

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM Horry COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Larry B. Hyman, Jr., Circuit Judge

Appellant Case No. 2019-000533
Case No. 2016-CP-26-00652

Larry T. Chestnut,

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX
VOLUME III

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1 bodily harm.

2 The force needed in self-defense does not have to be
3 limited to the degree or amount of force used by the victim.
4 The defendant has a right to use so much force as appeared to
5 be necessary for complete self-protection and which a person
6 of ordinary reason would believe to have been needed to
7 prevent death or serious bodily harm.

8 If a defendant is justified in defending himself or
9 others, the defendant is also justified in continuing until
10 it is apparent that the danger of death or serious bodily
11 injury has completely ended.

12 Under the law of self-defense, a defendant may take
13 another's life in the defense of others. The right to
14 intervene to protect another person is subject to the same
15 rights and limitation as the right to self-defense, those
16 same elements we just talked about.

17 The defendant may take the life of a person who assaults
18 a friend, relative, or bystander if that friend, relative, or
19 bystander would have had the right of self-defense.

20 To show that the person being defended had the right of
21 self-defense, it has to be shown that the person being
22 defended and the defendant were both without fault in
23 bringing on the difficulty.

24 The defense of another person is excusable if the
25 defendant had reasonable grounds to believe and in good faith

1 did believe that the person being defended was in imminent
2 danger of death or serious bodily harm. In deciding whether
3 the person defended actually was or the defendant actually
4 believed they were in imminent death (sic) of serious bodily
5 injury, you consider all the facts and circumstances
6 surrounding the crime, including the physical condition and
7 characteristics of the parties.

8 Again, a person acting on behalf of another has the
9 right to act on appearances just like the person who may be
10 attacked.

11 And I told you a couple of times, there's two
12 Defendants. Kendrick Chestnut is charged with the crime of
13 murder, and Larry Tyrone Chestnut is charged with the crime
14 of murder, with also the lesser included offense of voluntary
15 manslaughter. The case of each Defendant and the evidence
16 and law concerning that Defendant must be considered
17 separately and individually. Your verdict does not have to
18 be the same for both Defendants.

19 You may find one Defendant guilty or not guilty, and
20 that does not control your verdict as to the other Defendant.
21 Where more than one person is charged with a crime, if the
22 evidence warrants it, the evidence you find to be true and it
23 is proved to you beyond a reasonable doubt, you can convict
24 one, acquit the other. You may acquit both, or you may
25 convict both.

CHARGE BY THE COURT

1 It will depend upon your view of the testimony and
2 evidence, and you must take each Defendant and consider the
3 evidence as to that Defendant and my instructions to you.
4 You must write a separate verdict for each Defendant on the
5 charge, so we will get to the verdict form then.

6 There is a verdict form here for Larry Tyrone Chestnut.
7 It has the caption of the case and it says murder. On the
8 charge of murder, we, the jury, by unanimous consent, find
9 the Defendant, Larry Tyrone Chestnut, and you've got two
10 choices -- I put one before the other; don't assign anything
11 to that -- not guilty or guilty.

12 Mr. Foreman, once your jury has well and truly
13 deliberated on that particular charge, if you have found the
14 Defendant, Larry Tyrone Chestnut, not guilty of murder, then
15 you must consider whether the State has proved to you beyond
16 a reasonable doubt the charge or crime of voluntary
17 manslaughter, and you make your decision on that now.
18 Obviously if you found him guilty of murder, you stop and
19 that's the end of that particular case against Larry Tyrone
20 Chestnut.

21 If you found him not guilty, you go on to the second
22 page, voluntary manslaughter. On the charge of voluntary
23 manslaughter, we, the jury, by unanimous consent, find the
24 Defendant, Larry Tyrone Chestnut, again two choices, not
25 guilty or guilty.

CHARGE BY THE COURT

1 Mr. Foreman and ladies and gentlemen, when you've
2 reached a unanimous verdict on Larry Tyrone Chestnut, that's
3 the end of that matter.

4 You also have the case of Kendrick Chestnut, and I'm not
5 telling you which one to go -- go one before the other.
6 Y'all can make that decision. I've got to read one to you
7 before the other one, so the other one is Kendrick Chestnut,
8 a separate case.

9 On the charge of murder, we, the jury, by unanimous
10 consent, find the Defendant, Kendrick Chestnut, two choices,
11 not guilty or guilty. If you find him not guilty of murder,
12 you must proceed to the next lesser included offense,
13 voluntary manslaughter. If you find him guilty, obviously
14 that's the end of that particular matter with Kendrick
15 Chestnut.

16 If you found him not guilty on the charge of voluntary
17 manslaughter, we, the jury, by unanimous consent, find the
18 Defendant, Kendrick Chestnut, two choices, not guilty or
19 guilty.

20 So, Mr. Foreman and ladies and gentlemen of the jury,
21 when you have reached a unanimous verdict on both of the
22 matters, then you knock on the door and let the bailiff know
23 that the jury has reached a unanimous verdict on both of the
24 matters.

25 Now, I've said unanimous throughout this -- the entire

CHARGE BY THE COURT
JURY OUT

1 trial I don't know how many times. It means exactly what you
2 think it means. It means twelve/zero. It does not mean
3 eleven/one, ten/two, any combination thereof. Whatever the
4 verdict is, whatever block is checked, it is unanimous. It
5 is the verdict of each and every member of the jury.

6 So, Mr. Foreman, when you sign your name on the verdict
7 form, and you've checked the block, you've put today's date
8 on there, you are indicating to the Court that each and every
9 member of the jury agrees that is their verdict in that
10 particular matter.

11 What I'm going to ask that you do, Mr. Foreman, is take
12 your jury to the jury room. One, I believe lunch will be
13 there so you can enjoy lunch. Two, do not begin any
14 deliberations. Do not begin any deliberations until the
15 bailiffs hand to you the verdict forms and the exhibits.
16 When the bailiffs hand to you the verdict form and the
17 exhibits, then you may begin your deliberations. Do not
18 deliberate in any fashion before that.

19 The two alternates, that's Mr. Justice and Ms. Gardner,
20 you please stay with us.

21 Mr. Foreman, take the other members of the jury to the
22 jury room. Thank you very much. The pads and pens of the
23 jury go in. Y'all take those at this time.

