

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

CERTIORARI TO BERKELEY COUNTY
Court of Common Pleas in a Post-Conviction Relief Action
Maite Murphy, Circuit Court Judge

Appellate Case No. 2018-000882

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S.C. SUPREME COURT

DAVID JUDSON PENN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. In violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, did trial counsel provide ineffective assistance by failing to prepare and call Petitioner as a witness where (1) trial counsel informed the jury in his opening statement that Petitioner would testify and (2) the only way the jury could learn that the deceased was armed with a knife was if Petitioner testified, which was imperative to the defense's strategy that he was guilty of voluntary manslaughter, not murder?

II. In violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, did trial counsel provide ineffective assistance by failing to request a ruling on the state's ability to use Petitioner's prior record for impeachment if Petitioner were to testify where trial counsel indicated his advice to Petitioner not to testify was based upon his fear that the state would use Petitioner's prior conviction against him and a ruling on the matter would have assisted Petitioner in deciding whether to testify?

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

I. Whether the record supports the PCR court's determination that trial counsel was not deficient regarding his preparing for and representing to the jury that Petitioner would testify when Petitioner unequivocally testified that he later decided not to take the stand after being duly advised on that choice by his counsel.

II. Whether the record supports the PCR court's determination that trial counsel did not error in failing to ask the trial court for a ruling regarding the admissibility of each of Petitioner's prior convictions should he choose to testify where the burden of doing so rests on the State as the proponent of that evidence and where counsel advised his client on impeachable prior bad acts.

STATEMENT OF THE CASE

A Berkeley County Grand Jury indicted Petitioner David Penn in April 2012 for the murder of Kathy Chrastina and for grand larceny of a minivan taken from Chrastina's home. (App. 645-49). Law enforcement discovered that Chrastina had been strangled to death in her living room, where she was discovered with a laptop power cord wrapped around her neck three times and then looped back through itself. (App. 166-67, 322-29). Petitioner proceeded to a jury trial beginning September 30, 2013, before the Honorable R. Markley Dennis, Jr. (App. 1). David Schwacke and Cody Groeber of the Ninth Circuit Public Defender's Office represented Petitioner, and Assistant Ninth Circuit Solicitors Anne Williams and Colleen Dixon prosecuted the case. (App. 1).

At trial, the State introduced Petitioner's video and audio-recorded confession provided to law enforcement upon arrest.¹ (App. 292-305). Petitioner turned himself in a few days later and told police:

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.

¹ The State introduced the video-taped confession with two redactions in an exhibit marked 49-A. (App. 301). Petitioner designated this video as part of this record, but this Court discovered when it was transported that the original exhibit became damaged after the trial and could not be played. As a result, the unredacted copy of this video, Exhibit 49, has been designated by consent. (Jan. 15, 2019 Ltr. in App. Case No. 2018-000822 from Susan Hackett to the Hon. Daniel Shearouse). The entire video, without redactions, runs just under one hour and six minutes. (Ex. 49). As is evident from the trial transcript, any portion of Exhibit 49 which mentions a prior criminal domestic violence conviction and a life without parole sentence are not to be considered as part of the record introduced at trial. (App. 102).

(State's Ex. 49 at 11:22-12:36).

One of the officers asked, "And then what happened?" (State's Ex. 49 at 12:38). Petitioner 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. I'm not a bad person. I've always worked. I've got a drug problem, man." (State's Ex. 49 at 12:41-13:05). Petitioner told the officers that he used a computer cord to strangle her. (State's Ex. 49 at 14:27-14:38). Petitioner expounded, "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 at 14:55-15:01).

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 at 15:05-15:36).

Petitioner drew a diagram of the victim's residence, marking where police would find her and other individual items like her computer. (State's Ex. 49 at 31:58-36:45). He did not mention a pocket knife.

