

STATE OF SOUTH CAROLINA

IN THE 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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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. 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?
- II. 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?
- III. 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?
- IV. 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 can be "fighting words" know to incite violence, there was evidence in this case of the most provocative fighting word in the English language?

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred in instructing the jury that words alone could not be the provocation for voluntary manslaughter but that the "words must be accompanied by some overt threatening act which could have produced the heat of passion."
- II. Whether the trial court erred in declining to charge the examples of legal provocation proffered by Appellant where Appellant asked that spitting be included as one of the examples and where there was evidence that Victim spit at Appellant before he strangled her.
- III. Whether the trial court erred in charging circumstantial evidence where the trial court's charge was not a verbatim recitation of the language in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013).
- IV. Whether the trial court properly instructed the jury that "[w]ords alone, however vulgar or insulting, are not enough to be legal provocation."

RESPONDENT'S STATEMENT OF THE CASE

A Berkeley County Grand Jury indicted Appellant, David Judson Penn, in April 2012 for the murder of Kathy Chrastina (R. pp. 285–86) and for grand larceny (R. pp. 287–88).

On September 30, 2013, Appellant's case was called to trial before the Honorable R. Markley Dennis, Jr. (R. p. 1). Appellant was represented by Public Defenders David Schwacke and Cody Groeber during the trial. (R. p. 1). Assistant Solicitors Anne Williams and Colleen Dixon represented the State. (R. p. 1). On October 1, 2013, the jury returned verdicts of guilty as to murder and grand larceny. (R. p. 275, line 12–p. 276, line 15). Judge Dennis sentenced Appellant to incarceration for thirty-five (35) years on the murder conviction and to incarceration for five (5) years on the grand larceny conviction. (R. p. 281, line 17–p. 282, line 2). The sentences were set to run concurrently. (R. p. 281, line 17–p. 282, line 2).

Appellant filed a timely notice of appeal. (R. pp. 283–84).

RESPONDENT'S STATEMENT OF FACTS

Police officers with the Berkeley County Sheriff's Office got a call on October 15, 2011 about a possible homicide at a residence. (R. p. 14, line 6–p. 16, line 17). All of the doors to the home were locked, but the officers were able to get inside by kicking open the side door. (R. p. 16, line 18–p. 17, line 16). In the living room of the home, the officers found the body of a dead female with a laptop power cord wrapped around her neck. (R. p. 17, line 17–p. 18, line 7). The body was that of Kathy Chrastina (Victim). (R. p. 157, lines 6–16). Dr. Erin Presnell, a forensic pathologist, testified that Victim's body had started to deteriorate but that she was able to determine that the cause of death was ligature strangulation—the laptop cord had been wrapped three times around Victim's neck and then looped through itself. (R. p. 157, line 14–p. 329, line 20).

Appellant was arrested by Berkeley County officers on October 15, 2011 after they received information that he was involved in Victim's murder. (R. p. 123, line 22–p. 127, line 7). After his arrest, Appellant gave a statement to police, which was recorded, (both audio and video, State's Ex. 49), and a redacted form of Appellant's statement to police was played for the jury, (State's Ex. 49-A). (R. p. 128, line 9–p. 141, line 22). During his statement, Appellant confessed to strangling Victim. (State's Ex. 49-A). Appellant told police that he went to Victim's house on Wednesday, October 12, 2011, around 11 or 12 o'clock in the middle of the day. (State's Ex. 49-A at 16:03). Appellant stated:

I went down to her house . . . I was doing some work inside of her house. And she was mad at me because she suspected that I had a drug problem, and I kept lying to her, and I shouldn't have kept lying to her. She's been too good to me We were talking and she said that she didn't want me there, and I said, "Kathy, please forgive me." And she said, "You're nothing but a low down n****r, and I don't want you in my house." And

she spit on me, and I have a bad anger problem, man. I do. I do. I was a time-bomb waiting to go off. I tell those guys not to be around me because I will hurt somebody, and I didn't want to hurt anybody.

(State's Ex. 49-A at 11:22). One of the officers talking with Appellant asked, "And then what happened?" (State's Ex. 49-A at 12:38). And Appellant responded, "I started choking her, and I didn't stop, and I took her in a different room, and I put the cord around her neck and choked her. She didn't deserve what I done to her, man." (State's Ex. 49-A at 12:41). Appellant told the officers that he used a computer cord to strangle Victim. (State's Ex. 49-A at 14:25). Appellant stated, "She spit in my face, man, and I lost it . . . She called me a n*****, and I don't even use that word." (State's Ex. 49-A at 14:55). Appellant then explained,

I know I'm not one, you know, but I was angry, and everything that was going on in my life, man, with my ex-wife and her leaving me and . . . a guy that I know, they end up together, you know. And this here hurts, man. And the drugs. And I took it out on Kathy when I should've—I should've went and found him. I'm telling you guys, I wanted to hurt them two, and it ain't right.

(State's Ex. 49-A at 15:05). When asked by police how Appellant got Victim's car, he stated that he took Victim's car keys when he left the house. (State's Ex. 49-A at 19:23). He also told them that he took Appellant's purse but that he had thrown it into a dumpster on Friday night. (State's Ex. 49-A at 41:25).

In addition to presenting Appellant's videotaped confession, the State presented various witnesses who testified about their interactions with Appellant after he killed Victim. For instance, Darrell Hackney, Appellant's former employer, testified that Appellant called Hackney in October 2011, and Appellant was very upset. (R. p. 52, line 21–p. 55, line 11). On the phone call, Appellant said, "Nobody will help me and now I've done it. I got some bad stuff." (R. p. 55, lines 1–8). Also during the call, Hackney

agreed to meet Appellant to pay him for some work Appellant had done, and when they met, Appellant told Hackney that he had killed someone. (R. p. 55, line 9–p. 56, line 10; R. p. 60, line 25–p. 61, line 7).¹

Nitesh Patel, the manager of the Economy Inn in Moncks Corner, testified about his encounter with Appellant in October 2011. (R. p. 62, line 3–p. 66, line 4). Appellant had checked into the hotel on October 12, 2011 and had paid with cash. (R. p. 64, lines 17–23). Patel testified that Appellant spoke to him when checking out of the hotel three days later. (R. p. 64, line 24–p. 65, line 9). According to Patel's testimony, Appellant "talked about life, mentioned that he was a killer and that he wanted to turn himself in." (R. p. 65, lines 5–9).

James Price, the assistant manager at a Walgreen's in Moncks Corner, testified that he encountered Appellant on October 15th around 6:20 a.m. (R. p. 66, line 11–p. 82, line 5). Price was called up to a register to speak with Appellant who wanted to write a check in exchange for cash. (R. p. 68, line 19–p. 69, line 8). Appellant told Price "that he was going to Tennessee, that he needed money to get there." (R. p. 69, lines 11–12). When Price explained that the store could not accept a check and give him cash in return, Appellant stated that he had left something in the Walgreen's trash and asked Price to get it. (R. p. 69, lines 5–20). Appellant told Price that he had left some sort of debit or credit card in the trash around 2:30 the prior afternoon, but Price explained that the trash cans had already been dumped into the trash compactor, which Price did not have access to. (R. p. 69, line 13–p. 72, line 16).

¹ Hackney initially testified that Appellant told him, "I murdered somebody last night." (R. p. 56, lines 8–9). But after reading a printout of his 9-1-1 call, he affirmed that he told 9-1-1 that "he said he had killed someone." (R. p. 59, line 20–p. 61, line 7).

The State also presented the testimony of Patty Cobb, Appellant's ex-girlfriend's sister. (R. p. 115, line 12–p. 123, line 19). Cobb testified that Appellant called her, said “he had done something bad,” and asked Cobb to have her sister call Appellant. (R. p. 120, lines 1–15). Cobb also testified that she was on a phone call from Appellant where Appellant “said that he had killed Miss Kathy and then he said ‘maybe it should have been your sister, then you.’” (R. p. 120, lines 16–24).

The State introduced various voicemails left by Appellant on Penny Blair's voicemail. (R. p. 142, line 5–p. 153, line 9; State's Ex. 50). In one voicemail Appellant calls Blair and sounds very distressed and implores her to call him. (State's Ex. 50). In the next voicemail, Appellant calmly states, “Penny, you don't know the point that I was at. Okay? Your sister was next, and then you weren't there. Okay? That's the point I was at. Bye.” (State's Ex. 50). In the next voicemail, Appellant states, “Penny, I tried to talk to you, and I tried to tell you where y'all were pushing me to. You didn't listen. You didn't listen. You fucked with my head and fucked with my head” (State's Ex. 50). In the following voicemail, Appellant says, “That bitch is the one that I should have got first. I should have fucking done her. And the only reason I didn't is because she's your fucking sister. She ain't shit. She's a nasty fucking bitch, and you probably feel the same mother fucking way.” (State's Ex. 50). In the final message from Appellant, Appellant tells Blair that he is going to turn himself in. (State's Ex. 50).

STANDARD OF REVIEW

The issues that Appellant now raises all concern the trial court's jury instructions.

The same standard of review is applicable to all of Appellant's issues.

As this Court has stated, "[t]he trial court is required to charge the correct law applicable to the case. When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. However, the court is not required to use any particular language in explaining the principle." *State v. Marin*, 404 S.C. 615, 619–20, 745 S.E.2d 148, 151 (Ct. App. 2013) (citations omitted).

"In reviewing jury charges for error, [appellate courts] must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)).

"To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)). "A jury charge which is substantially correct and covers the law does not require reversal." *State v. Zeigler*, 364 S.C. 94, 105, 610 S.E.2d 859, 865 (Ct. App. 2005) (citing *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996); *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994)).

ARGUMENT

- I. The trial court did not err in instructing the jury that words alone could not be the provocation for voluntary manslaughter and that the “words must be accompanied by some overt threatening act which could have produced the heat of passion” to suffice as provocation for voluntary manslaughter.

Introduction

The trial court did not err in charging the jury that words must be accompanied by some overt threatening act to be sufficient legal provocation. That instruction is consistent with South Carolina law.

How the Issue Was Raised at Trial

After denying Appellant’s directed verdict motion, the trial court informed both parties that he would charge voluntary manslaughter and would include that “[w]ords alone, however vulgar and insulting are not enough to be legal provocation.” (R. p. 173, line 23–p. 176, line 15). Defense counsel indicated that he could provide “a couple cases where spitting has been charged as also being part of adequate provocation, spitting and words.” (R. p. 176, lines 20–23). The trial court responded,

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 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.

(R. p. 176, line 24–p. 177, line 3).

Later, during the charge conference, defense counsel provided the trial court with the case that supported his request for a charge that spitting could be sufficient provocation. (R. p. 183, lines 23–25). The trial court declined to give the charge, stating

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.

....

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 fact. I think that it's—I think that would be a charge on the facts, personally.

(R. p. 184, line 1–p. 185, line 2).

Defense counsel provided the trial court with *State v. Gallman*, 79 S.C. 229, 60 S.E. 682 (1908) and with *State v. Petit*, 144 S.C. 452, 142 S.E. 725 (1928), two cases which include spitting as an example of provocation. (R. p. 188, line 8–p. 191, line 5). The trial court again declined to charge specific examples that included spitting, explaining

[G]iven that is exactly what we have in this case, I think that it is a charge on the facts and I would therefore decline 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.

(R. p. 191, line 6–p. 192, line 17). Counsel for the State answered, “Well, it definitely is not spitting.” (R. p. 192, lines 18–19). The trial court disagreed, saying “No. It could be, might be, might not be.” (R. p. 192, lines 20–21).

Defense counsel then indicated that “against precedent” he was objecting to the instruction that “words alone are not enough.” (R. p. 193, lines 3–7). Specifically, defense counsel argued that there was evidence that “fighting words” had been used, which warranted the elimination of the charge. (R. p. 193, lines 3–16). The trial court declined to exclude the charge. (R. p. 193, line 17–p. 194, line 6).

The trial court gave the following charge on voluntary manslaughter:

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 lose [sic] 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.

(R. p. 258, line 22–p. 260, line 19). At the conclusion of the trial court's charge, defense counsel took exception to the instructions, arguing "Your Honor said 'an overt threatening act', and I don't think that an [sic] threatening act is required, just an overt act." (R. p. 269, lines 17–21). The trial court expressed its belief that the charge was consistent with the law on that point. (R. p. 270, lines 3–13).

Analysis

Appellant asserts that the trial court erroneously instructed the jury that an overt threatening act was required for them to find Appellant guilty of voluntary manslaughter.² However, Appellant misconstrues the instruction. The record reflects that the trial court, as part of its charge to the jury regarding when words could be considered legal provocation, told the jury that words alone are never enough to constitute legal provocation and that "the words must be accompanied by some overt threatening act which could have produced the heat of passion." (R. p. 259, lines 18–25). The trial court's charge is consistent with South Carolina law as outlined by our Supreme Court—"When death is caused by the use of a deadly weapon, words alone, however opprobrious, cannot constitute sufficient legal provocation. Rather, the offending words

² The argument Appellant now raises is slightly different from the objection made at trial. As outlined above, defense counsel only objected to the use of the word "threatening" in combination with "overt act" in the trial court's charge. (R. p. 269, lines 17–21). To the extent Appellant's current argument differs from the one he raised at trial, his argument is not preserved. See, e.g., *State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (noting that an argument must be raised and ruled upon by a trial court to be preserved for appellate review); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court."). At any rate, Appellant is not entitled to reversal on the merits of his current argument for the reasons discussed herein.

must be accompanied by some overt threatening act which could have produced the heat of passion.” *State v. Johnson*, 324 S.C. 38, 40, 476 S.E.2d 681, 682 (1996) (citing *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996); *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993)); see also *State v. Hernandez*, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010) (“Sufficient legal provocation must include more than ‘mere words’ or a display of a willingness to fight without an overt, threatening act.” (citations omitted)).³

Contrary to Appellant’s assertion, the trial court did not instruct the jury generally that an overt threatening act was required for voluntary manslaughter. Rather, the trial court properly instructed the jury that words alone are never enough and that the words

³ The record does not show that the trial court instructed the jury completely consistently with the law as stated in these cases. The “use of a deadly weapon” language appears to have been omitted from the charge. (R. p. 259, lines 20–25 (“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.”)). Defense counsel did not object to the omission. (R. p. 269, line 17–p. 271, line 3).

A review of the record reveals that it is possible that the trial court mistakenly omitted the “use of the deadly weapon” language because defense counsel had asked the court not to charge that malice could be inferred from the use of a deadly weapon, consistent with *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). (R. p. 182, line 14–p. 183, line 22; R. p. 194, line 7–p. 195, line 17). Defense counsel argued that the inference should not be charged based on *Belcher* and that a deadly weapon was not used in Appellant’s case. (R. p. 182, lines 14–23). The trial court disagreed, noting “[t]here is a portion of that that says ‘any instrument that can be used to effect death.’” (R. p. 182, line 24–p. 183, line 1). The trial court’s understanding is consistent with South Carolina law. See, e.g., *State v. Bennett*, 328 S.C. 251, 262, 493 S.E.2d 845, 851 (1997) (“[W]e have held, in the context of murder, that a hand or fist may be considered a deadly weapon depending on the factual circumstances. ‘Whether an object has been utilized as a deadly weapon depends upon the facts and circumstances of each case.’” (emphasis in original) (quoting *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992))); *State v. Campbell*, 287 S.C. 377, 379, 339 S.E.2d 109, 109 (1985) (finding gasoline could be a deadly weapon). Ultimately, the trial court did not charge that malice could be inferred from the use of a deadly weapon, but the court also left the “use of a deadly weapon” out of the legal provocation charge. (R. p. 240, line 16–p. 268, line 22).

Appellant has not raised this issue in his appeal brief, nor has he preserved this issue as he failed to make an objection to the omission at trial.

must be accompanied by some overt threatening act to constitute sufficient legal provocation for voluntary manslaughter. The trial court correctly charged the law in this respect. Accordingly, Appellant is not entitled to reversal.

- II. The trial court did not err in refusing to charge the jury on examples of legal provocation including spitting where the proposed examples offered by Appellant would be a direct charge on the facts contrary to S.C. Constitution Art. V, § 21.

Introduction

The trial court did not abuse its discretion in denying Appellant's request to charge language from *State v. Gallman*, 79 S.C. 229, 60 S.E. 682 (1908), and *State v. Petit*, 144 S.C. 452, 142 S.E. 725 (1928). Had the trial court included language from those cases, his jury instructions would have been a charge on the facts, which is expressly prohibited by the South Carolina Constitution. S.C. Const. art. V, § 21. Thus, Judge Dennis did not err in refusing to give the requested charge.

How the Issue Was Raised at Trial

As recited previously, the trial court initially declined to charge that spitting could be sufficient legal provocation, finding that to be a charge on the facts.

Later, defense counsel provided the specific citations to the charges given in *Gallman* and *Petit*. (R. p. 188, line 8–p. 191, line 5). Defense counsel cited to the seventeenth exception in *Gallman*, which reads in pertinent part:

Seventeenth exception: Because his honor erred in his charge to the jury upon the subject of manslaughter, as follows: "I make some physical aggression upon your person, such as to indicate a contempt for your manhood, slap you in the face with the back of my hand, to indicate my contempt for your courage, spit in your face, as if you were a dog, tweak your nose, take you by the ear and lead you across the street in the presence of the people, and you strike me dead. The law says that is manslaughter. It takes a provocation something like that, not necessarily confined to those things, but to some physical aggression upon the person of another, or on the person of a member of his family (somebody for whom he is responsible), or on his property, in his presence. The law says that is manslaughter. If you had a valuable horse, or a horse, whether it was valuable or not, and I walk up to you in your presence and kill your horse without rhyme or reason, and you strike me dead, the law says that

would be manslaughter, now if you did it because of passions aroused by that act”

79 S.C. at 239–40, 60 S.E. at 687. Defense counsel also read directly from *Pettit*, 144 S.C. at 472–73, 142 S.E. at 733:

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.”

(R. p. 190, line 9–p. 191, line 5).