24 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE**
25 **JURY.)**

JURY OUT/ON RECORD

1 **THE COURT:** As to the alternates, it appears that the
2 jury is ready, willing, and able to go forward with their
3 duties and responsibilities in this matter.

4 Is there any objection from the State to excuse the
5 alternates?

6 **MS. LIVESAY:** No sir.

7 **THE COURT:** From the -- your client, Mr. Wilson?

8 **MR. WILSON:** No sir, Your Honor.

9 **THE COURT:** Mr. Long?

10 **MR. LONG:** No.

11 **THE COURT:** All right. Very good.

12 Again, Mr. Justice, Ms. Gardner, I want to thank you for
13 your service. You did an important -- you filled an
14 important role here. Any one of those members of the jury
15 could not have gone forward. Then in Criminal Court the way
16 we have to do it, we have to put both of your names in and
17 have the Clerk pull out one name.

18 And in Civil Court, it's different. It's just whoever
19 is the first alternate comes in, but both of you would have
20 been equally able to fill in, but they appear ready, willing,
21 and able to go forward with their duties and responsibilities
22 in this case.

23 So I'm able to release you from your obligations for
24 jury service not only in this case, but for this particular
25 week. I appreciate all the hard work you've put into this

JURY OUT/ON RECORD

1 case, all the attention you paid. You were there ready to do
2 -- do the job as required, and I appreciate that very much.
3 We could not have gone forward without your assistance.

4 With that, the both of you are now excused and relieved
5 of your duties. Thank you very much. Just -- if you want to
6 give your pads and pens -- you can just leave them right
7 there. That's fine. Right there would be great. And just
8 accompany the Deputy.

9 They probably -- they'll probably have lunch for them,
10 too, I assume, so if you want to get that to them and y'all
11 can have that before you go if you want to.

12 All right. Thank you very much.

13 All right. Any exceptions, deletions, or additions to
14 the charge from the State?

15 **MS. VON HERRMANN:** Yes sir, Your Honor. I believe the
16 Court charged that malice could be inferred from the use of a
17 deadly weapon during that charge. My understanding that that
18 is no longer good law in South Carolina after the 2009
19 Belcher case, and I think we need to take a look at that.

20 **THE COURT:** Okay. All right. I thought I was talking
21 about the felony murder inference. You're using a deadly
22 weapon, it can be inferred, but it's not -- there's not a --
23 what they were talking about, was that not the felony murder
24 inference? I did not charge that. Maybe I'm mistaken.

25 Mr. Wilson?

JURY OUT/ON RECORD

1 **MR. WILSON:** I didn't -- I didn't ---

2 **MR. LONG:** I don't have any objection to the charge.

3 **MR. WILSON:** I don't have any objection to it.

4 **THE COURT:** I -- let me look that up, but I didn't say
5 anything about the felony murder inference. I didn't -- I
6 deliberately didn't say anything about that, but the use of a
7 deadly weapon, I think that -- that is still proper to say
8 when you have the -- the use of a deadly weapon -- and what I
9 said was, and let's -- let me be clear, and I didn't give any
10 examples also. I didn't do that.

11 What I did say was malice can be inferred from conduct
12 showing a total disregard for human life. Inferred malice
13 may also arise when the deed is done with a deadly weapon. A
14 deadly weapon is any article, instrument, or substance which
15 is likely to cause death or great bodily harm. Whether an
16 instrument has been used as a deadly weapon depends on the
17 facts and circumstances of each case, didn't give any
18 examples, and I did not go on to talk about the -- you know,
19 the felony murder ---

20 **MS. VON HERRMANN:** Well, Your Honor, ---

21 **THE COURT:** But let me -- have you got the cite?

22 **MS. VON HERRMANN:** I do. It's 685 S.E.2d 802.

23 **THE COURT:** All right. Hold on one second. Let me
24 find it.

25 All right. I'm looking at The State vs. Miller.

JURY OUT/ON RECORD/JURY IN
CHARGE BY THE COURT

1 **MS. VON HERRMANN:** And I will say this to the Court,
2 that Belcher decision is based on a case where there was a
3 self-defense like in this ---

4 **THE COURT:** That's what I'm reading in State vs. Miller
5 that just came out.

6 All right. Go tell the jury to come back.

7 You're right.

8 **MS. VON HERRMANN:** Your Honor, ---

9 **THE COURT:** Yes Ma'am.

10 **MS. VON HERRMANN:** --- obviously it doesn't benefit us
11 too much to have them -- that particular portion emphasized
12 to the jury, and I would just ask that you recharge the
13 entire malice charge leaving -- leaving that -- I mean,
14 obviously you have to inform them ---

15 **THE COURT:** Well, I have to tell them that part of it,
16 because self-defense is an element of this, that that part of
17 the murder charge is not proper, so I'll probably have --
18 what I would probably need to do is just go back and go --
19 read to them the first part of the murder charge.

20 Y'all come over here and talk to me for a second.

21 **(BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)**

22 **(THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE**
23 **JURY.)**

24 **THE COURT:** Mr. Foreman, ladies and gentlemen, it's
25 been brought to my attention and it is something that I did

CHARGE BY THE COURT
JURY OUT/ON RECORD

1 that I should not have done.

2 In this case self-defense has been raised. I told you
3 that regarding malice, that it could be inferred when the
4 deed is done with a deadly weapon. Self-defense is an issue
5 that cannot be inferred. Malice cannot be inferred by the
6 use of a deadly weapon. That is not part of a murder charge,
7 so disregard that. It is not part of this case. Disregard
8 that completely.

9 All right. Thank you very much. Go back to your jury
10 room. Y'all go ahead and have your lunch and when you're
11 done with that, let the bailiff know, please. Thank you.

12 (THE FOLLOWING TAKES PLACE AT 1:05 P.M. OUTSIDE THE
13 PRESENCE OF THE JURY.)

14 THE COURT: All right. Solicitor, I know you wanted me
15 to re-charge malice. Without further request from the jury,
16 I would not do that.