In addition to the videotaped confession, the State presented various witnesses who testified about their interactions with Petitioner shortly after he killed the victim. Petitioner's former employer Darrell Hackney testified that he received a phone call in which Petitioner, upset, stated "Nobody will help me and now I've done it. I got some bad stuff." (App. 201-04). Hackney agreed to meet Petitioner to pay him for some work he had completed. When they met, Petitioner told Hackney that he had killed someone and that he was "messed up for the rest of [his] life." (App. 204-05; App. 209-10). Hackney left that meeting and called the police. (App. 205).

The State also presented Patty Cobb, the sister of Petitioner's ex-girlfriend. (App. 279-87). Cobb testified that Petitioner called her, said "he had done something bad," and asked Cobb to have her sister call him. (App. 284). Cobb also testified that about two days later, she answered a phone call from Petitioner where he "said that he had killed Miss Kathy and then he said 'maybe it should have been your sister, then you.'" (App. 284).

The State also introduced various voicemails Petitioner left with his ex-girlfriend Penny Blair's voicemailbox. (App. 310-13). In the messages, Petitioner expressed anger at least in part directed at Blair's sister. (App. 310-11, 316). Within the voicemails Petitioner indicated that he harmed someone else, stating "You don't know the point that I was at . . . I should have got that b---- first, she's the one I should have done. . . . Your sister was next and then her boyfriend." (App. 383, 398, 403).

Petitioner conceded his responsibility for the victim's death at trial but argued that he did not have the requisite intent to be found guilty of murder. Petitioner instead argued that he committed voluntary manslaughter as a result of the provocation by the victim as described in his videotaped confession. (App. 157-62). Though Petitioner planned to testify at trial, and his trial counsel informed the jury of the same during the opening statement, Petitioner later elected not to testify and the trial court charged the jury that they were not to consider that fact in their deliberations. (App. 160, 354-58, 416, 607). The State did not request, and Judge Dennis did not initiate, a colloquy regarding the admissibility of Petitioner's prior criminal record. (App. 346-59). Petitioner put forth no additional witnesses at trial. (App. 359).

The jury returned a verdict of guilty as to murder and grand larceny. (App. 448-49). Judge Dennis sentenced Petitioner to 35 years' incarceration on the murder conviction, and a concurrent five years for grand larceny. (App. 471-72, 647, 650). Accordingly, Petitioner is

presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court.

Petitioner pursued a timely appeal of his convictions and sentence, raising four issues on direct appeal pertaining to the propriety of the jury instructions at trial. (App. 477). The South Carolina Court of Appeals affirmed in an unpublished opinion after oral argument. (App. 530-32 (*State v. Penn*, Op. No. 2016-UP-114 (S.C. Ct. App. Mar. 2, 2016))). Petitioner sought rehearing and was denied, with the Remittitur following on July 13, 2016. (App. 533-41).

Petitioner initiated this post-conviction relief (PCR) action with the filing of his *pro se* application on January 15, 2013. (App. 542-51). By and through PCR counsel Rodney Davis, Petitioner defined the claims through which he sought PCR in an oral amendment made at the time the case was called for an evidentiary hearing. (App. 568). Petitioner proceeded on the ineffective assistance of counsel allegations which may be summarized from the record and from the PCR court's Order as follows: (1) failure to prepare and call Petitioner as a witness; and (1) failure to request a ruling from the trial court on Petitioner's impeachable prior bad acts. (App. 569-70, 638-43). At a January 29, 2018, evidentiary hearing held before the Honorable Maite Murphy, trial counsel Groeber and Petitioner each testified in furtherance of the amended allegations in the manner expounded upon in the remainder of this Return. (App. 566).

Two months later, Judge Murphy issued an Order which denied and dismissed Petitioner's PCR application with prejudice. (App. 634-44). By and through PCR counsel, Petitioner served a notice of appeal upon Respondent on May 9, 2018. Represented by Susan Hackett with the South Carolina Commission on Indigent Defense, Petitioner filed his Petition for Writ of Certiorari, to which Respondent makes the instant Return.