The trial court declined to give the charges, concluding that to charge that spitting could be sufficient legal provocation would be a charge on the facts. (R. p. 191, line 6–p. 193, line 2).

Analysis

The trial court did not err in refusing to give the charges from *Gallman* and *Pettit*⁴ that Appellant requested. The South Carolina Constitution provides that “[j]udges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. art. V, § 21. To charge that spitting could be sufficient legal provocation would be a charge on the facts.

⁴ Appellant’s brief attributes all of the requested charges to *Gallman*, but the record reflects that Appellant requested charges from both *Gallman* and *Pettit*, and some of the charges that Appellant now argues should have been given came from *Pettit*.

The South Carolina Supreme Court's decision in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000),⁵ is directly on point and is dispositive of this issue. In *Hughey* the Court noted that "[a] trial judge's refusal to provide specific jury instructions is not reversible error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved." *Id.* at 452, 529 S.E.2d at 728. The Court found that the charge that Hughey had requested—a charge that spitting could be legal provocation—was a charge on the facts in that case:

Hughey requested that specific examples of legal provocation be provided to the jury. Specifically, Hughey requested the following examples of legal provocation: pulling a knife on a defendant, pointing a gun at defendant, spitting in a defendant's face, assault of a family member, sudden mutual combat where one of the participants is killed by the other without previously informed intention to do so, finding one's spouse in the act of adultery, or the deceased having molested a defendant's minor child. The requested examples constitute a direct charge on the facts because Hughey alleges that a knife was pulled on him, Jackson spit in his face, and there was sudden mutual combat. The requested jury charge elevates the specific facts of the case, such as spitting in a person's face, to an acceptable act of legal provocation. Because the requested charge is fully and fairly covered by the trial judge's general charge, refusal of the requested instruction is not reversible. *See State v. Barwick*, 280 S.C. 45, 310 S.E.2d 428 (1983).

Id.

In this case, just as in *Hughey*, the trial court's general charge properly outlined the law of voluntary manslaughter and legal provocation. The trial court charged that "[s]ufficient legal provocation must be the type that would make a person of ordinary reason and caution to become enraged and loose [sic] control temporarily." (R. p. 259, lines 14–17). The trial court also charged that "[t]he provocation needed for voluntary manslaughter must come from some act of or related to the victim." (R. p. 259, lines 18–

⁵ Overruled on other grounds by *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009).

20); *cf. State v. Tucker*, 324 S.C. 155, 171, 478 S.E.2d 260, 269 (1996) ("The provocation must come from some act of or related to the victim in order to constitute sufficient legal provocation."). Also like *Hughey*, the trial court's charge in this case was broad enough to encompass the specific examples that Appellant requested be charged. Indeed, had the trial court given the charges that Appellant requested from *Gallman* and *Petit*, it would have elevated the facts of Appellant's case to an acceptable act of legal provocation in contravention to the South Carolina Constitution and *Hughey*.⁶ As such, the trial court's refusal to give the *Gallman* and *Petit* charges does not warrant reversal.

⁶ Respondent disagrees with Appellant's suggestion that a charge must mirror the facts of the case to constitute a charge on the facts. *Hughey* indicates that when "[t]he requested jury charge elevates the specific facts of the case, such as spitting in a person's face, to an acceptable act of legal provocation[.]" it is a charge on the facts. 339 S.C. at 452, 529 S.E.2d at 728.

- III. The trial court did not err in refusing to give the *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), instruction on circumstantial evidence, and even had the court erred, the error was harmless, particularly in light of the significant direct evidence against Appellant in the form of Appellant's recorded confession.

Introduction

The trial court's jury instruction on circumstantial evidence, though not a verbatim recitation of the *Logan* instruction, conveyed the same substance as the *Logan* instruction. If this Court finds that the trial court erred in giving its own circumstantial evidence instruction, such error was harmless. Finally, even assuming there was error, there was no prejudice in this case where the State relied in large part on direct evidence to prove the elements of murder and grand larceny.

How the Issue Was Raised at Trial

Defense counsel requested that the trial court charge *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444, which was a recent decision at the time of Appellant's trial. (R. p. 196, line 23–p. 198, line 18). Looking at *Logan*, the trial court concluded that the circumstantial evidence charge that the court normally gave was in compliance with *Logan*. (R. p. 197, line 2–p. 204, line 3).

During the jury charge, the trial court instructed the jury that the State had the responsibility to prove Appellant's guilt beyond a reasonable doubt. (R. p. 243, line 14–p. 245, line 3). The trial court specifically informed the jury that Appellant was "entitled to every reasonable doubt arising in the whole case." (R. p. 244, lines 19–21). The trial judge then explained what he meant,

[I]f 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.

(R. p. 244, line 22–p. 245, line 3). Shortly thereafter, the trial court gave the following charge on circumstantial evidence:

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 weight 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.

(R. p. 248, line 7–p. 249, line 22).

Analysis

Though the trial court did not charge the exact language from *Logan*, the same concepts expressed in the *Logan* instruction are found in the trial court’s jury instructions in this case. Appellant takes issue with the trial court’s failure to include the particular language from *Logan* 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.” Initial Br. of Appellant, p. 16 (emphasis in original) (quoting *Logan*, 405 S.C. at 99, 747 S.E.2d at 452). However, as part of its reasonable doubt instruction, the trial court informed the jury that, as to all of the facts necessary for conviction, the jury must resolve any question of doubt in favor of the defendant, (R. p. 244, line 19–p. 245, line 3), and as part of its circumstantial evidence instruction, the trial court informed the jury that the circumstantial evidence relied upon by the State had to create more than a suspicion and more than a probability of guilt—the circumstantial evidence had to rise to the level of guilt beyond a reasonable doubt, (R. p. 249, lines 11–22). Respondent submits that the substance of the charge given by the trial court in Appellant’s case includes the same substance of the *Logan* charge, just in different words. See *State v. Martinson*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (“The substance of the law is what must be charged to the jury, not any particular verbiage.”) (quoting *State v. Adkins*, 353 S.C. 312, 318–19, 577 S.E.2d 460, 464 (Ct. App. 2003))).

Moreover, any error in the jury charge was harmless as the trial court’s charge properly conveyed the applicable law. See *State v. Drayton*, 411 S.C. 533, 544, 769 S.E.2d 254, 260 (Ct. App. 2015) (“[E]rroneous jury instructions are subject to harmless error analysis.”) (quoting *Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8)). Certainly, the jury instructions in this case went beyond the instruction propounded in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997). The trial court did not merely instruct the jury that “[a]fter weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.”

Grippon, 327 S.C. at 84, 489 S.E.2d at 464. The trial court told the jury, consistent with the charge set forth in *Logan*, that if the inferences that the State wanted the jury to draw resulted in only a suspicion of guilt or a probability of guilt, then that would be insufficient to find Appellant guilty. The trial court's jury instructions in the instant case struck the right balance of "requiring the State to prove its case beyond a reasonable doubt" and simultaneously "guiding the jury's consideration of circumstantial evidence" without shifting the burden to Appellant. See *Logan*, 405 S.C. at 98, 747 S.E.2d at 452.

Even if this Court finds that the trial court's circumstantial evidence instruction was erroneous, Respondent submits that Appellant was not prejudiced by the instruction. And Appellant has been unable to articulate what prejudice he suffered other than his conclusory allegation that the trial court's failure to give the *Logan* charge was "highly prejudicial." See *Daves v. Cleary*, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (2003) ("A circuit court's refusal to give a properly requested charge is reversible error only where the requesting party can demonstrate prejudice from the refusal." (citing *Cohens v. Atkins*, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (1998))). Respondent would note that the State relied in large part on undisputed direct evidence to establish that Appellant was guilty of both murder and grand larceny.⁷ The direct evidence, in the form of Appellant's videotaped confession, established: that Appellant killed Victim by strangling her with a computer cord, that Appellant "lost it" when Victim allegedly spit on him, that Appellant

⁷ Notably, "[p]rior to *Grippon*, if a request was made for a circumstantial evidence instruction, it was within the trial judge's discretion to deny the request when the crime and the identity of the perpetrator were established by direct evidence and the circumstances introduced were merely corroborative." *State v. Salisbury*, 343 S.C. 520, 523, 541 S.E.2d 247, 248 (2001). That is the posture of this case—where the circumstantial evidence presented by the State merely corroborated Appellant's confession.

“had a bad anger problem,” that he was “a time-bomb waiting to go off,” and that Appellant took Victim’s car after he killed her. Thus, the State presented quite a bit of direct evidence to establish the elements that the State was required to prove beyond a reasonable doubt—that Appellant killed Victim with malice aforethought and that he took goods in excess of \$2,000 without Victim’s consent. That is not to say that the State did not present any circumstantial evidence. However, where, as here, the State proved its case in large part by direct evidence, the error in charging circumstantial evidence that Appellant complains of is arguably not prejudicial. Accordingly, Appellant is not entitled to reversal.

- IV. The trial court properly instructed the jury that “[w]ords alone, however vulgar or insulting, are not enough to be legal provocation.”

Introduction

The trial court correctly charged South Carolina law when he informed the jury that words alone could not be sufficient legal provocation for voluntary manslaughter. Thus, Appellant is not entitled to reversal on the charge.

How the Issue Was Raised at Trial

Defense counsel asked the trial court not to charge “that ‘words alone are not enough[,]’” though he admitted that his request was “against precedent.” (R. p. 193, lines 3–7). Specifically, defense counsel argued,

We think that in this factual scenario, words alone should be enough. I know that is against precedent. I would site [sic] a couple of case [sic] 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

(R. p. 193, lines 9–16). While the trial court did not disagree that “that alone is a fighting word[,]” the court declined to charge that words alone could be enough, believing that to be “an inappropriate statement of the law.” (R. p. 193, line 17–p. 194, line 6).

Analysis

In his brief Appellant cites a number of South Carolina appellate court cases that dealt with “fighting words” and asserts “that if a defendant presents a case involving provocation of ‘fighting words[.]’ the trial court should not charge that words, no matter how humiliating or insulting, cannot be a legal provocation.” Initial Br. of Appellant, pp. 18–19. “Fighting words” are “words that ‘by their very utterance inflict injury or tend to incite an immediate breach of the peace.’” *City of Landrum v. Sarratt*, 352 S.C. 139, 142, 572 S.E.2d 476, 477–78 (Ct. App. 2002) (quoting *Chaplinsky v. New Hampshire*,

315 U.S. 568, 572 (1942)). The First Amendment does not protect this type of speech. *Id.* However, none of the cases cited by Appellant indicate that “fighting words” can be sufficient legal provocation for voluntary manslaughter. Rather, all of the cases cited by Appellant concern crimes such as breaching the peace or public disorderly conduct. See *In re Jeremiah W.*, 353 S.C. 90, 576 S.E.2d 185 (Ct. App. 2003) (finding profane language alone did not fall within the fighting words exception to the First Amendment), *affirmed in part* by 361 S.C. 620, 606 S.E.2d 766 (2004); *City of Landrum*, 352 S.C. 139, 572 S.E.2d 476 (determining defendant’s words were fighting words where the defendant “called [victim] a crack head, loudly yelled profanities, and called [victim’s] mother a ‘bitch’” and where defendant “called [victim’s mother] names and used the ‘f’ word”); *City of Columbia v. Brown*, 316 S.C. 432, 450 S.E.2d 117 (Ct. App. 1994) (noting that by shouting obscenities and racial slurs defendant was using fighting words); *State v. Perkins*, 306 S.C. 353, 412 S.E.2d 385 (1991) (finding the record did not indicate the use of fighting words where defendants merely “became upset and raised their voices”).

While our courts have recognized that “fighting words” are “inherently likely to induce the ordinary person to react violently[.]” *City of Landrum*, 352 S.C. at 142, 572 S.E.2d 478, our courts have also been very clear that “[w]here death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute sufficient legal provocation[.]” *see, e.g., State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). Indeed, in *State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996), the South Carolina Supreme court specifically addressed whether racist statements could be sufficient legal provocation. The court concluded, “the racist statements . . . are legally insufficient to constitute such legal provocation because mere words, no matter how

opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon.” *Rogers*, 320 S.C. at 525, 466 S.E.2d at 362. The court reaffirmed, “when death is caused by use of a deadly weapon, offending words must be accompanied by an ‘overt, threatening act . . . which could have produced the heat of passion.’” *Id.* at 525, 466 S.E.2d at 362–63 (quoting *Lowry*, 315 S.C. at 399, 434 S.E.2d at 274).

The trial court properly declined to omit the jury charge that “[w]ords alone, however vulgar or insulting, are not enough to be legal provocation” as it was a correct statement of the law. Appellant is not entitled to reversal on this argument.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

June 29, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

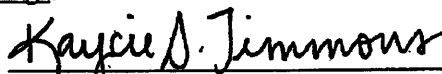
DAVID JUDSON PENN,

APPELLANT,

Appellate Case No. 2013-002146.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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June 29, 2015
Columbia, South Carolina

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
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Appeal from Berkeley County

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THE STATE,

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DAVID JUDSON PENN,

APPELLANT,

Appellate Case No. 2013-002146.

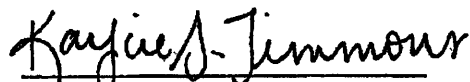
PROOF OF SERVICE

I, Kaycie S. Timmons, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record:

Robert M. Dudek
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.

This twenty-ninth day of June, 2015.



Kaycie S. Timmons
Assistant Attorney General
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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

David Judson Penn, Appellant.

Appellate Case No. 2013-002146

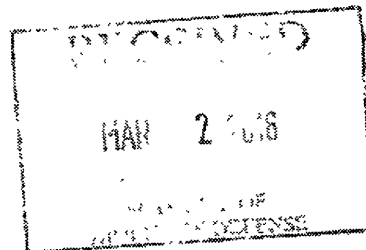
Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-114
Heard January 6, 2016 – Filed March 2, 2016

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Assistant
Attorney General Caroline M. Scrantom, and Assistant
Attorney General Kaycie Smith Timmons, all of
Columbia; and Solicitor Scarlett Anne Wilson, of
Charleston, for Respondent.



PER CURIAM: David Judson Penn appeals his convictions of murder and grand larceny. First, Penn argues the trial court erroneously instructed the jury "an overt threatening act" by the victim was required to reduce murder to voluntary manslaughter. Additionally, Penn maintains the court erred by refusing to charge the jury on examples of legal provocations as cited in *State v. Gallman*.¹ Further, Penn asserts the trial court erred in refusing to instruct the jury on circumstantial evidence using the supreme court's language from *State v. Logan*.² Finally, Penn contends the trial court erred by instructing the jury that words alone can never be enough to constitute legal provocation. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in instructing the jury "an overt threatening act" against him was required to reduce murder to voluntary manslaughter: *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (holding in reviewing a jury charge, the charge should be viewed as a whole and a charge is correct if read as a whole it adequately explains the law); *id.* ("A jury charge which is substantially correct and covers the law does not require reversal"); *State v. Rogers*, 320 S.C. 520, 525, 466 S.E.2d 360, 362-63 (1996) ("[W]hen death is caused by the use of a deadly weapon, offending words must be accompanied by an 'overt, threatening act . . . which could have produced the heat of passion.'" (alteration by court) (quoting *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993))); *State v. Scurry*, 322 S.C. 514, 517, 473 S.E.2d 61, 63 (Ct. App. 1996) ("A deadly weapon is generally defined as 'any article, instrument or substance which is likely to produce death or great bodily harm.'" (quoting *State v. Campbell*, 287 S.C. 377, 379, 339 S.E.2d 109, 109 (1985))).

2. As to whether the trial court erred by refusing to charge the jury on examples of legal provocations as cited in *Gallman*: S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *Ellison v. Parts Distribs., Inc.*, 302 S.C. 299, 301, 395, S.E.2d 740, 741 (Ct. App. 1990) (holding to warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) ("A trial judge's refusal to provide specific jury instructions is not reversible error if the general instructions are sufficiently broad to enable the

¹ *State v. Gallman*, 79 S.C. 229, 240, 60 S.E. 682, 687 (1908).

² *State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013).

jury to understand the law and the issues involved."), *overruled on other grounds* by *Rosemund v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009).

3. As to whether the trial court erred in refusing to instruct the jury on circumstantial evidence using the supreme court's language from *Logan*: *State v. Adkins*, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003) ("The substance of the law is what must be charged to the jury, not any particular verbiage."); *Logan*, 405 S.C. at 100, 747 S.E.2d at 452-53 ("This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon*³ and *Cherry*.⁴) However, trial courts may not exclusively rely on that charge over a defendant's objection.").

4. As to whether the trial court erred by instructing the jury that words alone can never be enough to constitute legal provocation: *Cohens v. Atkins*, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (Ct. App. 1998) (holding in charging the jury, the trial court is required only to charge the current and correct law of South Carolina); *Rogers*, 320 S.C. at 525, 466 S.E.2d at 362 ("[R]acist statements . . . are legally insufficient to constitute such legal provocation because mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon."); *Campbell*, 287 S.C. at 379, 339 S.E.2d at 110 (stating any "article, instrument or substance which is likely to produce death or great bodily harm" can be considered a deadly weapon) (quoting *State v. Sturdivant*, 283 S.E.2d 719, 725 (N.C. 1981))).

AFFIRMED.

FEW, C.J., and KONDUROS and LOCKEMY, JJ., concur.

³ *State v. Grippon*, 327 S.C. 79, 84-84, 489 S.E.2d 462, 463-64 (1997).

⁴ *State v. Cherry*, 361 S.C. 588, 600-02, 606 S.E.2d 475, 481-82 (2005).

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAVID JUDSON PENN,

APPELLANT

APPELLATE CASE NO. 2013-002146

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 2016-UP-114

PETITION FOR REHEARING

Appellant seeks rehearing pursuant to Rule 221(a), SCACR because this Court may have overlooked the fact that, as defense counsel argued at trial, when the defense requests a State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) jury instruction on circumstantial evidence, our Supreme Court had held that the judge must charge it. R. 197, 1. 2 – 204, 1. 5. **“Thus, we hold that trial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when so requested by a defendant:**

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, 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. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013).