17 Mr. Wilson, any objections, deletions to the charge as
18 originally given, with the correction?

19 MR. WILSON: None.

20 THE COURT: Mr. Long?

21 MR. LONG: No sir.

22 THE COURT: All right. Thank y'all.

23 Before -- obviously I want y'all to check with Ms.
24 Dixie, make sure we've got all the proper exhibits here to go
25 into the jury room.

1 Before we do that, I want to tell the State, Mr. Long,
2 Mr. Wilson, y'all did excellent jobs. Y'all did everything
3 that you should have done. I appreciate it. I'm sorry that
4 at the very end I've done something I shouldn't have done,
5 but y'all have done an exceptional job on behalf of the State
6 and your Defendants, and I just wanted to tell you that.
7 Thank you very much.

8 **MS. LIVESAY:** Thank you, Your Honor.

9 **MR. WILSON:** Thank you, Judge.

10 **MR. LONG:** Thank you.

11 **THE COURT:** We'll be at ease until the jury needs us.
12 Thank you.

13 **(THE EXHIBITS ARE REVIEWED BY COUNSEL FOR THE STATE AND**
14 **COUNSEL FOR THE DEFENDANTS, AND THE VERDICT FORMS AND**
15 **EXHIBITS ARE TAKEN TO THE JURY FOR DELIBERATION AT 1:10 P.M.)**

16 **(JURY DELIBERATING.)**

17 **(NOTE FROM JURY MARKED AS COURT'S EXHIBIT NUMBER 6 (Off**
18 **the Record).**

19 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE**
20 **JURY.)**

21 **THE COURT:** As I informed Counsel, the jury would like
22 to have the law of voluntary manslaughter re-charged, and so,
23 therefore, I'm going to call them into the jury -- or into
24 the courtroom to do that.

25 All right. Ask the jury to come in, please.

JURY IN
CHARGE BY THE COURT

1 **(AT 2:50 P.M., THE FOLLOWING TAKES PLACE WITHIN THE**
2 **PRESENCE OF THE JURY.)**

3 **THE COURT:** All right. Mr. Foreman, and ladies and
4 gentlemen, in regards to your request, I'm going to re-charge
5 you voluntary manslaughter. Obviously if there is anything
6 else you want to hear, please let me know, and remember, of
7 course, you are taking this in conjunction with everything
8 else that the Court charged you.

9 If you find that the State of State of South Carolina
10 has failed to prove to you beyond a reasonable doubt that the
11 Defendant, either Defendant, committed the crime of murder,
12 you may look at to see whether or not the State has proved to
13 you beyond a reasonable doubt whether or not the Defendant
14 has committed the crime of voluntary manslaughter, because
15 voluntary manslaughter is a lesser offense. It's included in
16 the crime of murder.

17 To prove voluntary manslaughter, the State has to prove
18 to you beyond a reasonable doubt that the Defendant took the
19 life of another in the sudden heat of passion based on
20 sufficient legal provocation. Both heat of passion and
21 sufficient legal provocation must be present at the time of
22 the killing to constitute voluntary manslaughter.

23 Sudden heat of passion may for a time affect a person's
24 self-control, temporarily disturb a person's reasoning. The
25 sudden heat of passion must be the type that would make an

1 ordinary, reasonable person to be unable to coolly reflect
2 and would produce an uncontrollable impulse to do violence.

3 Sufficient legal provocation must be the type that would
4 make an ordinary, reasonable person to become enraged and
5 lose control temporarily. The provocation needed for
6 voluntary manslaughter must come from some act or related to
7 the victim.

8 Now, words alone are not enough for legal provocation.
9 Words accompanied -- they have to be accompanied by some kind
10 of overt act, a threatening act, which would have produced
11 that heat of passion. Also, the exercise of a legal right,
12 no matter how offensive it might be, is never sufficient
13 legal provocation for voluntary manslaughter.

14 If the heat of passion cooled or if there was enough
15 time between the provocation, if any, and the killing for the
16 passion of a reasonable person to have dissipated, or gone
17 away, or cooled, the killing is not voluntary manslaughter.
18 In deciding whether a reasonable person would have had enough
19 time to cool off, you consider all the circumstances
20 surrounding the killing.

21 You can consider the nature of the provocation, if any,
22 the Defendant's mental and physical state, and any
23 circumstances and relationships between the parties. Again,
24 that has to be proved to you by the State beyond a reasonable
25 doubt, so that's the definition of voluntary manslaughter.

CHARGE BY THE COURT

1 If there is anything else, I will be glad to tell you,
2 but if that's it, Mr. Foreman, you can go back and -- yes
3 sir?

4 **THE FOREMAN:** Hand in hand.

5 **THE COURT:** Okay. Well, let me -- and I was asked, and
6 let me do that real quick.

7 I'm going to go over briefly the definition in your
8 presence because that's combined with the hand of one, hand
9 of all.

10 Mere presence at the scene of a crime is not sufficient
11 to prove somebody guilty of the crime. The burden, again, is
12 on the State of South Carolina to prove every element of the
13 crime charged. If you find after reviewing all of the
14 evidence the State has only proved to you that the Defendant
15 was only present at the scene of the crime and they haven't
16 proved beyond a reasonable doubt any other participation in
17 the crime, you must find the Defendant not guilty.

18 So, looking at the hand of one, if a crime is committed
19 by two or more people who are acting together in committing a
20 crime, the act of one is the act of all. A person who joins
21 with another to commit an unlawful act is criminally
22 responsible for everything done by that other person which
23 happens as a probable or natural consequence of the acts done
24 in carrying out that common plan or purpose. The act of one
25 is the act of all, or what is sometimes said, the hand of one

1 is the hand of all.

2 Prior knowledge that a crime is going to be committed
3 without more is not sufficient. Mere knowledge that somebody
4 else is going to commit a crime is not sufficient. What is
5 needed, you have to be a principal in a crime. It's one who
6 actually commits the crime or who is present aiding,
7 abetting, or assisting in the committing of a crime.

8 When a person does an act in the presence of and with
9 the assistance of another, the act is done by both. Where
10 two or more acting with a common plan or intent are present
11 at the commission of a crime, it doesn't matter who actually
12 commits the crime. All are guilty. The hand of one is the
13 hand of all.