STANDARD OF REVIEW

“On certiorari in PCR cases, the Court applies an ‘any evidence’ standard of review. *McHam v. State*, 404 S.C. 465, 472, 746 S.E.2d 41, 45 (2013). This Court will affirm the PCR court’s findings if there exists “any evidence of probative value” to sustain them, and will “reverse the PCR judge’s decision when it is controlled by an error of law.” *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007). “This Court gives great deference to the PCR judge’s findings of fact and conclusions of law.” *McHam v. State, supra*.

ARGUMENT

- I. **The record supports the PCR court’s determination that Petitioner chose not to testify after being advised by counsel and no error and prejudice results from counsel’s informing the jury during his opening statement that they would hear from Petitioner when that statement reflected counsel and client’s expectations at the time it was made.**

Petitioner alleges that counsel rendered deficient performance when he failed to prepare Petitioner to testify as a witness and failed to call him as a witness, yet informed the jury in his opening statement that they would hear testimony from Petitioner. The PCR court found no error or prejudice by counsel on this issue, noting (1) that the decision to testify lies with the accused and not trial counsel, and ruling (2) that both attorney and client expected the defendant would testify at trial until Petitioner himself chose not to do so, and (3) that any error in the opening statement was cured by the trial court’s final charge to the jury. (App. 638-43). Certiorari on this issue is not warranted as the circuit court records support the PCR court’s ruling, and as that ruling is appropriately rooted in law and fact.

“In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant’s case.”

Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). In regards to the first prong, “[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms.” *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065. The second prong requires a showing that counsel’s deficient performance 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 v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

At all times during the proceeding, Petitioner maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with “a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). “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, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). Therefore, Petitioner must demonstrate 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.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064).

Here, Petitioner had to elect whether to take the stand in his defense. “The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell

the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions.” *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Rule 609, SCRE). The decision itself belongs to the client and not counsel. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983) (“the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify on his own behalf”); *State v. Rivera*, 402 S.C. 225, 243, 741 S.E.2d 694, 703 (2013) (“The trial court’s thorough colloquy with Appellant demonstrates the trial court well understood the fundamental nature of the right to testify and that the decision rested solely with Appellant.”).

Counsel maintains a duty to advise Petitioner of his Fifth Amendment rights and the risks, rewards, and consequences associated with the decision to testify. *See* U.S. Const. Amend. V. “A defendant’s decision to testify or not must be made with knowledge of the consequences of either choice.” *Brown v. State*, 340 S.C. at 594, 533 S.E.2d at 310. But where the record evidences that a defendant received the advice of counsel on this point, the “advice not to testify is a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance.” *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir. 1983). Such advice constitutes a tactical decision, which cannot be “second-guessed” by the court reviewing a collateral attack. *Sexton v. French*, 163 F.3d 874, 887 (4th Cir. 1998); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel); *see also Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel); *Carter v. Lee*, 283 F.3d 240, 249 (4th Cir.

2002) (defendant must overcome presumption that the challenged action might be considered sound trial strategy).

The PCR court was correct to find that counsel did not render deficient performance when he informed the jury that they would hear from Petitioner. Trial counsel based his opening statement upon his client's version of events as expressed in his videotaped confession: that Petitioner killed the victim, but did it as a result of being provoked into an impassioned rage when the victim called him a racial epithet and spat in his face. (App. 160-62; State's Ex. 49). Trial counsel informed his decision at that time, quite properly, on the chosen strategy to concede guilt to voluntary manslaughter and argue that Petitioner did not embody the intent required to be found guilty of murder. (App. 573). At the time of opening statements, both counsel and Petitioner believed Petitioner would take the stand and testify as to his version of events. (App. 593, 607, 609). It was not deficient for counsel to therefore frame the issue to the jury in the manner employed. "[W]hen counsel articulates a **valid** reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original).