The use of the word “should” rather than “must” cannot mean that the Supreme Court made the Logan charge merely discretionary in each particular case. In **this case** the judge only charged:

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. (emphasis added).

Respectfully, this Court should grant rehearing on this issue because the Supreme Court in Logan could not have meant that the above essentially worthless circumstantial evidence instruction could be given by the trial court when defense counsel specifically requested the Logan instruction.

An overt threatening act is not required.

As this Court will recall there was evidence in this case that the decedent called David Penn the “N-word,” and spit on him. This Court should also grant rehearing because 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 trial court left the charge as given. R. 269, l. 13 – 270, l. 20.

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). Consensual sex is not an overt threatening act.

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 have been held to be sufficiently legal provocations, and the instruction in this case was therefore highly prejudicial.

Again, **the only issue in this case was murder versus manslaughter.** The solicitor argued:

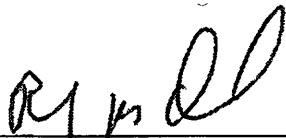
[B]ut you are going to hear from the judge that words alone are not provocation. You know why? Because we live in a society where you don't get to kill somebody because they've called you a name.

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. (emphasis added).

The solicitor's argument was obviously misleading because the only issue again was whether the killing was murder or voluntary manslaughter. The trial judge respectfully charged Appellant David Penn right out of court with this "over threatening act" instruction given the highly unusual facts of this case. Rehearing should be granted on both of these issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 16th day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

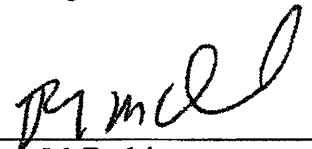
V.

DAVID JUDSON PENN,

APPELLANT

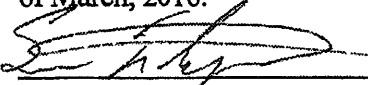
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and David Judson Penn, #312196, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of March, 2016.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 16th day
of March, 2016.

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

The South Carolina Court of Appeals

The State, Respondent,

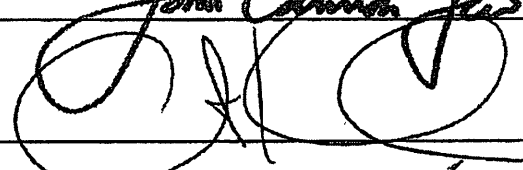
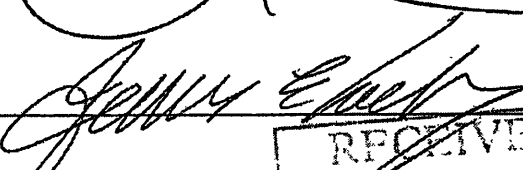
v.

David Judson Penn, Appellant.

Appellate Case No. 2013-002146

ORDER

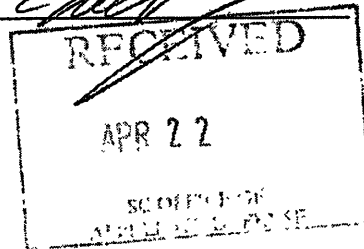
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
 Robert Michael Dudek, Esquire
 Donald J. Zelenka, Esquire
 Kaycie Smith Timmons, Esquire
 John W. McIntosh, Esquire



FILED

4/22/16

Scarlett Anne Wilson, Esquire
Caroline M. Scrantom, Esquire
The Honorable R. Markley Dennis, Jr.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11628
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 13, 2016

The Honorable Mary P. Brown
PO Box 219
Moncks Corner SC 29461-0219

REMITTITUR

Re: The State v. David Judson Penn
Lower Court Case No. 2012GS0800501, 2012GS0800502
Appellate Case No. 2013-002146

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

The following exhibits filed in this case are being returned to you:

State's Exhibit #49 - Video (Defendant's Statement), State's Exhibit #49A - Redacted copy of Exhibit #49, State's Exhibit #50 - CD (Voice mails left by defendant)

Please sign and return the enclosed copy of this letter acknowledging receipt of these items.

Exhibit Receipt Acknowledgment

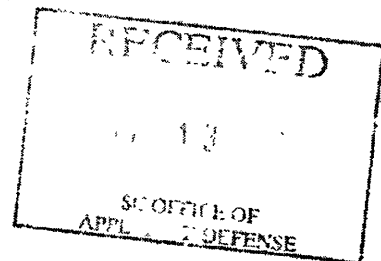
Name: _____ Date: _____

Very truly yours,

Gya. Katoj
CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
~~Robert Michael Dudek, Esquire~~
Donald J. Zelenka, Esquire
Kaycie Smith Timmons, Esquire
John W. McIntosh, Esquire
Scarlett Anne Wilson, Esquire
Caroline M. Scrantom, Esquire



FORM 5

STATE OF SOUTH CAROLINA

County of

BERKELEYDAVID TILSON PENN

Full name and prison number (if any) of Applicant

SCDC# 312196

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2016-CP-08-1428

APPLICATION FOR

POST-CONVICTION RELIEF

MARY P. SNOW
CLERK OF COURT
BERKELEY COUNTY

2016 JUN 29 PM 4:33

FILED

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention LIEBER CORRECTIONAL, P.O. Box 205
BRIDGEVILLE, S.C. 29472
2. Name and location of Court which imposed sentence BERKELEY COUNTY
GENERAL SESSIONS
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012-GS-08-0501
 - (b) 2012-GS-08-0502

- (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) OCT, 1, 2013 - 35 yrs.
- (b) N/A
- (c) N/A
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) ☒ after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. COURT OF APPEALS
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. AFFIRMED
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. MARCH 2, 2016
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No. 2016-ILP-114
- ii. N/A
- iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

(c) N/A

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

(a) SEE ATTACHMENT

(b) N/A

(c) N/A

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

(a) SEE ATTACHMENT

(b) N/A

(c) N/A

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

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? YES

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

(a) the specific nature thereof:

i. PETITION FOR REHEARING

ii. N/A

iii. N/A

iv. N/A

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

i. S.C. COURT OF APPEALS

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

- i. DENIED
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. 04-22-16
- ii. N/A
- iii. N/A
- iv. N/A

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

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

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

No.

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

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

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

- i. N/A
- ii. N/A
- iii. N/A

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

(a) N/A
 (b) N/A
 (c) N/A

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

(a) your arraignment and plea? N/A

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? ROBERT DULDEK, S.C. COMMISSION OF INDIGENT

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? DEFENSE.

N/A

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

(a) the name and address of each attorney who represented you:

i. CODY J. GROEBER, BERKELEY CO. PUBLIC DEFENDER
219 N. HWY. 52, SUITE E, P.O. BOX 1687
MONCK'S CORNER, S.C. 29461

iii. ROBERT DULDEK, 1330 LADY STREET, COLUMBIA, S.C.
29201 SUITE 401.

(b) the proceedings at which each such attorney represented you:

i. TRIAL.

ii. APPEAL.

iii. N/A

19. State clearly the relief you seek in filing this application:

REMAND TO LOWER COURT FOR A NEW TRIAL.

20. Are you now under sentence from any other court that you have not challenged?

No.

STATE OF SOUTH CAROLINA)

County of Berkeley)

VERIFICATION

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

David Penn

SWORN to and subscribed before me this 24th day of June, 2016.

Luduan Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

MAH Y P BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2016 JUN 29 PM 4:33

134

FILED

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

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

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

David Penn
Applicant

SWORN or affirmed to and subscribed before me this
24th day of June, 2016.

Ludrean Bryant
Notary Public

My Commission Expires: May 26, 2020

TSM
FILED
2016 JUN 29 PM 4:33
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

ATTACHMENT

10). STATE CONCISELY the grounds on which you base your allegation that you are being held in custody unlawfully.

SIXTH AMENDMENT

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHERE THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR AND TO HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

9). STATE CONCISELY the grounds on which you base your allegation that you are being held in custody unlawfully.

* SIXTH AMENDMENT VIOLATION

1155 STATE CONCISELY AND IN THE SAME ORDER THE FACTS
WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN
(10). * IMPARTIAL JURY.

Dear Culeku ofu Cowiti,

Re: PCR Application

Enclosed in my (PCR) application. Could you
please Stamp, Culochu, Date, and send me
a copy. Thanks you for your help in this
very important matter.

Sincerely,
David Penn

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
David J. Penn, SCDC #: 312196	)	
	)	Case No.: 2016-CP-08-2428
Applicant,	)	
	)	
v.	)	RETURN AND MOTION FOR
	)	MORE DEFINITE STATEMENT
State of South Carolina	)	
	)	
Respondent,	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR")
filed on June 29, 2016 would respectfully show this Court:

I. Procedural Posture

During its April, 2012 term, the Berkeley County Grand Jury indicted Applicant for murder (2012-GS-08-0501) and grand larceny (2012-GS-08-0502). Applicant pled not guilty and received a trial by jury. Applicant was represented by Assistant Public Defender David Schwacke, Esquire, and Assistant Public Defender Cody Groeber, Esquire at trial. The Honorable R. Markley Dennis presided over the trial, which occurred on September 30 and October 1, 2017. The State was represented by Assistant Solicitor Anne Williams, Esquire and Assistant Solicitor Colleen Dixon, Esquire. The jury convicted Applicant on both indictments. Judge Dennis sentenced Applicant to thirty-five years incarceration on the charge of murder and five years incarceration on the charge of grand larceny. The sentences were to be served concurrently.

Applicant appealed his conviction. Chief Appellate Defender Robert Dudek of the South Carolina Commission on Indigent Defense – Division of Appellate Defense represented Applicant. The State was represented by Assistant Attorney General Caroline Scranton, Assistant

Attorney General Kaycie Smith Timmons, and Senior Assistant Deputy Attorney General Donald Zelenka. The Applicant argued four grounds as the basis for his appeal:

1. "The trial court erroneously instructed the jury "an overt threatening act" by the victim was required to reduce murder to voluntary manslaughter."
2. "The court erred by refusing to charge the jury on examples of legal provocations as cited in State v. Gallman." State v. Gallman, 79 S.C. 229, 240, 60 S.E. 682, 687 (1908).
3. "The trial court erred in refusing to instruct the jury on circumstantial evidence using the supreme court's language from State v. Logan." State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013).
4. "The trial court erred by instructing the jury that words alone can never be enough to constitute legal provocation."

The South Carolina Court of Appeals affirmed Applicant's conviction on March 2, 2016 in an unpublished opinion. State v. David Judson Penn, Op. No. 2016-UP-114 (Ct. App. filed March 2, 2016.).

II. Facts of the Case from the Trial

Police officers with the Berkeley County Sheriff's Office got a call on October 15, 2011 about a possible homicide at a residence. (Tr. p. 163, line 6–p. 165, line 17). All of the doors to the home were locked, but the officers were able to get inside by kicking open the side door. (Tr. p. 165, line 18–p. 166, line 16). In the living room of the home, the officers found the body of a dead female with a laptop power cord wrapped around her neck. (Tr. p. 166, line 17–p. 167, line 7). The body was that of Kathy Chrastina (Victim). (Tr. p. 321, lines 6–16). Dr. Erin Presnell, a forensic pathologist, testified that Victim's body had started to deteriorate but that she was able

to determine that the cause of death was ligature strangulation—the laptop cord had been wrapped three times around Victim’s neck and then looped through itself. (Tr. p. 321, line 14–p. 329, line 20).

Applicant was arrested by Berkeley County officers on October 15, 2011 after they received information that he was involved in Victim’s murder. (Tr. p. 287, line 22–p. 291, line 7). After his arrest, Applicant gave a statement to police, which was recorded, (both audio and video, State’s Ex. 49), and a redacted form of Applicant’s statement to police was played for the jury, (State’s Ex. 49-A). (Tr. p. 292, line 9–p. 305, line 22). During his statement, Applicant confessed to strangling Victim. (State’s Ex. 49-A). Applicant told police that he went to Victim’s house on Wednesday, October 12, 2011, around 11 or 12 o’clock in the middle of the day. (State’s Ex. 49-A at 16:03). Applicant stated:

I went down to her house . . . I was doing some work inside of her house. And she was mad at me because she suspected that I had a drug problem, and I kept lying to her, and I shouldn’t have kept lying to her. She’s been too good to me . . . We were talking and she said that she didn’t want me there, and I said, “Kathy, please forgive me.” And she said, “You’re nothing but a low down n*****, and I don’t want you in my house.” And she spit on me, and I have a bad anger problem, man. I do. I do. I was a time-bomb waiting to go off. I tell those guys not to be around me because I will hurt somebody, and I didn’t want to hurt anybody.

(State’s Ex. 49-A at 11:22). One of the officers talking with Applicant asked, “And then what happened?” (State’s Ex. 49-A at 12:38). And Applicant responded, “I started choking her, and I didn’t stop, and I took her in a different room, and I put the cord around her neck and choked her. She didn’t deserve what I done to her, man.” (State’s Ex. 49-A at 12:41). Applicant told the officers that he used a computer cord to strangle Victim. (State’s Ex. 49-A at 14:25). Applicant stated, “She spit in my face, man, and I lost it . . . She called me a n*****, and I don’t even use that word.” (State’s Ex. 49-A at 14:55). Applicant then explained,

"I know I'm not one, you know, but I was angry, and everything that was going on in my life, man, with my ex-wife and her leaving me and . . . a guy that I know, they end up together, you know. And this here hurts, man. And the drugs. And I took it out on Kathy when I should've—I should've went and found him. I'm telling you guys, I wanted to hurt them two, and it ain't right."

(State's Ex. 49-A at 15:05). When asked by police how Applicant got Victim's car, he stated that he took Victim's car keys when he left the house. (State's Ex. 49-A at 19:23). He also told them that he took Victim's purse but that he had thrown it into a dumpster on Friday night. (State's Ex. 49-A at 41:25).

In addition to presenting Applicant's videotaped confession, the State presented various witnesses who testified about their interactions with Applicant after he killed Victim. For instance, Darrell Hackney, Applicant's former employer, testified that Applicant called Hackney in October 2011, and Applicant was very upset. (Tr. p. 201, line 21–p. 204, line 11). On the phone call, Applicant said, "Nobody will help me and now I've done it. I got some bad stuff." (Tr. p. 204, lines 1–8). Also during the call, Hackney agreed to meet Applicant to pay him for some work Applicant had done, and when they met, Applicant told Hackney that he had killed someone. (Tr. p. 204, line 9–p. 205, line 10; Tr. p. 209, line 25–p. 210, line 7).¹

Nitesh Patel, the manager of the Economy Inn in Moncks Corner, testified about his encounter with Applicant in October 2011. (Tr. p. 216, line 3–p. 220, line 4). Applicant had checked into the hotel on October 12, 2011 and had paid with cash. (Tr. p. 218, lines 17–23). Patel testified that Applicant spoke to him when checking out of the hotel three days later. (Tr. p. 218, line 24–p. 219, line 9). According to Patel's testimony, Applicant "talked about life, mentioned that he was a killer and that he wanted to turn himself in." (Tr. p. 219, lines 5–9).

¹ Hackney initially testified that Applicant told him, "I murdered somebody last night." (Tr. p. 205, lines 8–9). But after reading a printout of his 9-1-1 call, he affirmed that he told 9-1-1 that "he said he had killed someone." (Tr. p. 208, line 20–p. 210, line 7).

James Price, the assistant manager at a Walgreen's in Moncks Corner, testified that he encountered Applicant on October 15th around 6:20 a.m. (Tr. p. 220, line 11–p. 236, line 5). Price was called up to a register to speak with Applicant who wanted to write a check in exchange for cash. (Tr. p. 222, line 19–p. 223, line 8). Applicant told Price “that he was going to Tennessee, that he needed money to get there.” (Tr. p. 223, lines 11–12). When Price explained that the store could not accept a check and give him cash in return, Applicant stated that he had left something in the Walgreen's trash and asked Price to get it. (Tr. p. 223, lines 5–20). Applicant told Price that he had left some sort of debit or credit card in the trash around 2:30 the prior afternoon, but Price explained that the trash cans had already been dumped into the trash compactor, which Price did not have access to. (Tr. p. 223, line 13–p. 226, line 16).

The State also presented the testimony of Patty Cobb, Applicant's ex-girlfriend's sister. (Tr. p. 279, line 12–p. 287, line 19). Cobb testified that Applicant called her, said “he had done something bad,” and asked Cobb to have her sister call Applicant. (Tr. p. 284, lines 1–15). Cobb also testified that she was on a phone call from Applicant where Applicant “said that he had killed Miss Kathy and then he said ‘maybe it should have been your sister, then you.’” (Tr. p. 284, lines 16–24).

The State introduced various voicemails left by Applicant on Penny Blair's voicemail. (Tr. p. 306, line 5–p. 317, line 9; State's Ex. 50). In one voicemail Applicant calls Blair and sounds very distressed and implores her to call him. (State's Ex. 50). In the next voicemail, Applicant calmly states, “Penny, you don't know the point that I was at. Okay? Your sister was next, and then you weren't there. Okay? That's the point I was at. Bye.” (State's Ex. 50). In the next voicemail, Applicant states, “Penny, I tried to talk to you, and I tried to tell you where y'all were pushing me to. You didn't listen. You didn't listen. You fucked with my head and fucked

with my head" (State's Ex. 50). In the following voicemail, Applicant says, "That bitch is the one that I should have got first. I should have fucking done her. And the only reason I didn't is because she's your fucking sister. She ain't shit. She's a nasty fucking bitch, and you probably feel the same mother fucking way." (State's Ex. 50). In the final message from Applicant, Applicant tells Blair that he is going to turn himself in. (State's Ex. 50).

III. Applicant's Statements at the Sentencing

At sentencing, after being convicted at the conclusion of the jury trial, Applicant said the following:

"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."

(Tr. p. 461 lines 8-16.) Additionally, Applicant said "I made a mistake. There are people not far away from me that make mistakes every day." (Trial Tr. p. 462 lines 17-19.) Applicant also said "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." (Tr. p. 462 line 25 – p. 463 line 3.)