14 Now, present at the commission of a crime means to be
15 sufficiently near to aid, abet, or assist in the commission
16 of a crime. Again, mere presence at the scene of a crime is
17 not sufficient to convict somebody. Intent is an element.
18 There has to be some kind of common design or intent to
19 commit the crime. The crime must have been committed with
20 the person aiding and abetting by some kind of overt act,
21 just -- not by just being there.

22 Intent means intending the result which actually occurs,
23 not accidentally. Intent can be shown by the acts and
24 conduct of the Defendant and other circumstances from which
25 you can reasonably infer intent. And again, the State has to

CHARGE BY THE COURT
JURY OUT/ON RECORD

1 prove all this to you by proof that convinces you beyond a
2 reasonable doubt, remembering the State always has the burden
3 of proof on the facts and evidence.

4 Anything else, Mr. Foreman?

5 **THE FOREMAN:** No sir.

6 **THE COURT:** All right. Very good. If you would retire
7 back to your jury room and continue deliberations. Thank you
8 very much.

9 (AT 3:00 P.M., THE FOLLOWING TAKES PLACE OUTSIDE THE
10 PRESENCE OF THE JURY.)

11 **THE COURT:** Exceptions, deletions, additions to the
12 charge from the State?

13 **MS. VON HERRMANN:** No sir.

14 **THE COURT:** From your client, Mr. Wilson?

15 **MR. WILSON:** Your Honor, I don't have any exceptions to
16 what you did charge. The only thing that I would have
17 requested would have been -- and I know they didn't
18 specifically ask for this, but I would have requested that
19 you charge them that self-defense is a complete defense and
20 if they made that determination, then they need not go
21 further.

22 **THE COURT:** I appreciate that, Mr. Wilson. I was
23 guided by what the jury asked. I mean, they only asked for
24 voluntary manslaughter and then in the courtroom they asked
25 for hand of -- hand of one, hand of all.

1 I did tell them at the very beginning they had to take
2 the charge in conjunction with everything else that I had
3 previously told them, but I appreciate -- your objection is
4 noted. I will not bring them back to re-charge them self-
5 defense.

6 MR. WILSON: Thank you, Your Honor.

7 THE COURT: All right. Mr. Long?

8 MR. LONG: No sir.

9 THE COURT: All right. Very good.

10 All right. Again, we will be at ease until the jury
11 needs us then. Thank you very much.

12 MS. LIVESAY: Thank you.

13 MR. WILSON: Thank you.

14 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
15 JURY.)

16 THE COURT: All right. Counsel, as I understand that
17 the jury has reached a verdict in these two matters, is the
18 State ready to receive it?

19 MS. LIVESAY: Yes sir.

20 THE COURT: And, Mr. Wilson, you and your client?

21 MR. WILSON: We're ready, Your Honor.

22 THE COURT: And Mr. Long?

23 MR. LONG: Yes sir.

24 THE COURT: All right. Very good.

25 All right. Before the jury comes in, let me talk just a

JURY OUT/ON RECORD/JURY IN
VERDICTS OF THE JURY

1 brief moment with everybody in the courtroom. I do not know
2 what the verdict is. We will all hear the verdict at the
3 same time.

4 Whatever the verdict is, it will be received with
5 respect and silence. There will be no reaction to the jury's
6 verdict. I will give you an opportunity to leave the
7 courtroom now if you cannot follow these instructions. If
8 you stay and there is some kind of outburst or overt reaction
9 to the verdict, you will be detained by a Deputy Sheriff of
10 the Horry County Sheriff's Office. When all these
11 proceedings are over with, I will then proceed into a
12 contempt of court hearing.

13 If anyone wishes to leave, please do so now. Thank you
14 very much.

15 Ask the jury to come in.

16 **(AT 3:45 P.M., THE FOLLOWING TAKES PLACE WITHIN THE**
17 **PRESENCE OF THE JURY.)**

18 **THE COURT:** All right. Mr. Foreman, has your jury
19 reached a verdict in these matters?

20 **THE FOREMAN:** Yes, we have, Your Honor.

21 **THE COURT:** All right. Good. Could you hand the
22 verdict forms to the Clerk of Court, please sir.

23 (The Court reviews the verdict forms.)

24 You may publish the verdicts.

25 **DEPUTY CLERK OF COURT:** Indictment Number 2006-GS-26-

VERDICTS OF THE JURY

1 2998, State of South Carolina, County of Horry, versus Larry
2 Tyrone Chestnut. On the charge of murder, we, the jury, by
3 unanimous consent, find the Defendant, Larry Tyrone Chestnut,
4 not guilty.

5 Indictment Number 2006-GS-26-2998, State of South
6 Carolina, County of Horry, versus Larry Tyrone Chestnut. On
7 the charge of voluntary manslaughter, we, the jury, by
8 unanimous consent, find the Defendant, Larry Tyrone Chestnut,
9 guilty.

10 2006-GS-26-2997, State of South Carolina, County of
11 Horry, versus Kendrick Chestnut. On the charge of murder,
12 we, the jury, by unanimous consent, find the Defendant,
13 Kendrick Chestnut, not guilty.

14 Indictment Number 2006-GS-26-2997, State of South
15 Carolina, County of Horry, versus Kendrick Chestnut. On the
16 charge of voluntary manslaughter, we, the jury, by unanimous
17 consent, find the Defendant, Kendrick Chestnut, not guilty.

18 Signed by Foreperson, James Spain.

19 Ladies and gentlemen of the jury, if this is your
20 verdict, so signify by raising your right hand.

21 **THE COURT:** The jury having affirmed their verdict by
22 raising of the right hand, does the State wish the jury
23 polled?

24 **MS. LIVESAY:** No sir.

25 **THE COURT:** Does the Defendant, Larry Chestnut, wish

COURT TO JURY

1 the jury polled?

2 **MR. WILSON:** No sir, Your Honor.

3 **THE COURT:** Does the Defendant, Kendrick Chestnut, wish
4 the jury polled?

5 **MR. LONG:** No sir, Your Honor.

6 **THE COURT:** All right. Very good.

7 Anything further from the State before I discharge the
8 jury in this matter?

9 **MS. LIVESAY:** No sir.

10 **THE COURT:** Mr. Wilson?