Moreover, the PCR record reflects that counsel duly advised Petitioner on his choice to testify such that no finding of deficient performance or prejudice can result. Trial counsel Groeber expounded at PCR that it was never his practice to tell a client they absolutely should or should not testify—"that is a decision that needs to be theirs." (App. 578-79). Groeber recalled telling Petitioner "that a lot of the concerns that [Petitioner] had, that he wanted to make sure the jury understood, [Groeber] felt had been address in his confession. That was incredibly emotional and sincere." (App. 579). After the State rested, Groeber explained that he then

formed the opinion that the main points and concerns Petitioner wished to express by testifying had been expressed through the videotaped confession. “[T]here was a lot of danger for him in testifying”—“additional crimes could come out.” (App. 593-94).

According to counsel, the decision whether he would take the stand at all times lay with Petitioner. (App. 594). Groeber testified that it was part of his ordinary practice to talk with Petitioner about all of the things to consider when deciding whether to testify at trial: “someone’s record, what would be admissible, what could arguably be admissible, how things would come in that were not necessarily admissible but that could become admissible based on his testimony,” and how the decision would affect the order of closing arguments. (App. 577-78). Petitioner’s prior record “would have been a very high thing or one of the most important things that [they] would have talked about in relation to whether or not he should testify.” (App. 579-80).

Reviewing his file from the case, Groeber identified a folder prepared on Petitioner’s criminal record, and testified about his analysis of each particular prior conviction’s admissibility had Petitioner testified at trial (App. 580-82). Petitioner had prior convictions for a series of crimes of dishonesty such as theft, burglary, bad checks, and false information. (App. 581-82). Petitioner also had two prior criminal domestic violence convictions. (App. 581-82). Groeber assessed, “in a case where there was violence at issue, [he] had a concern that possibly, through testimony of the defendant, that that evidence could come in if he made some sort of statement that would put at issue his tendency to violence or no tendency for violence.” (App. 581-82). Groeber recalled that he would have explained this possibility to Petitioner. (App. 590).

Groeber also recalled that after the State rested its case, he and Petitioner spent the lunch recess at trial that day discussing whether he would testify. (App. 583; *see also* App. 346). When the parties returned for the afternoon session, it was time for Petitioner to decide whether to

testify, and Groeber recalled it being a “very difficult decision” for his client, who ultimately decided he would not take the stand. (App. 584-85).

Petitioner’s testimony did not conflict with that of his trial counsel. Petitioner did expect to be able to testify at the outset of trial and “up until the court time” where he informed the court he would not. (App. 607, 609). Petitioner unequivocally stated it was his decision not to testify at trial. (App. 621). Consistent with trial counsel’s stance on the issue, Petitioner did not remember whether trial counsel advised him whether he should or should not testify. (App. 609). Instead, he discussed the option with trial counsel and learned that his prior criminal record could come in if he testified. (App. 609-10). Though he did not recall being specifically prepared on “how” to testify, he did specifically recall trial counsel speaking to him about how it was possible to “open the door to [his] past history” if some of his prior charges “were brought up.” (App. 606). They reviewed the specifics of his prior record in terms of admissibility and Petitioner “was certain of the ones that might open the door to” cross-examination by the State. (App. 610).

Both trial counsel and Petitioner’s testimonies reflect that Petitioner was duly advised about the ramifications of testifying at trial. *Brown v. State, supra*. Ultimately, as the record also demonstrates, Petitioner chose not to testify because doing so risked exposing the jury to his prior criminal record, which included a series of previous convictions for crimes of dishonesty, as well as two prior domestic violence convictions which were arguably relevant based on the facts of this case. (App. 580-82, 609-10). However, the jury was instructed that they could not consider the fact that Petitioner did not testify in their deliberations. (App. 417). The “trial judge must, if requested, instruct the jury that the defendant’s failure to testify cannot be held against him or considered by the jury in any manner during its deliberations.” *State v. Gunter*, 286 S.C. 556, 335 S.E.2d 542 (1985). Juries are presumed to follow instructions. *State v. Young*, 420 S.C.