IV. Applicant's Filing and Background Materials

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Sixth Amendment Violation"
 - a. "Impartial jury"

Attached to this Return and incorporated by reference are the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant

materials.

V. State's Position as to Applicant's Claims

Applicant has alleged that his 6th Amendment rights were violated regarding an issue of an impartial jury. Applicant's claim can only be based on one of two theories. Applicant is either alleging that he was denied his right to an impartial jury, or he is alleging that he was denied the assistance of counsel in that his counsel was ineffective for failing to ensure that he was tried by an impartial jury.

The 6th Amendment of the United States guarantees criminal defendants the right to a jury trial where the jury is impartial. U.S. Const. amend. VI. cl. 1-3. See Morgan v. Illinois, 504 U.S. 719, 728. That right has been construed to apply against the individual states as part of the 14th Amendment's guarantee of due process. Duncan v. Louisiana, 391 US 145, 149 (1968).

The 6th Amendment also guarantees criminal defendant's the right to assistance of counsel. U.S. Const. amend. VI. cl. 1-3. That right was also held to apply against the State's under the 14th Amendment. Gideon v. Wainwright, 372 U.S. 335, 339 (1963). Not only must a criminal defendant have the assistance of counsel, the 6th Amendment requires that counsel must provide effective assistance. Strickland v. Washington, 466 U.S. 668, 686 (1984).

A. State's Position as to Claim that Applicant was denied his 6th Amendment right to effective assistance of counsel.

Applicant's PCR application potentially claims ineffective assistance of counsel. Nevertheless, Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Strickland, 466 U.S. at 669. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record, a question of fact is raised which can only be resolved by an evidentiary hearing. See Sharper v. State, 279 S.C. 264, 265,

305 S.E.2d 247, 248 (1983). Because Applicant's claims of ineffective assistance of counsel may not conclusively refuted by the record, then Respondent would request an evidentiary hearing to fully resolve this issue.

B. State's Position as to Claim that Applicant was denied his 6th Amendment right to an impartial jury.

If the Applicant is alleging that he did not have an impartial jury at trial, then he is either proceeding on the theory that he did not receive a trial by an impartial jury without alleging the existence of any new information, or he is asserting that he is in possession of new information that would indicate that he did not have an impartial jury.

If Applicant is alleging that he did not receive a trial by an impartial jury without any new information, then his claim is barred procedurally as he could have raised the issue on appeal. The South Carolina Supreme Court has held that "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons v. State, 264 S.C. 417, 423 (1975). See also Drayton v. Evatt, 312 S.C. 4, 8 (1993). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

If Applicant is alleging that he has new information regarding a denial of the right to an impartial jury, then Applicant must meet the test set forth in McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013). There the Court held that:

Because juror misconduct is a separate basis for a new trial, it is governed by a separate standard. Provided a claim is timely raised, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a

challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

Id at 371, 627. The Court also held that "Evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing." Id at 371, 628.

In this case, Applicant has failed to even make an assertion that a juror intentionally concealed information and that the information would have supported a challenge for cause or would have been a material factor in the use of Applicant's peremptory challenges. As such, Applicant's claim is insufficient to challenge his conviction.

Although Applicant has failed to explain how this allegation could not have been handled on direct appeal and has failed to meet the two pronged test of McCoy, Respondent is cognizant that when there are claims of juror misconduct, a hearing is appropriate. As such, at this time, Respondent requests an evidentiary hearing.

VI. Motion for More Definite Statement

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. Additionally, Applicant has failed to clearly state his claims. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). It is incumbent upon Applicant to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests Applicant be required to amend his application to set forth specifically both his claims and the grounds on which his claims are based.

VII. State's Assertion and Reservation of Rights

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

VIII. Request for Evidentiary Hearing

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to the claims regarding the General Session Court's alleged lack of Subject Matter Jurisdiction and the alleged violations of Applicant's Fourth Amendment rights, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

IX. Conclusion

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel and denial of the right to an impartial jury.

Respectfully submitted,

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August 14, 2017

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

DAVID JUDSON PENN, #312196

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent,

IN THE COURT OF COMMON PLEAS

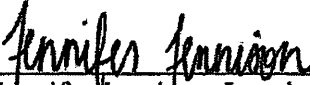
2016-CP-08-1428

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion for More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Rodney Duane Davis, Esquire
Lowcountry Law Office
4000 Faber Place Drive, Suite 300
Charleston, SC 29405

DATED this the 14th day of August, 2017.


 Jennifer Jennison, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF BERKELEY) Court of Common Pleas
3) Case No. 2016-CP-08-2428
4)
5 DAVID J. PENN,)
6 Applicant,)
7 vs.) Transcript of Record
8 STATE OF SOUTH CAROLINA,)
9 Respondent.) DATE: January 29, 2018
10)

11 B E F O R E:

12 THE HONORABLE MAITE MURPHY

13 A P P E A R A N C E:

14 RODNEY DUANE DAVIS
15 Attorney for the Applicant

16 JOHN E. JAMES, JR.
17 Attorney for the Respondent

18 Karen V. Andersen, RMR, CRR
19 Circuit Court Reporter
20
21
22
23
24
25

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1 THE COURT: Good morning, Mr. Penn.

2 MR. PENN: Hello. Good morning.

3 MR. JAMES: If it pleases the Court, this is the
4 matter of David J. Penn vs. the State of South Carolina,
5 Docket No. 2016-CP-08-02428. Mr. Penn is present in the
6 courtroom this morning and is represented by Mr. Rodney
7 Davis, Esquire.

8 Mr. Penn was indicted during the April 2012 term of
9 the Berkeley County Grand Jury for murder and grand larceny.
10 Mr. Penn was represented on those charges by Mr. David
11 Schwacke, Esquire, as well as Mr. Cody Groeber, Esquire. He
12 proceeded to trial on September 30th, 2017, before the
13 Honorable R. Markley Dennis, and was convicted by the jury
14 on October 1st, 2017. He was thereafter charged by Judge
15 Dennis to 35 years incarceration on murder and five years
16 incarceration on grand larceny to run concurrent.

17 Your Honor, he thereafter appealed. On appeal, he
18 was represented by Mr. Robert Dudek of Appellate Defense.
19 They raised four issues on appeal. And the South Carolina
20 Court of Appeals affirmed his conviction on March 2nd, 2016.

21 Your Honor, just as a housekeeping matter, to make
22 sure that the record is as clear as possible, in his
23 original application, his only allegation is Sixth Amendment
24 violation, impartial jury. It was brought to the State's
25 attention, I believe last week, late last week, and to my

1 attention this morning, that there are a number of other
2 allegations that he wishes to raise.

3 Your Honor, I have had a moment this morning to
4 review those allegations and to review them with the
5 witness. And the State is prepared to proceed on those
6 allegations. I would respectfully request that opposing
7 counsel state with specificity those allegations on the
8 record at the outset of the hearing just so that there's no
9 confusion.

10 THE COURT: Thank you, Mr. James.

11 MR. DAVIS: Judge, I'm happy to do that. I have a
12 request for my client, though. He's been in lockup and not
13 sure when he was going to get called out. May we take a
14 very brief bathroom break, because this is going to be a
15 rather lengthy hearing.

16 THE COURT: Sure. Just let me know when you are
17 ready to go.

18 (Whereupon, a recess transpired.)

19 THE COURT: Ready to proceed?

20 MR. JAMES: Yes, Your Honor.

21 MR. DAVIS: We are, Your Honor.

22 MR. JAMES: I believe when we left off before our
23 break, Your Honor, opposing counsel was going to summarize
24 his present allegations on the record.

25 THE COURT: Yes, sir, Mr. Davis.

1 MR. DAVIS: Thank you, Judge. Judge, this was a
2 trial before Judge Dennis back in September 30th of 2013 and
3 carried over to October 1st of 2013, a murder trial. It's
4 clear from the transcript and in talking with Mr. Groeber
5 and Mr. Penn that the strategy of this case was all with
6 intent, whether this was a with-malice-aforethought killing
7 or not.

8 Given that and looking through the documents that
9 were filed, the transcript, the allegations we would go
10 forward today all fall under the category of ineffective
11 assistance of counsel. Specifically, Your Honor, as a road
12 map for the Court, and the attorney general is correct, I
13 have shared with them the general points I want to go over,
14 but I think I can summarize them this way.

15 At the beginning of the trial, it was promised in
16 opening statement that Mr. Penn would testify. It was
17 referenced at least a couple of times in opening statement.
18 But, in fact, when it came time for the defense to present
19 their case, he did not testify.

20 Furthermore, I believe that the testimony today
21 will show that preparation for that testimony was lacking.
22 The advice that Mr. Penn received about whether to testify
23 or not was ineffective. And, ultimately, Your Honor, one of
24 the factors that would have made his decision dealt with
25 what prior record of Mr. Penn would be used for impeachment

1 purposes. We believe the testimony today will show that
2 that was discussed, but not thoroughly enough. And most
3 importantly, there was not a ruling obtained from Judge
4 Dennis during the colloquy about whether Mr. Penn would
5 testify or not. So that it left it vague as to what
6 specific prior record he would be inquired about for
7 impeachment purposes.

8 So all of those issues goes towards the handling of
9 Mr. Penn and whether he would testify or not. He didn't.
10 We intend today to show the testimony of what the jury would
11 have heard, had he testified.

12 And then finally, Your Honor, there's one other
13 issue dealing with testimony that was, again, similar to the
14 prior case, Mr. Stanley's case. There was testimony that
15 Mr. Groeber objected to in pretrial, had a ruling on it, and
16 then when it was addressed in front of the jury, there was
17 no contemporaneous objection.

18 But the gist of our argument, basically, is this,
19 Judge. Mr. Penn was promised to testify. He didn't. Part
20 of the reason he didn't was advice of counsel. And part of
21 the reason he didn't was some omissions of counsel. And we
22 would then have you hear the testimony today that the jury
23 would have heard. We will argue that all of those factors
24 together would have caused the jury to come back with a
25 different verdict, either not guilty, or had the jury heard

1 not just the statements beginning with law enforcement, but
2 Mr. Penn's live testimony at trial, we are confident that
3 would have been the tipping point enough for them to find
4 that this was under legal provocation heat of passion, not
5 with malice aforethought, and would have found a verdict of
6 voluntary manslaughter.

7 THE COURT: Thank you, Mr. Davis. Mr. Davis, have
8 you explained to your client that should he be successful,
9 of course, the case would start over, and he would be
10 potentially be looking at a life sentence if this matter
11 were to be retried?

12 MR. DAVIS: Thank you for raising that on the
13 record, Your Honor. We have spoken about that. Obviously,
14 the grand larceny is five years as well. But the bigger
15 risk, and I talked to my client about all of this,
16 certainly, the only way to make it better is to win on a
17 PCR. But he understands that a 35-year sentence, if we win
18 the PCR, that's undone. He starts over. He's facing 30 to
19 life on murder because his arrest warrant was for murder.
20 He does understand that.

21 MR. PENN: Yes, I do, Your Honor.

22 THE COURT: All right, sir. And knowing that, you
23 wish to proceed here today?

24 MR. PENN: Yes, ma'am.

25 THE COURT: Sir, you may call your first witness.

1 MR. DAVIS: Thank you very much. We call
2 Mr. Groeber to the stand.

3 MR. GROEBER: Your Honor, can I bring my file?

4 THE COURT: Absolutely.

5 CODY J. GROEBER,

6 having been duly sworn, testifies as follows:

7 THE CLERK: State your full name for the record.

8 THE WITNESS: Code Groeber, G-r-o-e-b-e-r.

9 THE COURT: Your witness.

10 MR. DAVIS: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 By MR. DAVIS:

13 Q. At the time you represented Mr. Penn, you were at
14 the public defender's office here in Berkeley County?

15 A. Yes.

16 Q. Do you recall when you were appointed on the case?

17 A. It was sometime in May of 2013.

18 Q. Okay. And just to clear the record on that, Ms.
19 Patty Kennedy of the public defender's office, originally
20 had Mr. Penn's file?

21 A. That's correct.

22 Q. Is it fair that you handled the case the majority
23 of the time and up through the trial?

24 A. I would say that I handled it as soon as I came in
25 to the office in May of 2013. I think he was in jail for

1 quite some time before that. But certainly from May on, I
2 handled everything in regards to his case.

3 Q. And, in fact, at trial, Mr. Schwacke assisted you
4 at the trial, correct?

5 A. Yes.

6 Q. You heard my colloquy to the Court a moment ago.
7 Is that a fair representation of the strategy at trial, that
8 this was not murder, that there was no malice aforethought?

9 A. I don't want to adopt your whole colloquy, but
10 certainly, the strategy was to argue to the jury that
11 Mr. Penn did not have malice aforethought, that he was
12 adequately provoked in killing the victim in this case.

13 Q. There were -- or there was a recorded statement of
14 Mr. Penn by law enforcement, correct?

15 A. Yes.

16 Q. You had reviewed that prior to trial?

17 A. Yes.

18 Q. That was played for the jury at trial?

19 A. Yes.

20 Q. I think it was about an hour long or so?

21 A. Yes, it was.

22 Q. In that statement, Mr. Penn talks about remorse for
23 his actions, correct?

24 A. Absolutely.

25 Q. But in his statement, he does admit the physical

1 act that caused, forgive me, Ms. Kathy's death, correct?

2 A. Yes.

3 Q. From May of '13 until this went to trial in
4 September of '13, how many times would you say you met with
5 Mr. Penn?

6 A. I went back and looked through my notes in
7 anticipation of trial. I know that the very first time I
8 met with him was on May 24th of 2013. And that would have
9 been an introductory meeting where I get a lot of
10 information from him, but also kind of hear his side of the
11 story. I know that, at least from my notes, that the last
12 time I can testify that I for sure saw him was September
13 18th. And between those two times, I can't swear, but at
14 least five or six times.

15 Q. During your representation, you attempted to broker
16 a plea deal, correct?

17 A. I did. And I believe that the deal that was
18 offered was in place before I took over representation.

19 Q. And that was, basically, a minimum 30 years
20 day-to-day on the murder plea?

21 A. That's correct.

22 Q. You were certainly attempting to get the State to
23 reduce this to voluntary manslaughter for a guilty plea,
24 correct?

25 A. Absolutely.

1 Q. The State never made that offer?

2 A. That was never made.

3 Q. And given the fact that -- well, let me ask you
4 this. Did you have discussions with Mr. Penn about what a
5 30-year day-to-day sentence might realistically mean for a
6 man of his age at the time of trial?

7 A. We did talk about that several times.

8 Q. What do you recall from those discussions?

9 A. That a 30-day day-to-day sentence for him is pretty
10 much a life sentence.

11 Q. So, ultimately, the offer to plead to the mandatory
12 minimum of murder was rejected by the defense?

13 A. Yes.

14 Q. You've had a chance to review the transcript of the
15 trial?

16 A. Yes.

17 Q. And for the Court's indulgence, on page 160, at the
18 beginning --

19 A. May I look at it too?

20 Q. Please, please. In fact, page 157, line 13, begins
21 your opening.

22 A. Yes.

23 Q. And then if we flip over to the top of 160.

24 MR. DAVIS: And, Judge, I won't go through the
25 entirety, but to give the Court a frame of reference.

1 Q. Page 160, top of that, this is still your opening:
2 You will hear Mr. Penn from the stand talk about he lost
3 control.

4 That was part of your opening, correct?

5 A. Yes.

6 Q. And then you go on to paraphrase what you
7 anticipate he would testify to.

8 A. Yes. Well, I think that's the -- after that, I
9 talked about what he would say.

10 Q. Correct, continuing in your opening?

11 A. Yes.

12 Q. Okay. In May of '13, how long had you practiced
13 criminal defense work?

14 A. Six and a half years.

15 Q. Was this your first murder trial?

16 A. No.

17 Q. So that's an expressed indication to the jury that
18 it's your intention to call him as a witness in the defense?

19 A. Yes.

20 Q. You and Mr. Penn had discussed that prior to trial?

21 A. Yes.

22 Q. In fact, I think in our discussions, the September
23 18th meeting just prior to trial, that's one of the things
24 you would have discussed?

25 A. If I can look at my notes, please.

1 Q. Sure.

2 A. I'm sure we were talking about exclusively the
3 trial at that point, but if you would like me to be more
4 specific, I can. The 18th -- so I met with Mr. Penn on the
5 17th and the 18th to talk about the trial, because it was
6 less than two weeks away at that point. And on the 18th,
7 Mr. Penn left our meeting without us completing, at least
8 what I felt would be, completing to prepare for trial. And
9 so I don't know if we covered that specific topic on the
10 18th.

11 Q. But you would have discussed with him his right to
12 testify or not, correct?

13 A. We talked about that a lot.

14 Q. In fact, you have an individual file in your large
15 box file of prepared questions or at least topics that you
16 would have gone over, had he testified, correct?

17 A. I do, yes.

18 Q. Do you recall prior to trial discussing with him
19 the benefit of last argument and, therefore, for presenting
20 any witnesses?

21 A. I don't have a specific recollection of that, but I
22 believe that I certainly would have talked to him about that
23 when we discussed all of the things to consider when he
24 was -- whether or not he would testify.

25 Q. I'm going to skip ahead then. Do you recall during

1 the break in the trial proceedings, after the State rested,
2 discussing with him that issue, that if he did not testify
3 and not present any other witnesses, you would have last
4 argument?

5 A. Yes.

6 Q. Pretrial, do you recall discussing with Mr. Penn
7 about any prior record that might be used to impeach him?

8 A. I don't have a specific recollection of that
9 either. But, again, I think that, and it would be my
10 practice, to talk about all of the different things to
11 consider, someone's record, what would be admissible, what
12 could arguably be admissible, how things would come in that
13 were not necessarily admissible but that could become
14 admissible based on his testimony. All of those things we
15 would have talked about in discussion for trial preparation.

16 Q. Moving ahead to the end of the State's case at
17 trial, you would have had discussions with Mr. Penn pretty
18 urgently about whether he was then going to get called to
19 the stand after the break or not, right?

