 S.C. 620, 606 S.E.2d 766 (2004), the Supreme Court affirmed this Court's holding, ruling that the minor could not be convicted of breach of the peace where he did not use fighting words when addressing a police officer. The police officer in Jeremiah W. admitted that he was used to citizens using the "F-word" in his presence, and this Court found that word did not have the tendency to make a reasonable police officer react to violence in response.

In City of Landrum v. Sarratt, 352 S.C. 139, 572 S.E.2d 476 (Ct.App. 2002), the Court held that the defendant yelling profanities at another person and his mother while they were leaving the courthouse, and walking across the parking lot, accompanied with a loud manner in which the profanities were spoken, did constitute unprotected fighting words.

"Fighting words" have been defined as words that by their very utterance inflict injury or tend to incite an immediate breach of the peace. "Fighting words" can also be those which inherently are likely to induce an ordinary person to react violently. E.g. Cohen v. California, 403 U.S. 15, 20 (1971).

It has been held that the determination of whether insulting and profane words constitute fighting words depends upon the circumstances surrounding their utterance. Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring).

It is clear the solicitor was concerned about appellant's confession wherein he told the police that the decedent used the "N–word" when addressing appellant in a humiliating and insulting manner. The solicitor presented evidence that the decedent reportedly was not a racist.

Defense counsel candidly admitted to the judge that his request to **not charge** that words alone could never be sufficient to constitute a legal provocation was a request that went against current "precedent." However, he correctly explained that "fighting words" have been applied in other legal contexts, and the fighting words doctrine should also apply in a voluntary manslaughter case.

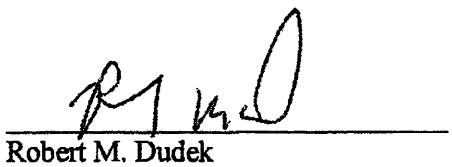
Appellant respectfully submits that the refusal to instruct as appellant requested in this case was highly prejudicial, and that this Court respectfully should hold here that if a

defendant presents a case involving a provocation of "fighting words, the trial court should not charge that words, no matter how humiliating or insulting, cannot be a legal provocation.

CONCLUSION

By reason of the foregoing arguments appellant's convictions should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of June, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 29, 2015

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID JUDSON PENN,

APPELLANT

APPELLATE CASE NO. 2013-002146

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Kaycie S. Timmons, Esquire, Senior Assistant Deputy Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of June, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of June, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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Appellate Case No. 2013-002146.

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