608, 623, 803 S.E.2d 888, 896 (Ct. App. 2017). Petitioner has not demonstrated prejudice flowing from the opening statement which could not be cured by the jury instruction.

The record supports the PCR court's determination that Petitioner was not prejudiced by counsel's opening statement that the jury would hear from Petitioner. (App. 642). Petitioner has not otherwise shown a reasonable probability of a different result at trial had the jury heard Petitioner's proffer from the PCR hearing prior to their deliberations. *See Cherry v. State, supra; Brown v. State*, 340 S.C. at 596, 533 S.E.2d at 311 (discussing prejudice prong in context of a defendant's choice to testify at trial). At PCR, Petitioner testified about what happened that led him to strangle the victim. That testimony was largely cumulative to what the jury did hear. Just as is reflected in the videotaped confession played at trial, Petitioner stated that he was at the victim's home to do some remodeling work when their "conversation got sideways." (App. 611-12; State's Ex. 49 at 11:22-12:36). According to Petitioner, the victim for the first time told Petitioner that she did not care for his girlfriend, Penny Blair, and openly opined that he should not date her. (App. 612). Then, the victim called him the N-word and spit in his face, "[a]nd that is when things happened." (App. 612). He hit her and then "pushed her to the living room" and "picked up the phone cord and wrapped it around her neck." (App. 616; State's Ex. 49 at 12:41-14:38). "There was no planning." (App. 616-17; *see also* State's Ex. 49 at 15:05-15:36). When prompted, he did state that he had "an emotional reaction." (App. 619; *see also* State's Ex. 49 at 14:55-15:01). He also stated, as is included in the video, that he took some items from her residence, left in her van, and eventually got rid of some things before turning himself in. (App. 617; *see generally* State's Ex. 49 at 19:23 and 41:25).

In response to the slur, Petitioner testified at PCR that he "was very shocked at the time" but that he "can't actually say that [he] got angry." (App. 616). Elsewhere, he testified he "kind

of got irritated.” (App. 612). This description of his reaction does not support a verdict as to voluntary manslaughter,² which “is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation.” *State v. Cooley*, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000). “Both heat of passion and sufficient legal provocation must be present at the time of the killing.” *Id.*

Petitioner’s proffer elsewhere materially diverged from the videotaped confession where he stated that he had been having a cup of coffee at a table in the victim’s home and picking his nails with a pocket knife when this happened. (App. 614-15). He said the victim “picked up that pocket knife that was on the table” when she made the racial slur. (App. 616). Petitioner testified at PCR that he told trial counsel the same story he provided to the PCR court. He stated he omitted from his videotaped confession “[t]he part when she picked the knife up off the table, because the knife was in evidence.” (App. 620). Of course, additional evidence concerning sufficient legal provocation may support a finding of voluntary manslaughter. *State v. Cooley*, *supra*. “When death is caused by the use of a deadly weapon, words alone, however opprobrious, cannot constitute sufficient legal provocation. Rather, the offending words 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)). However, Petitioner’s description of the pocket knife fails to measure as indicia of an overt threatening act which could have produced the heat of passion—by his own testimony he was “picking [his] nails” with that very knife. (App. 616). “Sufficient legal provocation must

² Petitioner’s videotaped confession which played at trial gave an emotional response. (State’s Ex. 49). The contents of the video additionally lends credence to the reasonableness of trial counsel’s assessment regarding its sincerity. (App. 579). “. . . I was a timebomb waiting to go off. . . 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. . . .” (State’s Ex. 49 at 11:22-15:36).

include more than ‘mere words’ or a display of a willingness to fight without an overt, threatening act.” *State v. Hernandez*, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010). It is unknown from the record whether the pocket knife was open or closed at the time. And Petitioner’s testimony fails to demonstrate that the victim did anything other than hold the pocket knife in her hand. Petitioner did not represent that she directed the pocket knife at him in any action she took. In fact, Petitioner did not state he was scared or angered in response, but rather that he was shocked. (App. 615-17, 620).