20 A. Yes.

21 Q. At that time, was your advice to him that he
22 testify or not testify now that you heard the State's case?

23 A. I remember telling -- well, so, generally, and I
24 don't believe I have ever told someone that they must
25 testify or they absolutely shouldn't testify, because I

1 think that that is a decision that needs to be theirs. I do
2 remember telling Mr. Penn that a lot of the concerns that he
3 had, that he wanted to make sure the jury understood, I felt
4 had been addressed in his confession. That was incredibly
5 emotional and sincere. But that some of -- I believed that
6 those concerns had been addressed through his confession.

7 Q. So without advising him strictly yes or no whether
8 to testify or not, it was your opinion, though, that the
9 benefit of his testimony had already been presented to the
10 jury through his videotaped statement?

11 A. Could you ask that again?

12 Q. Sure. I will try to say it almost exactly the
13 same. Without strictly telling him yes or no, it was your
14 opinion, as an experienced trial lawyer, that the benefit of
15 his testimony had already been conveyed to the jury in his
16 videotaped statement?

17 A. Certainly, most of the benefit, so, yes.

18 Q. I will try to mirror before. Not pretrial now, but
19 in the break, after the State rested, do you recall -- if I
20 asked this previously, forgive me -- do you recall at that
21 point talking about how his record could be used for
22 impeachment?

23 A. I'm sure that we discussed that. Again, I don't
24 have a specific recollection of it, but that would have been
25 a very high thing or one of the most important things that

1 we would have talked about in relation to whether or not he
2 should testify.

3 Q. Without specific notes on that or specific
4 recollection, would you now be able to, or do you have the
5 record, would you now be able to advise the Court what
6 concerns you would have had about his prior record?

7 A. Yes.

8 Q. You have that ability?

9 A. I do.

10 Q. If you could, please.

11 A. So in my very large file, I have a little folder
12 that says "defendant's record". And this was a copy of the
13 defendant, or Mr. Penn's, rap sheet that I received through
14 discovery. And in this file I have -- and this is my
15 standard practice -- is that I will write in my own
16 handwriting next to every conviction, so that I know that
17 I've looked at it, that it shows as a conviction.

18 And then oftentimes, when I'm preparing for trial,
19 I will actually right, yes, no, or maybe, as to whether or
20 not those things would be admissible.

21 Do you want me to go through the record in my
22 notes?

23 Q. If you would, please.

24 A. So the first arrest that I show is a conviction out
25 of Tennessee. And this shows as a malicious mischief, which

1 I did not think would come in as evidence against him. And
2 I believe mainly because it was too old, even though,
3 arguably, it could have been a crime of dishonesty. It was
4 from 1983. So I felt like that would be outside the
5 timeline.

6 So the next one is a theft charge. And this was
7 also a burglary charge that was out of -- also appears to be
8 out of Tennessee in 2000. And I have "yes" written next to
9 this, indicating that I believed that these, at least the
10 theft charge, most certainly would come in, and quite
11 possibly the burglary charge as well.

12 There's also in 2001 some bad checks. And I've had
13 judges go both ways on those.

14 2003, he had a conviction, and this is now in South
15 Carolina, and this specifically was in Berkeley, South
16 Carolina, where he was charged with criminal domestic
17 violence, first offense. And at least his rap sheet shows a
18 conviction for that.

19 Also, and I don't have a mark on that. I have CDV
20 written next to it. But I don't have a yes, no, or question
21 mark. To me, that indicates that it's -- I don't think CDV,
22 generally, would come in as a crime of dishonesty. But in a
23 case where there was violence at issue, I had a concern that
24 possibly, through testimony of the defendant, that that
25 evidence could come in if he made some sort of statement

1 that would put at issue his tendency to violence or no
2 tendency for violence. So I had a concern about that one.

3 2004, there's a conviction for a purse snatching
4 and forgery. And these I have written "Tennessee
5 conviction, too old". So I believed that these would not be
6 admissible.

7 There was a 2005 paraphernalia charge and false
8 information. I believed he -- oops. I missed one, but I
9 will come back to it. On the false information, I believe
10 that could have been used against him as a crime of
11 dishonesty.

12 And I missed one, 2005 arrest and conviction for
13 possession of cocaine, first offense. I did not think that
14 would become -- be admissible, although, again, through
15 testimony of Mr. Penn, it could have become relevant somehow
16 and admissible.

17 And, finally, a conviction in 2009 for criminal
18 domestic violence, second offense.

19 Q. And what's your notation on that one? I believe on
20 the other one, you had not made any notation.

21 A. Yes, I had no notation on that. And that, to me,
22 again, would indicate that I was concerned that it is
23 possible that it could come in. Certainly, it wouldn't come
24 in in and of its own right.

25 Q. If I can turn the Court's attention and,

1 Mr. Groeber, your attention to 353 in the transcript, line
2 20. It says lunch resist. Can you take a look just before
3 that, just after that. Is that the point in which the State
4 has rested and you take a break to have the discussion you
5 were just testifying about?

6 A. Yes.

7 Q. Now, unfortunately, the transcript does not provide
8 a stop time and a start time. Is it fair to say that this
9 was a brief lunch recess, to your recollection?

10 A. My memory of that time was that it was -- "brief"
11 is a tough description for us lawyers. I think we probably
12 had around an hour. And all of that time was spent
13 discussing whether or not Mr. Penn would testify.

14 Q. So if you had about an hour, you've got an hour to
15 discuss testifying or not, which would include the record we
16 just went over, correct?

17 A. Yes.

18 Q. It would have included any advice to him about
19 testifying or not, correct?

20 A. Yes.

21 Q. If the decision was that he was going to, you would
22 have had to fit any review of testimony in that hour?

23 A. Yeah.

24 Q. At some point, he made it clear that he was not
25 going to, correct?

1 A. Yes.

2 Q. Would that have been early on, so you had a bunch
3 of time to focus on other things, or was the decision right
4 pretty much before he came back into the courtroom?

5 A. I think it was -- I remember it being a very
6 difficult decision. And I know that when we -- we were
7 summoned back to the courtroom by Judge Dennis. And my
8 recollection is that it was then that Mr. Penn made his
9 final decision.

10 Q. So you are also needing to prepare for closing
11 argument. If he wasn't going to testify, you didn't have
12 time to do that in that hour?

13 A. I would have loved more time to prepare for closing
14 argument.

15 Q. Not that you didn't prepare, we're not making
16 argument about that, but that would have been something,
17 that time frame, that break would have allowed for, but
18 because it was only an hour, it really didn't, correct?

19 A. Yes.

20 Q. Okay. So when you are summoned back to the
21 courtroom by Judge Dennis. We begin on page 353 that you
22 and Mr. Penn are present. I will let you have a moment to
23 look at pages 353 through 359. And then I will ask you a
24 few questions about that.

25 A. Okay. Okay.

1 Q. Is it fair that on line 11 is when the colloquy
2 about Mr. Penn testifying or not ends? Judge Dennis begins
3 talking about some jury instruction cases.

4 A. That is correct. That's when it occurs.

5 Q. At any point during the colloquy with Judge Dennis,
6 is there a specific ruling on these prior convictions of
7 Mr. Penn?

8 A. No.

9 Q. And Judge Dennis didn't inquire about them and you
10 did not ask him to?

11 A. I did not, and nor did he.

12 Q. Following the discussion on jury instructions then,
13 you, on behalf of Mr. Penn, rested without calling any
14 witnesses?

15 A. Correct.

16 Q. Shifting gears just slightly, or actually,
17 significantly, if we can look at page 107, line 12, and I
18 will let you review just a bit past that --

19 A. What would you like me to read?

20 Q. If you can go from line 12 to the end of,
21 basically, your argument, for the purpose right now, which
22 would be line 12 on the next page --

23 A. Okay. Okay. I finished reading it.

24 Q. Rather than me paraphrasing for you, can you tell
25 Judge Murphy the issue you were trying to suppress in that

1 argument?

2 A. Sure.

3 MR. JAMES: Objection. It does need to be framed
4 as a question, Your Honor.

5 BY MR. DAVIS:

6 Q. Were you trying to suppress any evidence; and if
7 so, what?

8 A. Yes. There were some statements made by Mr. Penn
9 to various people that -- or, excuse me. I'm sorry. There
10 were statements of the victim in the case to at least one
11 and maybe two people that were alleged that she had
12 communicated to them that she was fearful of Mr. Penn. And
13 we objected to that being introduced as hearsay.

14 Q. "She" being the deceased?

15 A. That's correct.

16 Q. Let's move over to page 111. We can go slightly in
17 reverse. Page 111, page 5 -- I'm sorry, page 111, line 5,
18 you make -- line 5 and 6, you make a standard Lyle motion;
19 is that correct?

20 A. Yes.

21 Q. Is that a second way in an attempt to deal with
22 this same testimony about fearful or afraid?

23 A. It could have been. It certainly would have been
24 more geared forward the charges on his record.

25 Q. Just prior to that, you raise the Lyle motion. Had

1 you obtained a ruling on what we were just talking about
2 this, being afraid or being fearful, that the deceased
3 having that opinion towards Mr. Penn?

4 A. Correct. I believe that we won that motion.

5 Q. Now, let's skip over to page 201. Actually, I
6 believe it says at the top, page 198, line 8 and 9 is
7 calling this witness. And so on page 198, line 8 and 9 is
8 calling of Neil Croft. And with that setting the stage, on
9 page 201, line 2 through 6, this is Mr. Croft discussing
10 Kathy? And Kathy is the deceased; is that right?

11 A. Yes.

12 Q. And his testimony is: She was afraid of him. I
13 told her, I said, Kathy, I'm just around the corner if you
14 need me for anything. Just give me a call. We lived about
15 a mile from where she lived.

16 Correct?

17 A. Yes.

18 Q. And there's no contemporaneous objection to that
19 testimony of Mr. Croft by you?

20 A. There's -- that's correct.

21 MR. DAVIS: Your Honor, if I can have just a moment
22 with Mr. Penn.

23 THE COURT: Yes, sir.

24 MR. DAVIS: Thank you very much, Your Honor.
25 That's all we have.

1 THE COURT: Cross-examination.

2 CROSS-EXAMINATION

3 BY MR. JAMES:

4 Q. Good morning, Mr. Groeber.

5 A. Good morning.

6 Q. If at any point you can't understand me, just let
7 me know. I am not at my full bombast that I normally carry
8 with me into the courtroom.

9 You indicated earlier that your meeting with your
10 client on September 18th, if I recall correctly, that he
11 left early, for lack of a better word; is that correct?

12 A. Yes.

13 Q. Why did he leave early? Why did that meeting end
14 short?

15 A. I need to refer to my notes. Mr. Penn -- I have
16 notes about what he was -- he was very upset that day and
17 upset about how things were coming. I have notes that
18 suggest several things: First is that he was just now
19 receiving certain discovery; second, he had requested all
20 e-mails between his lawyers and the State, and that he
21 believed things were being withheld of my from.

22 My recollection of this is, he had requested e-mail
23 from Ms. Kennedy to and from the solicitor in the case. I
24 had earlier given him copies of everything. But that was
25 one of the things, he believed that I was just part of the

1 "system". He believed that a paid lawyer would work harder
2 than I was doing for him. He believed that race would
3 affect the outcome of his sentence. He did not want Ms.
4 White on his case. Oh, Ms. White was another lawyer in our
5 case.

6 And, finally, I have that we were unable to listen
7 to CDs 578 to 571 because he left.

8 Q. Did he leave that meeting, I suppose, against your
9 wishes and desires, or --

10 A. We had more to discuss and prepare for. There's
11 always more to discuss and prepare for when you are looking
12 down the barrel of a trial. I had more time to give to him
13 that day.

14 Q. Then you touched on this, but to be clear, you did
15 give him all of his discovery or reviewed it all with him?

16 A. Yes, except for maybe the last three CDs from that
17 meeting. But, otherwise, he had -- I believe he had a copy
18 of his whole file. That would include all the discovery.
19 And I know that we went through anything that he wanted to.
20 I mean, sometimes clients don't want necessarily or have to
21 see everything. But he certainly had -- we went through
22 much of his file. And he had ample opportunity to see all
23 of it.

24 Q. Earlier during direct examination, you went over in
25 substantial detail the applicant's prior record. You

1 indicated that while discussing his CDV convictions, that
2 you were worried that your client would say something to
3 bring them in. How often does that happen, in your
4 experience as a criminal defense attorney?

5 A. I'm assuming the question is meant generally.

6 Q. Yes, generally speaking.

7 A. Not CDV specifically?

8 Q. If I may broaden the question. Generally, in your
9 experience as a criminal defense attorney, how often does
10 the testimony of a defendant bring in convictions that might
11 otherwise stay out?

12 A. I don't think I could qualify or quantify that.
13 I'm sorry. It has happened. I've been in cases where it
14 has happened. But to quantify that somehow, I think is
15 impossible.

16 Q. But it does happen?

17 A. Yes.

18 Q. And has it happened to you?

19 A. Yes.

20 Q. And did you explain the possibility of that
21 occurring to Mr. Penn?

22 A. Yes.

23 Q. Did he appear to understand your explanation?

24 A. Yes.

25 Q. And speaking more broadly, did you ever have any

1 difficulty communicating with him in the course of your
2 representation?

3 A. I think -- I don't know. Could you rephrase that
4 question maybe?

5 Q. Did he appear to have any mental deficiencies?

6 A. No.

7 Q. Did he appear to have any learning disability?

8 A. No.

9 Q. If he didn't understand anything, did you take your
10 time to explain it further?

11 A. Yes.

12 Q. Isn't it true that in the pretrial hearing on
13 testimony about the decedent's fear, isn't it true that the
14 judge ruled that the statements of fear could come in?

15 A. The judge said that the statements of fear could
16 come in. My understanding of the ruling was that it was
17 limited, though, and should not be specified as to
18 Mr. Penn.

19 Q. Was there a reason why you did not object on page
20 201 of the transcript, lines 2 to 6?

21 A. If I can take a second to review a little before
22 that. Well, I mean, looking back at it, frankly, I think
23 the prosecutor did a pretty sly job of asking a question
24 within the context of other questions that provides a
25 suggestion that she wanted to get out. What I mean by that

1 is that the question itself was: Did she tell you how she
2 felt about him? And that was in the context before asking
3 about Mr. Penn. So I don't know -- I don't have a good
4 answer to why I did not object at that time or to that
5 answer.

6 Sometimes I don't object to things even when they
7 come up because I'm fearful to draw more attention to it
8 than otherwise. That could be maybe the only answer I could
9 think of at this time.

10 Q. Was Mr. Croft on the stand for very long?

11 A. No, he was there very short.

12 Q. In your general practice as a defense attorney, do
13 you normally request a ruling on what prior convictions may
14 come in before making the decision whether or not to testify
15 or advising your client as to whether or not to testify?

16 A. I would say that in most cases that we have had
17 that, that I have had that question answered. And if
18 Mr. Penn had wanted to know that information based on -- to
19 help form his decision, then I certainly would have asked
20 for that ruling to help him make that decision. I can't say
21 that it's my practice to ask for it every single time, but I
22 would say that most times, the judges do that or we ask for
23 that.

24 Q. You said you would have if the defendant had asked.
25 You did discuss with him your analysis of what you believed

1 would come in, correct?

2 A. Yes. And it was a combination of worried about
3 what would come in, but also what could come in through his
4 testimony.

5 Q. Did you believe that your client would testify
6 during the course of your opening statement?

7 A. Yes. I don't believe I would have said that if I
8 did not believe he was going to testify.

9 Q. Over the course of trial, did your opinion
10 regarding the necessity of his testimony change?

11 A. I don't know that I had an opinion about whether he
12 should testify or not before the State rested, to be honest.
13 Because I -- generally, it's hard to see how a trial is
14 going to play out until the State has rested, what evidence
15 had been presented, how it came out, or what were the
16 impactful moments during the trial.

17 Q. Isn't it true that once the State had rested, you
18 did form an opinion?

19 A. Yes.

20 Q. Okay. And did you share that opinion with your
21 client?

22 A. Yes.

23 Q. And what was your opinion?

24 A. My opinion was that the main concerns that he had,
25 that he wanted to express, have been expressed through his

1 confession, and that there was a lot of danger for him in
2 testifying, that these additional crimes could come out.

3 Q. Did you ever explicitly tell him he should not
4 testify?

5 A. No.

6 Q. Did you ever tell him he could not testify?

7 A. No.

8 MR. JAMES: Beg the Court's indulgence for just one
9 moment.

10 No further questions, Your Honor.

11 THE COURT: You may redirect.

12 REDIRECT EXAMINATION

13 BY MR. DAVIS:

14 Q. Let's start at the end there. The two reasons that
15 your opinion was he should not have testified are, the main
16 concerns that defendant wanted to express came in through
17 the video, which would have been his statement to law
18 enforcement?

19 A. Yes.

20 Q. You never objected to that coming in at trial?

21 A. I think we did have a *Jackson v. Denno* hearing.

22 Q. I'm sorry, pretrial *Jackson v. Denno*. And during
23 the trial, it speaks for itself, your argument, because once
24 they had gone through the *Denno* factors, I don't believe --
25 and we can find in the transcript. Do you recall saying, I

1 believe that the video speaks for itself?

2 A. I don't recall saying that, but I take your word
3 that it's in there.

4 MR. DAVIS: Your Honor, at the appropriate time, I
5 will find the cite to that.

6 THE COURT: Yes, sir.

7 BY MR. DAVIS:

8 Q. So *Denno* to preserve the record, but you knew that
9 video was coming in?

10 A. We anticipated -- yes, we expected it to come in.

11 Q. You wanted it to come in for the very reasons you
12 just testified, that it shows his remorse and lack of
13 intent, you hoped?

14 A. Yes. Well, I mean, would it have been great that
15 that didn't come in and we had a choice then? Yes. But I
16 expected it to come in and we prepared for it to come in.