11 **MR. WILSON:** Nothing, Your Honor.

12 **THE COURT:** And Mr. Long?

13 **MR. LONG:** No, Your Honor.

14 **THE COURT:** All right.

15 Ladies and gentlemen of the jury in this particular
16 matter, I want to thank you as your Presiding Judge and
17 Resident Judge here. You did exactly what the Court asked
18 you to do. You well and truly tried this case, examined the
19 facts and evidence to find that evidence which convinces you
20 of its truth.

21 . I know we asked you to do a very difficult thing. Many
22 of you are in -- in a relationship. You understand it's
23 difficult sometimes to get two people to agree on anything,
24 much less twelve people. This was a case that had a lot of
25 facts that needed to be sorted through. You did an excellent

COURT TO JURY/JURY OUT/ON RECORD

1 job. I appreciate the hard work that all of you put into
2 this case, the attention you paid to all of the facts and
3 evidence presented.

4 With that, you are now discharged from your duties. You
5 may leave if you so choose to. Thank you very much.

6 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE**
7 **JURY.)**

8 **THE COURT:** All right. Let me first, I guess, with the
9 matter of Kendrick Chestnut, Mr. Chestnut, if you would stand
10 up, please sir. The jury having found you not guilty of the
11 charges levied against you, you are hereby released from the
12 terms of your bond and you are hereby discharged from this
13 matter.

14 **MR. KENDRICK CHESTNUT:** Thank you, Your Honor.

15 **THE COURT:** Mr. Wilson, on behalf of your client, Larry
16 Chestnut, any motions, sir?

17 **MR. WILSON:** Yes sir. Your Honor, at this time I would
18 make a motion for a judgment of acquittal notwithstanding the
19 verdict or in the alternative for a new trial in this matter.

20 I think that the verdict is certainly not in my opinion
21 consistent with the evidence that was produced, especially in
22 regards to the evidence of self-defense in this particular
23 case, and I think that the verdict appeared to be, to me
24 anyway, a compromised verdict of some type based on some
25 sympathy or some prejudice that the jury may have had. I'm

JURY OUT/ON RECORD

1 not sure what that was or is, but I would ask the Court to
2 grant us a new trial.

3 **THE COURT:** All right, sir. Based on the facts and
4 evidence presented, Mr. Wilson, the testimony that was educed
5 at trial, the exhibits that were introduced in this matter,
6 regarding your motion, the Court finds that there was
7 competent evidence to sustain the jury's verdict.

8 Again, it was not my job to judge credibility and
9 believability, but in this particular matter I do find there
10 was more than sufficient evidence, if that evidence was so
11 believed by the jury, and it must have been believed through
12 their verdict to convict your client beyond a reasonable
13 doubt of the crime of voluntary manslaughter and for there to
14 be consistent with that a verdict of not guilty to both
15 charges to the Defendant, Kendrick Chestnut.

16 I find the evidence is sufficient, more than sufficient
17 competent evidence, to sustain the jury's verdict in all that
18 regard and, therefore, I respectfully decline to grant your
19 motions in this matter.

20 **MR. WILSON:** Your Honor, and I don't know if this is
21 necessary at this point in time, but what I would ask to do
22 is to renew any motions I made obviously at the end of the
23 State's case and again at the end of the Defense's case.

24 **THE COURT:** All right, sir. Those are noted for the
25 record. The Court would reiterate and reaffirm the rulings

1 that I previously made on the record regarding those -- those
2 matters. All right, sir.

3 All right. Is the State ready to proceed with
4 sentencing at this time?

5 **MS. LIVESAY:** Yes sir.

6 **THE COURT:** All right. Solicitor, I'll be glad to hear
7 from you.

8 **MS. LIVESAY:** One minute.

9 **THE COURT:** Yes Ma'am.

10 **MS. LIVESAY:** Your Honor, the victim's family does not
11 wish to be heard. They don't want to address the Court.

12 **THE COURT:** All right, Ma'am. And is there anything
13 that the State would -- would want to -- want to say at this
14 time?

15 **MS. LIVESAY:** No sir.

16 **THE COURT:** All right. Thank you, Ma'am.
17 Yes sir, Mr. Wilson.

18 **MR. WILSON:** May it please the Court, Your Honor.

19 You know, I -- you've heard all the testimony in this
20 case, so it's pointless for me to go back through that. I
21 would just say to you that Larry has no criminal history,
22 and, you know, this all obviously is a very tragic,
23 unfortunate act that -- or unfortunate event for everybody
24 involved, and that he and the victim in this case were good
25 friends, had been friends throughout before all this

JURY OUT/ON RECORD

1 happened.

2 And things obviously got out of control that night. How
3 they got out of control is debatable, but they did. This
4 happened. Obviously, and I don't know -- I know that if
5 recordings were brought to the Court, I don't know if this
6 ever occurred, but when he heard that his -- that Joey had
7 died, he was in shock, and you could tell that from the tape
8 recording of the conversation when the police told him that
9 Joey had died, and he just kept saying, Joey, Joey did, Joey
10 did ---

11 **THE COURT:** Yes sir. I remember that. I heard it.

12 **MR. WILSON:** And I'm saying that to say that he is
13 remorseful that Joey is dead. He is remorseful that this
14 occurred. You know, he believed that he needed to try to
15 defend himself as best he could. I tried to explain that to
16 the jury as best I could to convey that to them.

17 He was severely injured in this -- he was in the
18 hospital -- he had three stab wounds, one of which the doctor
19 says was clearly life-threatening. He was in Grand Strand
20 Hospital for, I think, six days while in custody. They moved
21 him to J. Reuben Long. His lung collapsed as a result of one
22 of the stab wounds. They had to take him to Conway Hospital.
23 He stayed in Conway Hospital, I think, for nearly two weeks
24 as a result of that before they brought him back to the jail,
25 you know, and so he has suffered a great deal also.

JURY OUT/ON RECORD

1 I understand that the Court has a responsibility once a
2 jury bring a verdict. We respect that and understand that.
3 I would ask, though, that the Court have mercy in this
4 situation considering all the facts and circumstances
5 surround this matter.

6 **THE COURT:** Thank you, sir. Does your client wish to
7 address the Court in any fashion?