More critically, by all indications, the PCR hearing was the first time counsel’s former client made him aware of that particular string of actions. (App. 624). Petitioner cannot establish deficient performance and prejudice upon a fact previously undisclosed to his trial counsel. *Stone v. State*, 419 S.C. 370, 397, 798 S.E.2d 561, 575, *cert. denied*, 138 S.Ct. 392, 199 L. Ed. 2d 290 (2017) (“trial counsel could not have presented this evidence to the jury because they did not know about his brain damage”). On re-call, trial counsel retorted that he remembered them “talking about the knife,” but did not recall Petitioner ever before sharing that the victim “possessed the knife during the slur and spitting on him.” (App. 621-22, 624). Though Petitioner’s testimony concerning the pocketknife was not cumulative to the remainder of the videotaped confession, trial counsel unequivocally testified that he had “not heard that before” the PCR hearing, and did not have anything in his file indicating “that particular [] recollection or sequence of those events.” (App. 624). Groeber elsewhere explained that in one meeting with Petitioner about two weeks prior to trial, Petitioner left the meeting without completing their trial preparations. (App. 577). Groeber testified that this new rendition may have changed his mind about whether Petitioner should testify at trial, but that he nonetheless remained concerned about the admissibility of Petitioner’s prior convictions. (App. 622, 624-25).

Indeed, even taking into account the proffered testimony, Petitioner risked introduction of his prior convictions for crimes of dishonesty, and potentially for domestic violence, if he elected to testify. As the PCR court found, Petitioner made the choice not to testify when presented with the potential admission of his criminal record. (App. 621). On the totality of the foregoing, Petitioner has failed to demonstrate a reasonable probability of a different outcome at trial, and the record supports the findings of the PCR court on the issue of Petitioner's election not to testify. *See Jackson v. State*, 329 S.C. 345, 352–53, 495 S.E.2d 768, 772 (1998) (no prejudice where counsel advised client not to testify because of client's prior convictions).

II. The record supports the PCR court's determination that counsel was not deficient for failing to request a ruling on impeachable prior bad acts and where counsel did not erroneously advise his client on this point.

The PCR court found no error by counsel for failing to seek a ruling from the trial court on the admissibility of Petitioner's prior convictions. (App. 643). Certiorari is not warranted on this issue because, as found by the PCR court, defense counsel is fastened with no affirmative requirement to request a hearing on the admissibility of impeachable prior bad acts before the defendant renders his decision to testify. *State v. Scriven*, 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000) ("On this record, we are unable to determine that the trial judge initially placed the burden of establishing admissibility on the State, as required by Rule 609(a)."). Petitioner is not entitled to perfect advocacy judged with benefit of hindsight, but rather to representation that falls reasonably in line with prevailing professional norms. *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065. Thus, when the State does not request a ruling on impeachable prior offenses for use at trial, Petitioner's counsel does not render deficient performance for failing to request one. Petitioner himself also did not request that trial counsel obtain a ruling on prior impeachable offenses. (App. 610). And counsel was under no other duty to request said ruling. *State v. Scriven, supra*.

Moreover, Petitioner cannot establish prejudice on this claim as the record reflects that counsel did advise Petitioner regarding prior impeachable offenses. *See Porter v. State, supra* at 383, 629 S.E.2d 356 (applicant must demonstrate prejudice in order to garner relief). As previously discussed, trial counsel reviewed with Petitioner the specifics of his prior criminal record in terms of admissibility. (App. 577-82, 606-10). As a result of this consultation, Petitioner testified that he “was certain of the ones that might open the door to” cross-examination by the State. (App. 610). Counsel’s representation of Petitioner on this point factored into Petitioner’s decision not to testify: “I guess what changed my mind would be them, the statement that they could open up my file.” (App. 610). The PCR record established that Petitioner did have a series of prior convictions which were admissible under Rule 609, SCRE, and its related principles of law.