17 Q. So if you knew what was contained in the hour video
18 statement -- and while, yes, confession out, not even
19 considering it at all would have been great. But if it's
20 coming in, you know what's contained in the hour statement
21 prior to your opening, correct?

22 A. Yes.

23 Q. So other than that being played for the jury, which
24 you anticipated, there was no other evidence that would have
25 affected the concerns that you want to express, that I now

1 realize had come in through the video? That could not have
2 been a realization you had after the State rested?

3 A. Correct.

4 Q. Second reason is the concern of either priors that
5 were admissible under the rules or prior record of Mr. Penn
6 that he might open the door to on testimony, correct?

7 A. Yes.

8 Q. As an experienced trial lawyer, while you cannot
9 control exact words for your client, isn't it fair to say
10 that thorough preparation of trial testimony is one way to
11 alleviate concerns of a client opening the door?

12 A. Yeah.

13 Q. And in this case, because of the few months that
14 you are on the case and because of the limited time, about
15 an hour after the State rested, is it fair to say that
16 meetings and time you spent with Mr. Penn were not primarily
17 focused on preparing his testimony?

18 A. If I may, to clarify the question, was our
19 preparations together primarily focused on his testimony?

20 Q. Correct.

21 A. No, it was not primarily focused on his testimony.

22 Q. And I think you testified to this earlier. You
23 could always have more time to prepare. And, specifically,
24 you can always have more time to prepare a witness for their
25 testimony, correct?

1 A. Yes.

2 Q. You would have preferred more time to prepare
3 Mr. Penn to make the decision whether to testify or not?

4 A. Yes.

5 Q. Final issue, during the break, when you were having
6 the final discussion about this most crucial decision that
7 Mr. Penn can make, do you recall at that point reminding him
8 what you had said in opening, that you had promised the jury
9 they were going to hear from him? Do you recall that?

10 A. I do think that we discussed that as part of those
11 discussions.

12 Q. And despite that, going back to the two reasons you
13 have testified previously, you had two major concerns. And
14 your opinion was that he shouldn't, even though it was his
15 decision?

16 A. Yes.

17 MR. DAVIS: Thank you, Your Honor. No other
18 questions.

19 THE COURT: You may sit down, sir.

20 MR. JAMES: If I may very briefly redirect.

21 THE COURT: Very briefly.

22 RECROSS EXAMINATION

23 BY MR. JAMES:

24 Q. You had more time to give to the applicant,
25 correct?

1 A. Yes.

2 Q. And he cut that meeting short, correct?

3 A. Yes.

4 Q. And whose decision was it to not testify?

5 A. It was his decision.

6 MR. JAMES: Thank you. No further questions.

7 THE COURT: You may step down.

8 You may call your next witness.

9 MR. DAVIS: Your Honor, I would anticipate
10 Mr. Penn's testimony would be about that length. We are
11 happy to keep going, whatever you want to do.

12 THE COURT: I'm starving. If you want to break for
13 lunch, we will break for lunch.

14 MR. GROEBER: May I be excused, Your Honor?

15 THE COURT: Any objection to him being released?

16 MR. GROEBER: I have a hearing at 3, so -- I could
17 reschedule, if we need to.

18 MR. JAMES: I must admit, I've run into this issue
19 before that something came out during applicant's testimony
20 that made me desire to call defense counsel back up.

21 THE COURT: Counsel, it looks like you are
22 staying.

23 MR. JAMES: I hate to keep him waiting.

24 THE COURT: Where is your other hearing?

25 MR. GROEBER: Federal court downtown at 3. I can

1 see if I can get it rescheduled, Your Honor.

2 THE COURT: I appreciate that. Thank you.

3 MR. DAVIS: So break for one hour?

4 THE COURT: Break until one o'clock.

5 (Whereupon, a recess transpired.)

6 THE COURT: Everyone ready to proceed?

7 MR. JAMES: The State is ready to proceed.

8 MR. DAVIS: Yes, Your Honor.

9 THE COURT: Call your witness.

10 MR. DAVIS: I will call Mr. Penn to the stand.

11 DAVID PENN,

12 having been duly sworn, testifies as follows:

13 THE CLERK: Please state your full name for the
14 record and spell your last name.

15 THE WITNESS: David Judson Penn, P-e-n-n.

16 THE COURT: Your witness.

17 DIRECT EXAMINATION

18 BY MR. DAVIS:

19 Q. Mr. Penn, let's get a little background on you.
20 Can you tell the judge how old you are?

21 A. 58.

22 Q. Where were you born and raised?

23 A. A little town called Soddy-Daisy, Tennessee.

24 Q. Can you spell that for the court reporter and for
25 me too?

1 A. S-o-d-d-y, D-a-i-s-y.

2 Q. What part of Tennessee is that?

3 A. It's right outside of Chattanooga.

4 Q. How far did you go in school?

5 A. 12 years and year of college.

6 Q. Got your diploma from high school?

7 A. Sir?

8 Q. Got your diploma from high school?

9 A. Yes, I do.

10 Q. Where did you go to college for the year?

11 A. Chattagnooga State.

12 Q. Studying what?

13 A. I was studying physical fitness.

14 Q. Didn't get your degree?

15 A. No, sir.

16 Q. Now, sir, approximately when did you come down to
17 South Carolina?

18 A. In '99.

19 Q. And family down here --

20 A. Yes, sir.

21 Q. -- at the time?

22 A. I had a brother at the time.

23 Q. Okay. And now let's jump ahead. You were living
24 here in Berkeley County for a while, right?

25 A. Yes, sir.

1 Q. And who were you living with at the time?

2 A. I was living with my brother, military gentleman at
3 the time, Joseph.

4 Q. And then at some point, were you involved in a
5 relationship?

6 A. Yes. It was a girl named Brenda. We lived in
7 Goose Creek.

8 Q. Okay. And now, while you were living in the area,
9 what kind of work were you doing?

10 A. I was drywall man, hung Sheetrock, painted.

11 Q. Handyman of sorts?

12 A. Yes, sir. I'm a handyman, pretty much do it all.

13 Q. And so why don't you tell the judge how you got to
14 know Kathy and what kind of relationship that was?

15 A. I got to know Kathy through my girlfriend's
16 brother, Thomas Blair. And we all became good friends. And
17 I needed a job at that time, because the handyman work that
18 I was doing wasn't enough to support me. So they introduced
19 me to Kathy. And she needed a guy to work with her as far
20 as painting. And so she gave me a job.

21 Q. How long would you have known her up until her
22 death?

23 A. About four years.

24 Q. And during the course of the four years, worked for
25 her off and on the whole time?

1 A. Yes, sir. I was remodeling her mobile home,
2 remodeled my mobile home with her help. We were basically
3 best friends.

4 Q. I'm going to jump way ahead for a second, and then
5 we will come back to that. Okay? After you were arrested,
6 did you get appointed an attorney?

7 A. After I was arrested?

8 Q. Were you appointed an attorney?

9 A. Yes.

10 Q. Who was it originally?

11 A. Ms. Patricia Kennedy.

12 Q. And she was working at the public defender's
13 office?

14 A. Yes, sir.

15 Q. And at some point, it switched from her to someone
16 else; is that right?

17 A. That's true.

18 Q. Who did it switch to?

19 A. Mr. Groeber.

20 Q. You see him in the courtroom here today?

21 A. Yes, sir.

22 Q. And is that -- did he handle the case from then all
23 the way through to trial?

24 A. Yes, sir.

25 Q. He was the lead attorney?

1 A. Yes, sir.

2 Q. Okay. If you recall, can you tell the judge why it
3 is that Ms. Kennedy was off your case? Do you recall?

4 A. That's a good question that I would like to know,
5 why Ms. Kennedy was taken off of my case.

6 Q. You don't recall her transferring to Charleston
7 County?

8 A. After she was off my case, I do remember.

9 Q. Okay. Okay. And, again, just a final question, to
10 be clear, at trial, Mr. Groeber was your lead trial counsel,
11 right?

12 A. Yes, sir.

13 Q. Can you tell Judge Murphy, as far as you and he,
14 how many times do you recall that you and he met in
15 preparation for your trial?

16 A. To think back, I would have to go along with what
17 Mr. Groeber said, six or seven times that we did meet, which
18 sometimes they were brief and sometimes they were lengthy.

19 Q. Now, just so the judge understands, did you make
20 bond, or were you incarcerated up until trial?

21 A. Incarcerated until trial.

22 Q. So these meetings would have occurred here at the
23 Berkeley County jail?

24 A. Yes, sir.

25 Q. Ever at the courthouse here?

1 A. No, sir.

2 Q. Ever at his office?

3 A. No, sir.

4 Q. Okay. During these six or seven meetings, you've
5 already testified some were short, some were long. Let's
6 focus on you testifying or not. During these six or seven
7 meetings, how often would you say y'all discussed that
8 issue, whether you would testify or not?

9 A. I would say it came up just about every time we
10 met, whether I was going to or not going to. And,
11 basically, there was issues at first about me testifying,
12 but, eventually, we come to the decision, I thought, of me
13 testifying all the way up until trial.

14 Q. Do you recall in any of these meetings discussions
15 about the fact that you had a right not to testify?

16 A. I'm sure we did discuss it, but I can't recall
17 specifically.

18 Q. Do you recall in these discussions whether or not
19 Mr. Groeber talked about that you would be subject to
20 cross-examination by the solicitor's office if you
21 testified?

22 A. Yes.

23 Q. Do you recall whether or not he discussed anything
24 about your prior record that might be brought up if you
25 testified?

1 A. We did discuss it, my prior record could be brought
2 up.

3 Q. Do you remember whether he told you what specific
4 charges could or could not, or he just mentioned it in
5 general?

6 A. Just in general. It was not specific.

7 Q. Do you recall whether or not he would have
8 discussed with you that if you testified or the defense
9 presented evidence, that he would not get last argument in
10 front of the jury? On the other hand, if you did, he would
11 get less argument? Do you remember a discussion about that?

12 A. Seems like I vaguely remember that.

13 Q. Do you know if that would have happened in the six
14 or seven meetings before trial or if it happened in the
15 break at trial?

16 A. Before trial, maybe the couple of sessions that we
17 had, I don't remember exact dates, but when he came to see
18 me before, right before trial, maybe we discussed it.

19 Q. Do you recall in any of these meetings going
20 through with him the questions that he might ask you or the
21 areas that he might touch on when you testified?

22 A. Not specifically.

23 Q. Do you ever recall him anticipating the questions
24 the State might ask you on examination if you testified?

25 A. I don't think I was prepped on that to be prepared

1 for what they might ask.

2 Q. Were there any suggestions about how to testify,
3 meaning, you know, verbally, out loud, yes or no, sir, or
4 anything like that?

5 A. No, sir. No, sir.

6 Q. Any discussions about what would happen if one of
7 the attorneys objected, to how you were supposed to handle
8 that as a witness, any discussion about that?

9 A. No, sir.

10 Q. Do you recall during any of these discussions him
11 talking to you about a phrase we heard earlier about
12 "opening the door"? Do you remember any discussions that he
13 would have had with you about that?

14 A. We did speak of that. Some of my charges, if they
15 were brought up, could open the door to my past history.

16 Q. And was there any discussion about how to avoid
17 that?

18 A. If there was, I don't remember, sir. I don't
19 remember if there was.

20 Q. Okay. You were present throughout your entire
21 trial in the courtroom, right?

22 A. Yes.

23 Q. So when Mr. Groeber began his opening and talked
24 about you testifying to the jury, did that surprise you or
25 did you expect him --

1 A. I expected to be able to testify.

2 Q. Now, shifting ahead in the trial, do you remember
3 the break after the State finished with all its evidence?
4 Do you remember talking to Mr. Groeber after that?

5 A. I remember the State finishing. If we talked, it
6 was briefly. To remember what we talked about --

7 Q. When you came back into the courtroom, do you
8 remember your discussion with Judge Dennis about testifying
9 or not?

10 A. To be honest with you, I don't remember talking to
11 Judge Dennis.

12 Q. Okay. Have you had a copy of your transcript to
13 review prior to this hearing?

14 A. Yes.

15 Q. So you've read through it previously?

16 A. Not previously, I haven't, sir, not previously.

17 Q. I'm sorry. You've had an --

18 A. I haven't read through it previously. I read
19 through it when you first made contact with me that we were
20 going to -- that you were going to be my lawyer, but I
21 haven't read it, say, within the last --

22 Q. Oh, recently. So prior to today, you read it, but
23 not recently? Is that what you are saying?

24 A. Yes, sir.

25 Q. I apologize. Would looking at that remind you

1 about talking to Judge Dennis?

2 A. Yes.

3 MR. DAVIS: Your Honor, if I could have one moment.
4 May I approach the witness, Your Honor?

5 THE COURT: You may.

6 BY MR. DAVIS:.

7 Q. I'm directing your attention, and the Court as
8 well, to page 353, beginning on Line 21, which says,
9 defendant present. If you will take just a second and
10 browse over the next few pages. When you get to bottom of
11 359, you can stop. But just take a second and browse
12 through. There you go, those pages. And see if that
13 refreshes your memory about talking to Judge Dennis.

14 A. What am I reading, 352?

15 Q. 353, where it says defendant present. And then
16 just go over the next few pages. And tell me when you've
17 had a chance to refresh your memory about talking to Judge
18 Dennis. And I will have a few questions for you.

19 A. I'm through with page 354.

20 Q. Yes. If you go to 360, you've gone too far, but
21 you read up to 360, or when you are now reminded about that,
22 so that I can ask you questions, whichever comes first.

23 Have you had enough time to read through it to
24 remind yourself about talking to Judge Dennis?

25 A. Bottom of 359?

1 Q. Yes. So having looked through that, do you recall
2 the discussions with Judge Dennis?

3 A. I do. It's right there on the paper. But, no, I
4 do not recall it.

5 Q. Well, one specific question I'm going to ask you:
6 Do you recall telling Judge Dennis that you were not going
7 to testify?

8 A. It's right there on paper. I guess I did say it.

9 Q. In fact, you did not testify?

10 A. I did not testify.

11 Q. Now, prior to talking to the judge about that, who
12 would you have talked to to help make that decision?

13 A. No one. I mean, just Mr. Groeber and I. I call
14 him Mr. Groeber. I'm sorry if I mispronounce his name.
15 He's the only one I talked to about the decision.

16 Q. And that, that you just read, did that happen after
17 the break and you talked to him?

18 A. Yes, yes.

19 Q. What was his advice about you testifying or not?

20 A. I don't recall his advice to me to testify or not.
21 Just like I said, I was under the understanding that I was
22 going to testify. But with that refreshing my memory, I
23 guess it says that I wasn't going to testify. But I thought
24 I was going to testify way up until the court time. I was
25 under the understanding that I was going to testify.

1 Q. What changed your mind?

2 A. I would guess what changed my mind would be them,
3 the statement that they could open up my file.

4 Q. And who was it that told you that?

5 A. Mr. Groeber.

6 Q. Okay. Do you recall any other dangers that he
7 talked to you about of testifying?

8 A. None that I can recall.

9 Q. Okay. In any of the meetings, had you all gone
10 through specifically your prior record? Did you all go over
11 that, you and Mr. Groeber?

12 A. Yes.

13 Q. Were you certain or uncertain as to what ones you
14 might open the door to if you testified?

15 A. I guess you could say I was certain of the ones
16 that might open the door to.

17 Q. And that was from your conversation with your
18 attorney, right?

19 A. Yes, sir.

20 Q. Did you ever ask your attorney to get a final
21 ruling from the judge on that?

22 A. No, I did not.

23 Q. So let's move ahead. Then because of these
24 concerns, you did not testify and no other witnesses were
25 called on your behalf, right?

1 A. No, sir.

2 Q. Now, you filed this post-conviction relief -- do
3 you recall when you filed it?

4 A. Shortly after my trial.

5 Q. Does June 29th, 2016, sound about right?

6 A. Yes.

7 Q. And your complaints were about your attorney's
8 performance, right?

9 A. Yes, sir.

10 Q. Let's move on and let Judge Murphy understand how
11 it would have been different if you had testified. Okay?
12 So let's pick up where we stopped a little while ago. You
13 testified you knew Kathy for about four years; is that
14 right?

15 A. Yes.

16 Q. You've done handiwork for her, right?

17 A. Yes.

18 Q. Let's move ahead to the day she died. Okay? Tell
19 the judge why you went over there.

20 A. Kathy picked me up about 6:30 or 7 that morning. I
21 think it was a Friday morning. And I was going -- she was
22 going to pay me for some work that I was doing on her mobile
23 home as far as some remodeling that we were doing. And she
24 was going to pay me half of my money that was owed, which
25 she did. She brought -- picked me up and took me to her

1 house. And we discussed what else needed to be done.

2 Q. So she picked you up from your residence?

3 A. Yes, sir.

4 Q. So who else was with you at her place?

5 A. She and I.

6 Q. During the discussion about payment and other
7 future jobs, did somehow the conversation get a little
8 sideways?

9 A. Conversation got sideways. Who I thought was her
10 friend, which was my girlfriend at the time, was brought in
11 to the conversation. And her name was kind of twisted
12 around. And Kathy told me that I didn't need to be with
13 her. And I don't want to go through the whole what all was
14 said, but that's mainly how the conversation got twisted
15 sideways. Because, evidently, she didn't care for Penny,
16 because I was with Penny. And the conversation just started
17 talking bad about her. And that's when I kind of got
18 irritated.

19 Q. Did the topic continue on that subject or did it
20 change to something else?

21 A. Topic continued on that subject. And when she had
22 told me that the subject Penny was no good for me, that's
23 when the statement was made to me that I was the N word.
24 And that's when she spit in my face. And that is when
25 things happened.

1 Q. Okay. Do you have an idea what caused her reaction
2 to call you the racial name?

3 MR. JAMES: Objection. Speculation. It's calling
4 for him to speculate on what the motives of the victim
5 were.

6 THE COURT: If he knows for sure, he can say.

7 BY MR. DAVIS:

8 Q. Do you know what reaction from you might have
9 caused that statement?

10 A. I can't honestly say what she was thinking, why she
11 would do it or said. I believed we were better than that.
12 Kathy and I talked about everything together. We were -- we
13 talked about her family, my family, Penny. So --

14 Q. But just prior to her using that slur, she had been
15 derogatory towards your relationship with Penny; is that
16 right?