8 **MR. WILSON:** No sir.

9 **THE COURT:** All right, sir. Thank you.

10 And is there anyone here on his behalf that wanted to
11 say something?

12 **MR. WILSON:** This is his father, Larry Chestnut, Sr.,
13 Your Honor.

14 **THE COURT:** All right, sir.

15 If you'd just come around right to that microphone right
16 there and just tell me your name and I'll be glad to hear
17 from you, sir.

18 **LARRY CHESTNUT, SR.:** Your Honor, my son has been a role
19 model to young kids. A lot of things he done when he was
20 young. I mean, he has four daughters. One of them turned
21 thirteen today, another one thirteen. He got one two, and
22 one about seven, and I can't help the kids. My health is not
23 as good as it should be, but I need my son, because he is my
24 son and my best friend, and just please have some leniency on
25 him because without him I won't survive. Thank you.

JURY OUT
SENTENCING OF DEFENDANT, LARRY CHESTNUT

1 **THE COURT:** Thank you, sir.

2 Anything else, Mr. Wilson?

3 **MR. WILSON:** That's all, Your Honor.

4 **THE COURT:** Very good.

5 Anything Solicitor?

6 **MS. LIVESAY:** Nothing further from the State, Your
7 Honor.

8 **THE COURT:** Thank you, Ma'am.

9 2006-GS-26-2998, the State of South Carolina, County of
10 Horry, versus Larry T. Chestnut, regarding voluntary
11 manslaughter.

12 Mr. Chestnut, the Court has obviously listened to all
13 the facts and the evidence presented at this trial. I've
14 heard the things that have been said on your behalf. I heard
15 the things regarding the tape that Mr. Wilson mentioned, and
16 obviously the passionate plea on your behalf by your father.
17 I appreciate all those things. This is just an immense
18 tragedy all the way around.

19 Based on the facts and circumstances presented at trial,
20 the jury having found you guilty of voluntary manslaughter,
21 the sentence of the Court is the Defendant is committed to
22 the State Department of Corrections for a determinate term of
23 twenty years. The Defendant is given credit for the time he
24 has already served. Thank you very much.

25 **MR. WILSON:** Thank you, Your Honor.

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THE COURT: This term of General Sessions Court for
this particular week is hereby adjourned sine die.

MS. LIVESAY: Thank you, Your Honor.

THE COURT: Thank you very much.

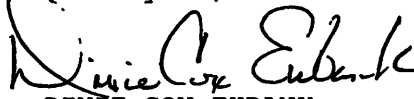
(Conclusion of Transcript of Record.)

C E R T I F I C A T E

1
2
3 I, the undersigned, DIXIE COX EUBANK, Official Court
4 Reporter for the Fifteenth Judicial Circuit of the State of
5 South Carolina, do hereby certify that the foregoing is a
6 true, accurate and complete Transcript of Record of all the
7 proceedings had and evidence introduced in the hearing of the
8 captioned case, relative to appeal, in the Court of General
9 Sessions for Horry County, South Carolina, on August 13-17,
10 2012.

11 I DO FURTHER CERTIFY that I am neither of kin, counsel
12 nor interest to any party hereto.

13 January 28, 2013

14 
15 DIXIE COX EUBANK

16 CIRCUIT COURT REPORTER

17 FIFTEENTH JUDICIAL CIRCUIT
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STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry VS. Larry T Chestnut

INDICTMENT/CASE#: 2006GS2602998

AKA: _____
Race: BLACK Sex: M Age: 34

A/W#: K000972

Date of Offense: 5/25/2006

S.C. Code § : 16-03-0010, 0020

CDR Code #: 0116

SENTENCE SHEET

*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: Voluntary Manslaughter

in violation of § 16-03-0050 of the S.C. Code of Laws, bearing CDR Code # 0217
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

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: Livsey, Nancy SCB75159 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 20 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.

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 |
| § 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 |
| § 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 |
| 3% to County (if paid in installments) | \$ |
| TOTAL | \$133.40 |

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 \$ 25.00 beginning 8/17/2006

\$ _____ 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: Melanie Higgins
Court Reporter: Dixie Banks
SCCA/217 (03/2011)

Presiding Judge: _____
Judge Code: _____
Sentence Date: 8/17/12

WITNESSES
S. Mann/MBPD

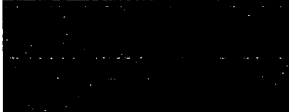
ARREST WARRANT NO. K-000972
CDR: 0116 816-03-0010,0020

DOA: 05-25-06

DOCKET NO. 2006-GS-26-2998
THE STATE OF SOUTH CAROLINA
COUNTY OF Horry
SRH 81448-2
COURT OF GENERAL SESSIONS
JULY TERM 2006

THE STATE
VS

LARRY TYRONE CHESTNUT M/B



ACTION OF GRAND JURY

TRUE BILL
[Signature]
Foreman of Grand Jury

JUL 27 2006

VERDICT

Foreman of Petit Jury Date:

ATTORNEY: ORRIE WEST

INDICTMENT FOR:

MURDER

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:

MURDER

At a Court of General Sessions, convened on July 27, 2006, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 §16-03-0010,0020

That LARRY TYRONE CHESTNUT, did in Horry County, while acting in concert with another, on or about May 21, 2006, willfully, feloniously, and intentionally kill the victim, Joseph Hucks, with malice aforethought, either express or implied, by means of stabbing the victim several times, and the victim did die as a proximate result thereof on or about May 21, 2006 in Horry County, in violation of Section §16-3-10, S. C. 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.