“When an accused takes the stand, he becomes subject to impeachment, like any other witness. Regardless of whether the accused offers evidence of his good character, an accused who takes the stand may be cross-examined about ‘past transactions tending to affect his credibility.’” *State v. Major*, 301 S.C. 181, 183, 391 S.E.2d 235, 237 (1990) (quoting *State v. Allen*, 266 S.C. 468, 482, 224 S.E.2d 881, 886 (1976)). There are two categories of impeachable prior bad acts which are admissible: crimes of dishonesty or false statement, and all crimes punishable by more than one year so long as the probative value is substantially outweighed by the danger of unfair prejudice. Rules 403 and 609(a), SCRE. Convictions are generally not admissible if the time served on the charge was completed more than ten years prior to the date sought for admission at trial unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially

outweighs its prejudicial effect and upon advance notice by the proponent of that evidence. Rule 609(b), SCRE; *see State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

Trial counsel testified that he created a folder for this facet of trial preparation. (App. 580). His annotations to the documents in that folder reflect that he was aware that Petitioner had a 1983 conviction from Tennessee for malicious mischief. (App. 580-81). Trial counsel identified this as a crime of dishonesty, but analyzed the prior as likely too old for introduction at trial. (App. 581); Rule 609, SCRE. Petitioner also had a prior convictions from Tennessee for theft and burglary from 2000, which counsel annotated “yes” for admissible. (App. 581). Petitioner’s murder trial was in 2013, (App. 1), and prior convictions are admissible so long as less than ten years elapsed between trial and the “release of the witness from the confinement imposed for that [prior] conviction.” Rule 609(b), SCRE. Trial counsel also noted that Petitioner had prior 2001 convictions for “some bad checks,” which trial counsel adequately assessed as potentially admissible prior crimes of dishonesty. (App. 581); *see* Rule 609, SCRE. Trial counsel also identified two more Tennessee convictions for purse snatching and forgery from 2004, and still more recent arrests and convictions for false information, drug paraphernalia, and possession of cocaine, each from 2005 in South Carolina. (App. 582). Trial counsel identified the false information prior as another admissible crime of dishonesty.³ (App. 582).

Not only did Petitioner have a series of prior convictions for crimes of dishonesty, but trial counsel also assessed a 2003 conviction for criminal domestic violence, first offense, and a more recent 2009 conviction for criminal domestic violence, second offense. (App. 581-82).

³ More, Petitioner’s videotaped confession referenced a drug problem as cause for his reaction to the victim. (State’s Ex. 49 at 12:41-13:05 and 15:05-15:36). In any event, Petitioner faced exposure on any prior conviction for possession of cocaine. (App. 582); *State v. Major*, 301 S.C. at 184, 391 S.E.2d at 237 (holding prior conviction for possession of cocaine is a crime of moral turpitude subject to admissibility for impeachment purposes).

Standing alone, those convictions were not admissible as they carried less than they carried a maximum punishment of less than one year. S.C. Code Ann. § 16-25-20 (eff. Jan. 1, 2004 to June 3, 2008); S.C. Code § 16-25-30 (omitted by 2003 Act No. 92, § 3, eff. Jan. 1, 2004). However, as trial counsel implicitly recognized in his PCR testimony, “where the accused offers evidence of his good character, thereby putting his reputation in issue, he may be cross-examined on particular acts which manifestly bear reference to the trait of character covered by the charge in the indictment.” *State v. Allen*, 266 S.C. 468, 482-83, 224 S.E.2d 881, 886 (1976), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Taylor*, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) (“because appellant ‘opened the door’ about his relationship with his wife, the solicitor was entitled to cross-examine him about the relationship, even if the responses brought out appellant’s prior criminal domestic violence conviction”); *State v. Doby*, 273 S.C. 704, 710, 258 S.E.2d 896, 899-900 (1979) (holding defendant on trial for murder opened the door to cross-examination about prior convictions for trespassing in women’s restrooms by testifying on direct about his “passive character and lack of mature sexual desires”).