17 A. Yes.

18 Q. And so then how did you react to that line of
19 statements from her? Did you say something? Did you do
20 something?

21 A. That was when I grabbed her.

22 Q. Well, now before or after she called the slur?

23 A. Right.

24 Q. Before or after she used the name?

25 A. After she used the name.

1 Q. Right. So I'm talking about before that. Okay?
2 Before that, she's being derogatory about you and Penny?

3 A. Right.

4 Q. What did you say or do in reaction to her
5 derogatorily talking about you two?

6 A. I didn't know what to say. I was caught off guard
7 because nothing had ever -- we had never been down that road
8 before.

9 Q. You stand there silent or tell her to stay out of
10 your business or tell her Penny was a good lady? Did you
11 react in any way?

12 A. I was just surprised that it came out. My reaction
13 to her was, like, where did that come from?

14 Q. But to be clear, you didn't yell at her in any way,
15 did you?

16 A. No, sir, no.

17 Q. Did you call her any name?

18 A. No, sir. No, sir.

19 Q. Did you strike her or bow up to her prior to the
20 slur?

21 A. Not prior to the slur, but after the slur, I did.

22 Q. I'm talking prior, sir.

23 A. I'm sorry.

24 Q. Okay.

25 A. Right.

1 Q. Any physical reaction towards her?

2 A. No, sir.

3 Q. Now, then she uses the slur. Did she say
4 anything -- oh, she uses the slur. And then did she
5 physically do anything?

6 A. There was --

7 Q. Did she spit on you?

8 A. She had spit in my face as she used the slur.

9 Q. Okay. Where were y'all in the residence when that
10 happened?

11 A. We were -- there's a kitchen, a dining room, and
12 then a living room. We were in between the kitchen and the
13 dining room. And there was a table right there where she
14 and I had just had coffee.

15 Q. Were you sitting or standing during this talk?

16 A. We were standing.

17 Q. Were you carrying anything or holding anything?

18 A. No, sir. At the time, I just sat my coffee cup
19 down.

20 Q. At the time she made the slur, was she carrying
21 anything or holding anything?

22 A. There was a pocket knife that I was sitting there
23 picking my nails with at the time. And it was on that
24 table.

25 Q. So it's on the table, but my question is, was Kathy

1 carrying or holding anything at the time?

2 A. Kathy had picked up that pocket knife that was on
3 the table.

4 Q. So where was it when she made the slur and spat on
5 you?

6 A. In her hand.

7 Q. Which hand?

8 A. It was in her right hand.

9 Q. She's holding the knife. She calls you a name.
10 She spits on you. What was going on in your head? Were you
11 calm? Were you shocked? Were you angry? What was in your
12 head?

13 A. I was very shocked at the time. I can't actually
14 say that I got angry. I was shocked at what was happening.
15 I don't remember getting angry. It's, like I said, nothing
16 ever had happened like that between Kathy and I.

17 Q. So then what happened?

18 A. I hit her. And then I pushed her to the living
19 room. And I picked up the phone cord and wrapped it around
20 her neck.

21 Q. Tell the judge what, if any, planning to do that
22 occurred in your mind.

23 A. There was no planning. There was no planning for
24 nothing like that. I didn't plan to even -- for nothing
25 like that to even happen. My only plan was to go there and

1 work and pick up my money. That was completely off guard.
2 I think both of us were off guard.

3 Kathy and I have had -- we've had offs and ons, me
4 working for her, go back to work for her. We've been in
5 Isle of Palms houses by ourselves all day, two or three days
6 out of the week. Just, we were a team. We worked as a
7 team.

8 Q. After she wasn't moving anymore, did you take some
9 things from the residence?

10 A. The things that were took from the residence was
11 things that had been given to me over an amount of time.
12 Kathy had held those from me because those were things from
13 a past relationship. And I had asked her to hold them
14 because I didn't want Penny to, you know -- I didn't want
15 Penny to know that I still had these objects, which I should
16 have gotten I rid of.

17 Q. The question was, did you take some items from the
18 residence?

19 A. Yes, I did.

20 Q. And you took a vehicle belonging to Kathy?

21 A. Yes, I did.

22 Q. For today's purposes for Judge Murphy, is there
23 anything following that, after you left in the van, is there
24 anything following that that you would testify that you did
25 that's different than what was brought out at trial, or is

1 the real core of your complaint about your testimony about
2 the incident?

3 A. I don't understand your question.

4 Q. Yeah. I apologize. That was a little wordy. We
5 had you testify about what happened in the house.

6 A. Yes.

7 Q. Is that the crucial argument today that you were
8 not able to present through Mr. --

9 A. Yes, I would think so.

10 Q. So as far as -- certainly, you were charged with
11 grand larceny as well, correct?

12 A. Yes, sir.

13 Q. And there was testimony about what you did
14 afterward, right?

15 A. Yes, sir.

16 Q. There was testimony about you talking to law
17 enforcement, right?

18 A. Yes, sir.

19 Q. As far as those, do you have any complaint about
20 that evidence or the way Mr. Groeber handled those things?

21 A. No, sir.

22 Q. Okay. I'm going to return just one last time to
23 what I think is a major issue. When you made physical
24 contact with Kathy and grabbed the cord and went in the
25 other room, was that cool, calm, collected planning, or was

1 that an emotional reaction?

2 A. It was a reaction. It was a reaction. It happened
3 so fast.

4 Q. One last question --

5 A. I would say it was an emotional reaction.

6 Q. One last question, Mr. Penn. When that happened,
7 did you have evil intent towards Kathy?

8 A. No, no, sir.

9 Q. Did you have meanness or cold heartedness toward
10 her?

11 A. No, sir.

12 MR. DAVIS: If I can have just one moment. Thank
13 you, Mr. Penn. Thank you. That's all the questions I have.
14 The other attorneys may have some questions for you.

15 THE COURT: Cross-examination.

16 MR. JAMES: If I may approach the witness, Your
17 Honor.

18 THE COURT: Yes, sir.

19 CROSS-EXAMINATION

20 BY MR. JAMES:

21 Q. Mr. Penn, your testimony that you gave today, did
22 you tell all of this to your attorney?

23 A. Yes, I did.

24 Q. Did you tell all of this to law enforcement?

25 A. Yes, I did.

1 Q. Was all of this a part of your confession to law
2 enforcement as to what happened?

3 A. No, sir.

4 Q. What did you leave out of your confession?

5 A. The part when she picked the knife up off the
6 table, because the knife was in evidence. And I kept asking
7 if it was in evidence or not.

8 Q. You testified that the things that you took from
9 the victim's house were only things that she had given to
10 you.

11 A. No, sir. I testified that the things I took from
12 the house were already mine.

13 Q. Already yours?

14 A. Yes, sir. She was holding them for me.

15 Q. Did that include her credit cards?

16 A. All of that stuff was in her purse. Her purse was
17 in the van.

18 Q. Does that include her husband's bracelet or her
19 bracelet with her husband's name on it?

20 A. If it was in the bag of stuff that I got, yes.

21 Q. Did you tell your defense counsel about the knife?

22 A. Yes.

23 Q. You said you changed your mind about testifying
24 because you were worried about your prior convictions coming
25 in; is that correct?

1 A. That's true.

2 Q. And that was your decision, correct?

3 A. As far as -- yes.

4 MR. JAMES: Beg the Court's indulgence for a
5 moment. No further questions for this witness, Your Honor.

6 THE COURT: Any redirect?

7 MR. DAVIS: No, Your Honor.

8 THE COURT: You may step down, sir. Thank you.

9 MR. DAVIS: That would be the applicant's
10 presentation.

11 THE COURT: Anything from the State?

12 MR. JAMES: I would very briefly like to call back
13 defense counsel, Mr. Cody Groeber.

14 THE COURT: Your witness.

15 CODY GROEBER,

16 having been previously sworn, testifies as follows:

17 RECROSS EXAMINATION

18 BY MR. JAMES:

19 Q. I will be very brief with you, Mr. Groeber. Is it
20 Groeber or Groeber?

21 A. It's Groeber, but I answer to pretty much
22 anything.

23 Q. I apologize for butchering your name all day today.
24 Mr. Groeber, did he tell you about the knife?

25 A. I do remember us discussing the knife. And what I

1 don't recall is that the knife was in her possession before
2 he or during the time that she used the N word and spat in
3 his face. I don't remember that being part of our
4 conversations.

5 Q. Now, to be clear -- scratch that. If he had told
6 you that the victim possessed the knife at the time of the
7 killing, would that have influenced your counsel to him as
8 to whether or not he should have testified?

9 A. Yes. I think that would have affected my opinion
10 about whether or not he should testify, because possession
11 of a weapon is certainly an important factor that somebody
12 would -- that a jury could consider when deciding whether or
13 not someone was adequately provoked.

14 Q. But you don't recall him ever telling you about
15 that?

16 A. I remember us talking about the knife. What I
17 don't remember is him telling me that she possessed that
18 knife when the threat or when the slur was made and when the
19 spitting was done. So that is -- I have not heard that from
20 him before.

21 Q. But you agree that would be an important factor?

22 A. Yes.

23 MR. JAMES: No further questions, Your Honor.

24 THE COURT: Any cross?

25 MR. DAVIS: May I have just a moment?

1 REDIRECT-EXAMINATION

2 BY MR. DAVIS:

3 Q. Mr. Groeber, do you recall Mr. Penn inquiring about
4 physical evidence, including the knife, whether it was
5 actually seized? Do you recall that?

6 A. I do remember us discussing physical evidence,
7 including what was taken and the knife specifically.

8 Q. And earlier on direct, you had your file with you.
9 It's still available, correct?

10 A. Yes, sir.

11 Q. But on your testimony now, specifically this issue
12 about the victim holding a knife, if and when she did, your
13 testimony now is you are not recalling specifically that.
14 But there's nothing, and correct me if I am wrong, is there
15 anything in your file to show that it was not factually
16 explained that way to you, or are you going from memory now?

17 A. Well, I probably need to look at my file,
18 specifically the letters that he wrote me, to see if that
19 was mentioned before I could answer the first part of that
20 question, which I'm happy to do, but I have to go get it.

21 Q. So the easier part of the not-artfully-created
22 question is, you are testifying from recollection now?

23 A. Yes.

24 Q. And to split the hair, you are aware that there was
25 a knife on the scene. The issue is if and when she held it?

1 That's what you are uncertain about?

2 A. What is different today is, Mr. Penn said today
3 that she possessed the knife during the slur and the
4 spitting on him. I have not heard that before today. And I
5 don't have anything in my file, as I've looked through it,
6 that indicates that particular --

7 Q. Sequence?

8 A. -- recollection or sequence of those events.

9 Q. I believe you testified on direct from the State
10 that her possession would have -- is a factor on Mr. Penn --
11 could have been a factor on Mr. Penn testifying or not, your
12 advice on that?

13 A. Absolutely. If he had -- first of all, I don't
14 recall his -- and I did not review his confession, but if
15 that fact was in his confession, then I probably would not
16 change my opinion about whether or not he needed to testify,
17 because the jury would have heard that version. I'm
18 assuming that, at least from memory, that that fact was not
19 in his confession, because I don't remember that fact coming
20 out before. And if it had, it would have certainly changed
21 the calculus, I believe, of my opinion about whether or not
22 he needed to testify.

23 Q. What still would have remained is your fear about
24 his record that would have come in under the rules or his
25 record that could have come in under him opening the door?

1 A. Yes, those would still be issues to consider and
2 concerns.

3 MR. DAVIS: May I have just another moment, Your
4 Honor, please?

5 Thank you, Your Honor. No other questions.

6 MR. JAMES: Nothing further, Your Honor.

7 THE COURT: You may step down.

8 MR. JAMES: The State has no further witnesses,
9 Your Honor.

10 THE COURT: Parties care to make a short summation?

11 MR. DAVIS: If I may, but just before that, I
12 didn't want to hold up on at least the witness. And, by the
13 way, I have no reason to have Mr. Groeber hang around unless
14 he wants to stay around. I know he's probably moved the
15 hearing, but just out of courtesy, obviously, he's released
16 as far as we are concerned.

17 MR. JAMES: I'm fine if the witness is released.

18 THE COURT: You are free to go, Mr. Groeber. Thank
19 you.

20 (Whereupon, Mr. Groeber is excused.)

21 MR. DAVIS: May I have just a moment with my client
22 before closing?

23 THE COURT: Sure.

24 MR. DAVIS: Thank you, Your Honor. May it please
25 the Court.

1 THE COURT: Yes, sir.

2 MR. DAVIS: Judge, as we said in the beginning, the
3 thrust of our argument deals with Mr. Penn not testifying.
4 On that review, all the testimony you have here, you have a
5 copy of the transcript. What we would argue is simply this,
6 that an effective lawyer owes an obligation to the client in
7 basically three ways about testimony. One, it was promised
8 in opening statement. The jurors pay attention. And the
9 theory of recency and -- primacy and recency is that they
10 pay attention to beginning and the end. So when they are
11 freshly seated, freshly under oath, what comes out at the
12 beginning, while not evidence, we would argue gets their
13 attention. And when they were promised in the beginning
14 that they would hear from Mr. Penn on the witness stand, and
15 then they don't, we believe that that is error.

16 Ultimately, that decision is client's. He
17 testified to that. He also testified to the influences on
18 his decision to testify or not. Any testimony about those
19 conversations, specifically about trial preparation -- I'm
20 sorry, testimony preparation, going through questions,
21 preparing to prevent opening the door, exactly what prior
22 record would be brought in during impeachment, while that
23 was a recurring discussion, I think from both witnesses, it
24 is clear that that was not as thorough and clear as it
25 should have been.

1 Ultimately, we have a break or lunch recess,
2 similar to the one we had today. It's discussed right up
3 until the point that Judge Dennis is calling them back in
4 the courtroom. He's got to make the decision. He relied on
5 his attorney. He made the decision himself, but relied on
6 his attorney. Both of them talked about his prior record.
7 Some would come in under the rule. Some might open the
8 door.

9 Certainly testimony there, as I think demonstrated
10 today, had that testimony that Mr. Penn presented today been
11 presented in front of a jury, that was not something that
12 would open the door. There was not the triggering
13 statement. You know: They are calling me a murderer; I
14 would never do something like that. Never? Really? Now
15 your CDV has come in.

16 I lost it. I lost. I was very emotional. I kind
17 of lost it, but, you know, never done something like that
18 before, those are the type of triggering statements that
19 only those type of trigger statements allow for the defense
20 to open the door to the State to those CDVs. There's a way
21 to prepare witnesses to avoid those.

22 So we would argue that the opening statement
23 promising more than was delivered, the lack of thorough
24 preparation to testimony was in error and, ultimately,
25 culminating into now you have seen that testimony, you have

1 heard that testimony.

2 We must show that the blame is with the trial
3 attorney. We believe we've done that. We must show that
4 the outcome would have been different. Here, obviously,
5 they would have found him not guilty, that's generally what
6 you would argue at a PCR. But here we have a unique
7 situation where on a case just about intent, while his
8 original statement and emotional statement was presented,
9 comes from some time ago. For this jury to observe
10 Mr. Penn, as you've been able to today, to handle direct and
11 cross-examination, been able to answer specific questions
12 about how he felt and what he thought, which is the key to
13 this case, whether it's murder or voluntary manslaughter, is
14 crucial.

15 And so I believe that we have carried our burden to
16 show that the choosing not to testify, while a personal
17 decision, was heavily influenced, inappropriately, by his
18 attorney. And had that testimony been presented, it's clear
19 that the outcome could have been different. The jury could
20 have bluntly, one of three things, not guilty of murder or
21 voluntary, could have hung up.

22 Now, that's not something that anybody can play
23 for. You can't play for the fumble, but if you've done this
24 long enough, you know that that is a legitimate verdict
25 sometimes that we cannot decide, despite Allen charges, we

1 still can't decide. That does not give him the win at
2 trial, but we are able to show an alternative outcome. And
3 if that testimony had been elicited, it is quite likely that
4 one or more of the jurors could have had their doubts about
5 his guilt swayed and hung up the jury.

6 Finally, and I think the more, most likely outcome
7 that is different than what happened, is that the jury
8 hearing him explain, the only surviving witness to this
9 event, what was going on in his head and his heart at the
10 time of the act, would have corroborated and compounded and
11 enhanced what they did see, which was his very emotional
12 confession. But now he gets to answer specific questions
13 about not just that he's remorseful, which has its value,
14 but don't they want to know, isn't the key to this case,
15 what was going on in his head and his heart at the time he
16 did what he admitted doing? That is the key. And for the
17 jury to hear him deal with that on direct and then
18 cross-examine, that is what helps them make the verdict not
19 guilty of murder, but guilty of voluntary manslaughter. We
20 think we've shown that would have happened.

21 So we would ask that you grant our relief on PCR,
22 that you vacate his convictions. We would argue they are
23 hand-in-hand, both the grand larceny and the murder.

24 If you are inclined to split hairs on that, we
25 understand, because we are more focused on the intent of the

1 one, but we would ask for full relief. But if you are not
2 inclined to do that, we would certainly ask for vacation of
3 his conviction on the murder, overturn his sentence and
4 allow him to return back to the county jail and face these
5 charges anew. Thank you so much, Your Honor.

6 THE COURT: Thank you, Mr. James.

7 MR. JAMES: Briefly, Your Honor, because I don't
8 know how much voice I have. Mr. Groeber was preparing his
9 client. His client walked out. He had more time to give.
10 His client didn't want to make use of it. That falls upon
11 Mr. Penn.

12 Mr. Penn told law enforcement story A. He told his
13 attorney story A. At trial, story A came out. And so when
14 it comes time to make the decision as to whether or not
15 Mr. Penn should testify, Mr. Groeber gives, very wise
16 counsel, story A is already out there. Why would we risk
17 these priors coming in? Why would we risk you getting tied
18 up by the questions of a very aggressive State after what is
19 a very brutal murder? We have danced around the facts of
20 this case, but it is truly brutal murder of a little old
21 lady with a laptop cable around her neck tied three times
22 tightly.