SOLICITOR

06-1201

ARREST WARRANT
K. 000973

STATE OF SOUTH CAROLINA)
 County/ Municipality of)
Horry)

01-06-31236
AFFIDAVIT

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA #18

STATE OF SOUTH CAROLINA
 County/ Municipality of
Horry

Personally appeared before me the affiant DET. SELERA MANN who
being duly sworn deposes and says that defendant LARRY TYRONE CHESTNUT
did within this county and state on MAY 21ST, 2006 violate the criminal laws of the
State of South Carolina (or ordinance of County/ Municipality of _____)
in the following particulars:
DESCRIPTION OF OFFENSE: ASSAULT AND BATTERY HIGH AND AGGRAVATED NATURE §17-25-30

THE STATE
against

LARRY TYRONE CHESTNUT

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:



SEE ATTACHED AFFIDAVIT

Prosecuting Agency: SPENCER POLICE DEPARTMENT
Prosecuting Officer: DET. SELERA MANN
Offense: ASSAULT AND BATTERY HIGH AND AGGRAVATED NATURE Offense Code:
Code/Ordinance Sec. §17-25-30

This warrant is CERTIFIED FOR SERVICE in the
 County/ Municipality of _____ . The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Affiant

Selera Mann

STATE OF SOUTH CAROLINA)
 County/ Municipality of)
Horry)

Affiant's Address 1101 OAK ST
MYRTLE BEACH SC 29577
Affiant's Telephone 843-918-1975

Signature of Judge (I.S.)
Date: _____

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
It appearing from the above affidavit that there are reasonable grounds to believe that
on MAY 21ST, 2006 defendant LARRY TYRONE CHESTNUT
did violate the criminal laws of the State of South Carolina (or ordinance of
 County/ Municipality of _____) as set forth below:
DESCRIPTION OF OFFENSE: ASSAULT AND BATTERY HIGH AND AGGRAVATED NATURE §17-25-30

RETURN
A copy of this arrest warrant was delivered to
defendant LARRY TYRONE CHESTNUT
on 5-25-06

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the
defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be
delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Law Enforcement Officer

Sworn to and subscribed before me
on 5-25-06)

Judge's Address 1101 OAK ST
MYRTLE BEACH SC 29577
Judge's Telephone 843-918-1356
Issuing Court: Magistrate Municipal Circuit

RETURN WARRANT TO:

Signature of Issuing Judge (I.S.)
Judge Code: _____

ORIGINAL

FILED
KORRY COUNTY
2006 JUN -11 AM 11:17
CLERK OF COURT

TRANSFERRED
TO CLERK JUN 02 2006

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

AFFIDAVIT: K-000973

MUNICIPALITY OF MYRTLE BEACH

VS. Larry Tyrone Chestnut

The affiant states that there is probable cause to believe that the defendant named above did commit the crime(s) set forth and that such probable cause is based on the following facts:

On May 21st, 2006 at approximately 0250hours, Officers of the Myrtle Beach Police Department responded to 1205 Highway 15 Apartment 4, a location within the City of Myrtle Beach South Carolina, to the report of a stabbing.

Affiant then began an investigation into the incident and an interview was conducted with the victim, Cindy Evans, and she stated that she observed the defendant, Larry Tyrone Chestnut, physically assault her sister and she then tried to intervene to stop the assault. She states that the defendant then assaulted her by biting and punching her. Affiant observed physical injuries to her person consistent with her account of the incident.

Based on the above facts that the defendant did commit and assault and battery to the victim in an aggravated manner, there is probable cause to believe the defendant did commit the offense of Assault and Battery of a High and Aggravated Nature a violation of SC CODE 17-25-30.

Sworn to and subscribed before me this 22nd day of May, 2006



(L.S.)



Signature of the Judge

Signature of the Affiant

TRANSFERRED
TO SOLICITOR
JUN 02 2006

FILED
HORRY COUNTY
2006 JUN -1 AM 11: 17
CLERK OF COURT

**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 Supreme Court**

The State, Respondent,

v.

Larry T. Chestnut, Appellant.

Appellate Case No. 2012-212800

Appeal from Horry County
Steven H. John, Circuit Court Judge

Memorandum Opinion No. 2015-MO-002
Heard September 24, 2014 – Filed January 14, 2015

AFFIRMED

Jeremy A. Thompson, of Columbia, for Appellant.

Attorney General Alan Wilson and Senior Assistant
Deputy Attorney General Deborah R.J. Shupe, both of
Columbia, for Respondent.

PER CURIAM: Appellant Larry T. Chestnut appeals his conviction and sentence for voluntary manslaughter, challenging the rule that where a defendant in a joint trial introduces evidence, the State is entitled to the final argument. *State v. Huckie*, 22 S.C. 298, 300 (1885). In this case, however, neither Appellant nor his

codefendant presented evidence, and as a result, Appellant and his codefendant had the final argument. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." (citation omitted)); *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 402–03 (1986) ("Ordinarily, this Court will not review alleged error of the exclusion of testimony unless a proffer of testimony is properly made on the record." (citation omitted)); *Dillon Cnty. v. Maryland Cas. Co.*, 217 S.C. 66, 76, 59 S.E.2d 640, 644 (1950) ("No one can obtain a decision as to the invalidity of a law on the ground that it impairs the rights of others, for one attacking the constitutionality of a statute is not the champion of any rights except his own." (citation and quotations omitted)).

AFFIRMED.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**

Received
8-2-18

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)

Larry T. Chestnut,)
S.C.D.C. No. 352116,)
) Case No.: 2016-CP-26-00652

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

2018 JUL 20 PM 1:34
REBECCA ELY'S
CLERK OF COURT
HORRY COUNTY, SC
HORRY COUNTY

This matter comes before the Court by way of an application for post-conviction relief filed by Larry T. Chestnut ("Applicant") on January 29, 2016. Respondent made its return on or about February 16, 2017. The Court convened an evidentiary hearing into the matter on Monday, May 21, 2018, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Stephen D. Geoly, 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, Ralph J. Wilson, Sr., 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 Horry 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 Horry County Clerk of Court. Applicant was indicted at the July 2006 term of the Horry County Grand Jury for murder (2006-GS-26-02998). Ralph J. Wilson, Esq. represented Applicant, and Nancy Livesay, Esq., of the Fifteenth Circuit Solicitor's Office,

prosecuted the case. On August 13, 2012, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty of the lesser-included offense of voluntary manslaughter on August 17, 2012.¹ Judge John sentenced Applicant to imprisonment for a term of 20 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Jeremy A. Thompson, Esq. While pending in the Court of Appeals, the case was certified by the Supreme Court of South Carolina for review pursuant to Rule 204(b), SCACR. By memorandum opinion decided January 14, 2015, the Supreme Court affirmed Applicant's conviction and sentence. State v. Chestnut, Op. No. 2015-MO-002 (S.C. Sup. Ct. filed January 14, 2015). The Remittitur was issued on January 30, 2015.