Trial counsel testified he “had a concern that possibly, through testimony of the defendant, that that evidence could come in if he made some sort of statement that would put at issue his tendency to violence or not tendency for violence.” (App. 581-82). Trial counsel’s assessment here was not misplaced given the facts of the case. Petitioner’s rationale for the killing as expressed in his confession and at PCR included his rendition of being in a heightened emotional state initiated by the victim’s racially-charged criticism of his on-the-rocks relationship with Penny Blair, interchangeably referenced by Petitioner as his girlfriend, ex-wife, and ex-girlfriend. (App. 601, 612-14; State’s Ex. 49 at 15:05-15:36). Petitioner testified at PCR

that he did not know what to say” when the victim was derogatory about Blair, that he “was caught off guard because nothing had ever – we had never been down that road before.” (App. 614). He testified he did not strike, bow up, or have any physical reaction “prior to the slur, but after the slur, [he] did.” (App. 614-15). “That was when [he] grabbed her.” (App. 613). The underlying facts of the case also included threatening statements directed from Petitioner towards his ex-girlfriend’s sister, including a series of voicemails left on his Blair’s phone. (App. 284, 383, 398, 403). Elsewhere introduced at trial, Petitioner’s videotaped confession included statements by him for other “not to be around [him] because [he] will hurt somebody” and that he “wanted to hurt them two,” meaning Blair and her sister. (State’s Ex. 49 at 12:00-12:36 and 15:05-15:36).

Given Petitioner’s prior record, and his record-based acknowledgement that counsel advised him concerning its admissibility, Petitioner cannot establish that he was prejudiced by counsel’s representation on this point. One or more of his prior convictions were admissible had he elected to testify, and it cannot be said that he made the decision to forego testifying upon erroneous advice by counsel in light of the facts of the case. *Contra Horton v. State*, 306 S.C. 252, 254-55, 411 S.E.2d 223, 224-25 (1991) (trial counsel erroneously identified prior drug possession conviction as crime of moral turpitude and elsewhere erroneously advised his client regarding the admissibility of a 15-year-old conviction).

CONCLUSION

Considering the foregoing, the State requests this Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

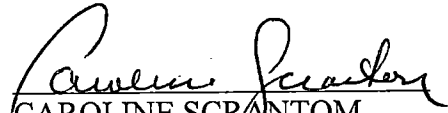
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February 13, 2019
Columbia, South Carolina

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

CERTIORARI TO BERKELEY COUNTY
Court of Common Pleas in a Post-Conviction Relief Action
Maite Murphy, Circuit Court Judge

Appellate Case No. 2018-000882

DAVID JUDSON PENN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RECEIVED

FEB 13 2019

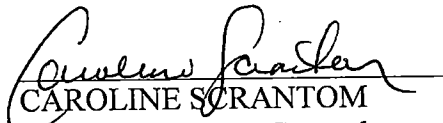
S.C. SUPREME COURT

PROOF OF SERVICE

I, Caroline Scrantom, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by by depositing two (2) copies of the same via U.S. Mail, first class, postage prepaid, and addressed to his attorney of record at:

Susan B. Hackett, Esquire
SCCID/Division of Appellate Defense
PO Box 11589
Columbia, SC 29211

I further certify that all parties required by rule to be served have been served this 13th day of February, 2019.


CAROLINE SCRANTOM
Assistant Attorney General
SC Bar No. 101357



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

FEB 13 2019

S.C. SUPREME COURT

February 13, 2019

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

RE: David Penn v. State of South Carolina
Appellate Case No.: 2018-000882

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Caroline Scramton
Assistant Attorney General
S.C. Bar # 101357

CS/jj
Enclosures

cc: Susan B. Hackett, Esquire
Victim Advocacy Division