23 Mr. Penn doesn't take the stand. As he stated here
24 today, it was his decision not to testify. But today in
25 proffering the testimony that he supposedly would have been,

1 it isn't story A that he told to law enforcement in his
2 confession. It isn't story A that he told to his attorney.
3 It isn't story A that came out at trial. It's story B,
4 which nobody has heard before, apparently, that the victim
5 had this knife. We can't hold that against the performance
6 of counsel if he's never heard the story before. And his
7 testimony on the stand, on direct and cross-examination, was
8 that, I've never heard this before; I don't remember ever
9 hearing this.

10 Defense counsel did his job. He gave good counsel
11 to his client. He called an audible in the middle of trial
12 and said, you know, set this back out before my client, he
13 may have promised he was going to testify, but, ultimately,
14 it's Mr. Penn's decision. And Mr. Penn's decision was, I
15 don't want to testify, based upon all the information set
16 forth to him that day at trial, and as Mr. Penn himself
17 testified, in every single meeting that they had in
18 preparation.

19 So, Your Honor, the standard is *Strickland*. There
20 must be a showing of deficiency. There must be a showing of
21 prejudice there on the part of the defense counsel. There's
22 neither deficiency nor prejudice therefrom. And, therefore,
23 the State requests that relief for request be denied.

24 THE COURT: Thank you, Counsel. I will take the
25 time, of course, to read the transcript and all the

1 materials that were submitted and consider the testimony
2 that was presented. And I will notify you with my opinion.

3 MR. DAVIS: Thank you, Your Honor.

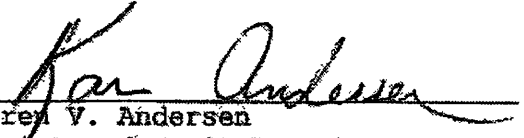
4 MR. JAMES: Thank you.

5 (Whereupon, proceedings are adjourned.)
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CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter for the State of South Carolina
at Large, do hereby certify that the foregoing transcript is
a true, accurate and complete Transcript of Record of the
proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	
David J. Penn,	)	Case No.: 2016-CP-08-02428
S.C.D.C. No. 312196,	)	
	)	
Applicant,	)	
	)	ORDER OF DISMISSAL
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

2018 APR -9 PM 4:54
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, S.C.

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This matter comes before the Court by way of an application for post-conviction relief filed by David J. Penn ("Applicant") on June 29, 2016. Respondent made its return on or about August 14, 2017. The Court convened an evidentiary hearing into the matter on Monday, January 29, 2018, at the Berkeley County Courthouse in Moncks Corner, South Carolina. Applicant was present at the hearing and represented by Rodney D. Davis, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Cody Groeber, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Berkeley County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted at the April 2012 term of the Berkeley County Grand Jury for murder (2012-GS-08-00501), and grand larceny,

value more than \$2,000 but less than \$10,000 (2012-GS-08-00502). Cody Groeber, Esq. and David Schwacke, Esq. represented Applicant. Anne Williams and Colleen Dixon, of the Ninth Circuit Solicitor's Office, prosecuted the case. On September 30, 2013, Applicant proceeded to trial before the Honorable R. Markley Dennis, Jr. and a jury. The jury found Applicant guilty as indicted on October 1, 2013. Judge Dennis sentenced Applicant to imprisonment for concurrent terms of 35 years for murder, and 5 years for grand larceny.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esq., who raised the following four issues to the South Carolina Court of Appeals:

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" [known] to incite violence, there was evidence in this case of the most provocative fighting word in the English language?

The parties proceeded to oral arguments on January 6, 2016. Applicant was represented by Mr. Dudek, Esq., and Garoline M. Scrantom, of the South Carolina Attorney General's Office, represented Respondent. By opinion decided March 2, 2016, the South Carolina Court of

Appeals affirmed Applicant's convictions. State v. Penn, Op. No. 2016-UP-114 (S.C. Ct. App. 2016). Applicant initially sought to petition the Supreme Court of South Carolina for a writ of certiorari, but subsequently informed appellate counsel that he did not wish to pursue the petition. Mr. Dudek informed the Court that further appeal would not be pursued by letter dated June 16, 2016. The Remittitur was issued on July 13, 2016.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Sixth Amendment Violation"
 - a. "Impartial Jury"

At the evidentiary hearing, Applicant, by and through counsel, orally amended his application to proceed *only* on the following allegations:

1. Ineffective assistance of counsel, in that:
 - a. Trial counsel promised the jury that Applicant would testify;
 - b. Trial counsel failed to adequately prepare Applicant to testify;
 - c. Trial counsel misadvised Applicant to not testify at trial;
 - d. Trial counsel failed to have Applicant's potential impeachment exposure explained in a colloquy on the record.

Respondent did not object to Applicant's amendment.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this

prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Prepare, Call Applicant as a Witness

Applicant alleges Counsel was deficient in failing to prepare and call Applicant as a witness at trial, despite informing the jury in his opening statement that Applicant would testify. The right of a criminal defendant to testify or not to testify is fundamental to our system of jurisprudence, and every defendant is privileged to either testify in his own defense or refuse to do so. State v. Rivera, 402 S.C. 225, 241-42, 741 S.E.2d 694, 702-03 (2013). The ultimate decision of whether to testify is not one for defense counsel to make, but lies exclusively with the accused. Id., 402 S.C. at 243, n.2, 741 S.E.2d at 703, n.2.

i. Trial

Counsel, during his opening statement at trial, informed the jury in no uncertain terms that Applicant would take the stand and testify:

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 started to argue.

(Tr. 160, ll. 1-8). Counsel then summarized Applicant's version of events—that he was provoked into an uncontrollable rage when the victim called him a racial epithet and spat in his face, and so killed her by strangling her with a phone cord still plugged into the wall. (Tr. 160, ll. 9-25). The issue at trial was not whether Applicant killed the victim, but only whether it constituted murder or voluntary manslaughter. (Tr. 157, 162).

After the lunch recess on the second day of trial, the Court inquired as to whether Applicant would testify, to which Counsel replied that Applicant would not. (Tr. 353-54). The Court asked Applicant if he had opportunity to discuss the matter with Counsel, if he had been able to ask questions concerning his right, whether they had discussed the strategies that accompanied each available choice, and whether he understood his right to testify; in each instance, Applicant answered in the affirmative. (Tr. 354-56). Applicant affirmed that it was his decision not to testify. (Tr. 356, ll. 11-13). Applicant stated that Counsel advised that not testifying was in Applicant's best interest. (Tr. 356, ll. 18-24). Applicant indicated he was satisfied with Counsel's advice on the subject. (Tr. 357-58). The Court accepted Applicant's decision as freely and voluntarily made, and Counsel called no witnesses in Applicant's defense. The Court instructed the jury to not consider or infer anything from Applicant's assertion of his right to remain silent. (Tr. 415-16). Applicant's prior record was not discussed on the record until sentencing. (Tr. 456-57).

ii. Evidentiary Hearing Testimony

At the evidentiary hearing, Counsel testified he met with Applicant at least five to six times prior to trial. Counsel stated that the overarching strategy at trial was to show and argue that Applicant was provoked into killing the victim. Counsel explained that at the time of his

opening statement, he intended to call Applicant as a witness. Counsel recalled meeting with Applicant on September 18, 2013, shortly before trial, and preparing him to testify. Counsel could not recall if he discussed the strategic consideration of "last argument" prior to trial, but was sure that he did so at trial. Counsel explained that, as a general matter, he never tells clients that they absolutely must or must not testify. Counsel expressed his belief from the time of trial that most of the benefit that Applicant would have received from testifying was already covered by the introduction of Applicant's recorded statement. Counsel agreed that Applicant's potential impeachment with his prior record would have been important, but did not have a specific recollection of discussing the subject at trial, though he expressed a firm belief that he did so. Counsel recalled worrying that Applicant would say something to bring in his prior convictions for criminal domestic violence and cocaine convictions. Counsel explained that the entirety of his discussions with Applicant during the lunch recess focused on whether or not Applicant would testify. Applicant ultimately indicated he would not testify.

On cross-examination, Counsel recalled Applicant was upset prior to trial about not receiving copies of certain e-mails and consequently cut short a preparatory pre-trial meeting. Applicant expressed to Counsel his belief that retained counsel would do a superior job and that race would be a factor at trial. Counsel noted that he had more time to give to Applicant to prepare, and that he was unable to review a portion of discovery with Applicant due to his leaving the meeting. Counsel noted that in most cases he gets a ruling on prior record impeachment and that he would have sought such a ruling had Applicant asked for one. Counsel more firmly asserted that he discussed with Applicant the subject of impeachment with his prior record. Counsel believed at the start of trial that Applicant was going to testify, but formed the opinion after the State rested that Applicant's main concerns were addressed in his confession

and that Applicant's testimony would lead to his prior convictions coming out. Counsel denied ever telling Applicant not to testify or that he could not testify.

Applicant testified he met with Counsel six or seven times at the jail. Applicant recalled that the question of whether he would testify was discussed at every meeting, and that Applicant thought he was going to testify. Applicant expressed he was sure he discussed the right not to testify with Counsel. Applicant testified he wasn't prepared on *how* to testify: speaking volume, what to do during an objection, or what questions he could expect the State to ask, for example. Applicant recalled talking about "opening the door," but could not remember whether or not Counsel discussed how to avoid doing so. Applicant could not recall discussing whether to testify with the Judge at trial, or the specifics of Counsel's advice during the lunch recess. Applicant testified he changed his mind on testifying after Counsel warned that his prior convictions could come in. Applicant recalled discussing priors before trial and talking about which ones would come in.

Applicant then proffered the testimony he would have given at trial. The victim picked Applicant up on the day of the incident and paid Applicant half of what she owed him for work he had performed. They drank coffee and discussed the remaining work that was needed around the victim's residence, but ultimately the conversation drifted to the subject of Applicant's girlfriend. The victim did not believe Applicant should be in a relationship with her and disliked the girlfriend. The victim became increasingly agitated until she called Applicant the "N-word" and spat on him. Applicant claimed the victim picked up a pocket knife that Applicant had been using to clean his fingernails. Applicant denied ever feeling angry, just shocked. Applicant testified he struck the victim, grabbed a cord, and wrapped it around the victim's neck.

Applicant testified he only took things from the residence that had been previously given to him, but held by the victim.

On cross-examination, Applicant testified he left out any mention of the knife in his confession, but told both Counsel and law enforcement about it. Applicant stated he repeatedly asked Counsel about the knife being in evidence. Applicant affirmed that he changed his mind about testifying and that it was his decision not to testify.

Respondent called Counsel as a witness as part of its own case in response. Counsel confirmed discussing the knife with Applicant, but did not recall the victim ever having the knife. Counsel confirmed that the facts as proffered would have changed, or at least impacted his opinion, and that the knife being in the victim's hand at the moment of provocation would have been an important factor in determining whether Applicant should testify. On cross-examination, Counsel reaffirmed that Applicant never told him a version of events where the victim possessed the knife.

iii. Findings

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The testimony at the evidentiary hearing was consistent that both Applicant and Counsel expected Applicant to testify at the time Counsel presented his opening statement. The Court finds that the trial judge asked Applicant, prior to the defense resting whether he wished to testify and that Applicant stated he did not. The trial judge also instructed the jury that they could not take into consideration a defendant's decision not to testify. The Court finds that Applicant was not prejudiced by the opening statement and any error was cured by the jury charge. Furthermore, Applicant affirmed at the evidentiary hearing that the decision not to testify was his own. The

Court can find no deficiency on the part of Counsel for the consequences of a decision that was Applicant's and Applicant's alone.

2. Failure to Request Ruling on Impeachable Prior Bad Acts

As to Counsel's alleged failure to request a ruling on the admissibility of impeachable convictions, though there is considerable case law on the subject, there is no requirement that defense counsel request a Rule 609 hearing prior to the defendant deciding whether to testify. The burden of establishing the admissibility of such evidence is on the party attempting to impeach the witness with prior convictions. State v. Scriven, 339 S.C. 333, 340, 529 S.E.2d 71, 74 (Ct. App. 2000); see also U.S. v. Cunningham, 638 F.2d 696 (4th Cir. 1981). Therefore, where the State does not inform the court of its desire to question the defendant about his or her prior convictions, as was the case here, no Rule 609 hearing needs to occur. There is no affirmative requirement for defense counsel to request a hearing on the admissibility of the defendant's prior convictions before the defendant makes a decision whether to testify. Accordingly, the Court finds that it was not an error for Counsel not to request a ruling from the trial judge as to the admissibility of defendant's prior convictions as impeachment evidence.

[Conclusion and signature on following page]

III. CONCLUSION

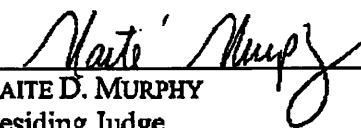
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

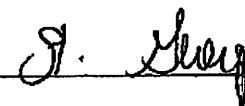
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 29 day of March, 2018.


 MAITE D. MURPHY
 Presiding Judge
 Ninth Judicial Circuit

, South Carolina

AMW2011-10-01502

WITNESSES

Berkeley County Sheriff's Office

[Signature]

AGENCY CASE NUMBER

201110044427

ARREST WARRANT NUMBER

M334458

DATE OF ARREST

October 17, 2011

ACTION OF GRAND JURY

True Bill

[Signature]

Foreperson of Grand Jury

Date: 4/11/12

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2012-GS-08-0501

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

April Term 2012

THE STATE

Vs

DAVID JUDSON PENN

DOB: 1959

B/M

Indictment for

Murder

12 APR 11 PM 12:37
MARY P. GROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

FILED

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

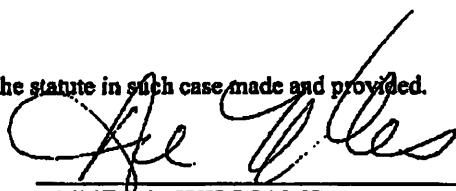
INDICTMENT

At a Court of General Sessions, convened on April 11, 2012 the Grand Jurors of Berkeley County present upon their oath:

Murder

That David Judson Penn did in Berkeley County on or about October 12, 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 thereof on October 12, 2011; in violation of Section 16-3-10 of the South Carolina Code of Laws (1976) as amended.

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



ANNE M. WILLIAMS
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Berkeley
STATE VS.
David Judson Penn

INDICTMENT/CASE#: 2012-GS-08-0501

AKA: _____

A/W#: M334458

Race: BLACK Sex: M Age: 54

Date of Offense: 10/12/2011

DOB: 1959 SS#: ██████████

S.C. Code § : 16-03-0010, 0020

Address: ██████████

CDR Code #: 0116

City, State, Zip: Alvin, SC 29479

SENTENCE SHEET

DL#: ██████████ SID#: SC01452877

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

☒ CONVICTED OF or ☐ PLEADS

In disposition of the said indictment comes now the Defendant who was
TO: Murder

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Williams, Anne 76463 SC Bar# _____ Defendant _____ Attorney for Defendant _____ SC Bar# _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 35 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. Since Oct 15, 2011

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$	
§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,

§ 47.12 requires \$500 be paid to Clerk

during probation.

Clerk of Court/Deputy Clerk L. Hill

Court Reporter: D. Garrison

SCCA/217 (03/2011)

Presiding Judge [Signature]

Judge Code: 2060

Sentence Date: 10/11/2013

✓

AMW2011-10-01502

WITNESSES

Berkeley County Sheriff's Office

[Signature]

AGENCY CASE NUMBER

201110044427

ARREST WARRANT NUMBER

M334459

DATE OF ARREST

October 17, 2011

ACTION OF GRAND JURY

True Bill

[Signature]
Foreperson of Grand Jury

Date: 4/11/12

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2012-GS-08-0502

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

April Term 2012

THE STATE

Vs

DAVID JUDSON PENN

DOB: [REDACTED]

B/M

Indictment for

Grand Larceny

648

FILED

[Handwritten initials]

12 APR 11 PM 12:37

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

✓

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

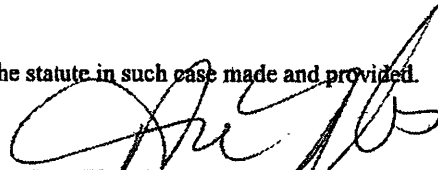
INDICTMENT

At a Court of General Sessions, convened on April 11, 2012 the Grand Jurors of Berkeley County present upon their oath:

Grand Larceny

That David Judson Penn did in Berkeley County, South Carolina, on or about October 12, 2011, take and carry away the property of Kathy Chrastina, valued more than \$2, 000 but less than \$10,000, described as follows 2004 Chevrolet Venture minivan, with intent to deprive the owner of such property; in violation of Section 16-13-30 of the South Carolina Code of Laws (1976) as amended.

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



ANNE M. WILLIAMS
ASSISTANT SOLICITOR

650

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Berkeley

VS.

David Judson Penn

AKA:

Race: BLACK Sex: M Age: 54

DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip: Alvin, SC 29479

DL#: [REDACTED] SID#: SC01452877

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Larceny / Grand Larceny, value more than \$2,000 but less than \$10,000

In violation of § 16-13-0030(B) of the S.C. Code of Laws, bearing CDR Code # 3420

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Williams, Anne

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. Issued Oct 16, 2011☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

Proviso 90.5 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$	
\$	
\$	100.00
\$	
\$	
\$	
\$	
\$	
\$	25.00
\$	
\$	
\$	
\$	
\$	500
\$	390
\$	133.90

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012-GS-08-0502

A/W#: M334439

Date of Offense: 10/12/2011

S.C. Code § : 16-13-0030(B)

CDR Code #: 3420

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code: 2840

Sentence Date: 10/13/11

Clerk of Court/ Deputy Clerk

Court Reporter: D. Garrison

SCCA/217 (03/2011)