Present Application

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

1. Ineffective assistance of counsel, due to:
 - a. "Counsel's failure to properly and adequately prepare for trial prior to the case being called for trial."
 - i. "While the case was pending for six years prior to the call or the case, the Applicant rarely met with and prepared for the trial with his attorney."
 - b. "Counsel's failure to strike a juror who he knew to be biased against the Applicant."
 - i. "Counsel sat a juror who he knew to have fired Applicant's father, and who he knew had knowledge of the matter at hand. Said juror had obvious prejudices against the Applicant, was not stricken, and eventually became foreman of the jury."
 - c. "Counsel's failure to file a speedy trial motion."
 - i. "A speedy trial motion was never filed during the six years this matter was pending."
 - d. "Counsel's failure to make a motion for severance."

¹ Applicant's co-defendant, Kendrick Chestnut, represented by Russell B. Long, Esq. was acquitted.

- i. "Despite the co-defendant making multiple statements against the Applicant's interest prior to trial, Counsel for the Applicant made no motion to [sever] the trial, and this failure continued to impact the trial of the case throughout the course of the proceedings. Eventually, the counsel for the Applicant admitted to the Court that this would be an issue for the Appellate Court or a PCR proceeding."
- e. "Counsel's failure to object to the Judge's instructions on the law."
 - i. "Typically in a murder case counsel is given an opportunity to review the proposed charge prior to the Judge giving instructions to the jury. Counsel failed to object to the improper mutual combat charge, so the matter was not preserved for Appellate counsel. Also, trial counsel failed to object to the misstatement of law that by using a deadly weapon in his own home while being attacked with a deadly weapon, the jury could presume malice. The Assistant Solicitor trying the case actually objected to the charge."
- f. "Counsel's failure to object to the Judge's correction of his misstatement of law and/or for failing to request the corrective charge include self-defense language in a timely manner."
 - i. "When the Judge made his corrected charge, trial counsel did not request that self-defense language be included in a timely [manner]. He eventually made a request after the jury had returned to deliberate, and the judge refused to bring them out again for the additional charge."
- g. "Counsel's failure to make a motion for mistrial when the Judge made a misstatement of law to the jury during his instructions."
 - i. "A bell cannot be rung. Trial counsel should have made a motion for a mistrial when the Judge improperly instructed the jury."
- h. "Counsel's failure to object to a mutual combat charge being included in the Jury instructions"
 - i. "There was no evidence to support a mutual combat charge. Mutual combat effectively ruins a self defense claim."
- i. "Counsel's failure to present evidence on behalf of his client when he had just announced to the court that it was necessary to properly try his case."
 - i. "Trial counsel knew that [it] was imperative that he present a defense."
- j. "Counsel's failure to preserve the record adequately by presenting evidence to the court regarding the matter of last argument."

- i. "Trial counsel made no proffer of evidence. Soon after this case the court proposed a rule change regarding last argument in this state."
- k. "Counsel's failure to put the Applicant's interests above those of his co-defendant and in failing to properly advise the Applicant regarding his decision not to take the stand."
 - i. "Same as (j) above"
- l. "Counsel's failure to properly prepare and present a defense that the co-defendant was the individual that actually caused the injuries that resulted in the death of the victim for which the Applicant was on trial."
 - i. "Applicant did not cause the injuries to the victim in this matter that resulted in his death, the Applicant was seriously injured and remained in critical condition for weeks fighting for his life. Someone got a pair of scissor sand stabbed the victim to death in this case. It was physically impossible for the Applicant to accomplish this in his wounded state. The co-defendant or some other individual was the killer and trial counsel did nothing to present this defense on behalf of the Applicant."

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), SCRPC; 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 Communicate, Prepare for Trial

Applicant alleges Counsel was ineffective in failing to adequately meet with him and prepare for trial. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C.210, 214, 481 S.E.2d 129, 132 (1997)). "The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Harris, 377 S.C. at 75, 659 S.E.2d at 145). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

The Myrtle Beach Police Department originally sought and obtained a warrant for Applicant's arrest on May 22, 2006. Applicant was indicted two months later, but the case did not proceed to trial until August 13, 2012, more than six years later.

At the evidentiary hearing, Counsel confirmed he represented Applicant for several years, but did not see Applicant very often until trial drew near. Counsel noted his original retainer was paid by Christie Hucks, Applicant's then-girlfriend and the victim's sister, with an indication that

Applicant's family would bear future expenses. Counsel reported the family paid only a very small amount and speculated Applicant avoided him due to the outstanding bills. Counsel would tell Applicant's parents that Applicant needed to come meet with him. Applicant was out on bond pending trial. Counsel did not recall ever suggesting a motion for a speedy trial to Applicant. To the contrary, on cross-examination, Counsel expressed his opinion that a long wait for trial generally benefits defendants. Counsel noted there were multiple solicitors reassigned to prosecution of the case, and recalled his hope that the charges would eventually be dropped as the case weakened with age. Counsel explained he focused on self-defense based on Applicant's insistence and Applicant's firm belief that Christie would be cooperative with his defense. Counsel met with Christie and was able to get a short statement from her prior to trial, but it was not helpful. Counsel testified he met with doctors, subpoenaed medical records, spoke with Applicant's girlfriend, and reviewed all of the evidence produced pursuant to Rule 5 and Brady.²

Applicant testified he met Counsel two to three times between 2006 and 2012. During the meetings they discussed strategy. Applicant recalled he told police that he didn't kill the victim, and he recalled telling the same version of the facts to Counsel.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. First, Applicant has failed to meet his burden of showing what, if anything, Counsel could have discovered or developed had he met more frequently with Applicant. Applicant's own testimony confirms that he communicated his version of facts to Counsel and that they discussed trial strategy prior to trial. The Court is left only with mere speculation as to what else could have been communicated had Applicant and Counsel spent more time in consultation. Second, where a defendant is out on bond, the impetus for meeting with defense counsel must fall largely on the

² Brady v. Maryland, 373 U.S. 83 (1963).

defendant; an attorney is not obliged to go hunting for his or her client when his or her client is free from custody. Nonetheless, Counsel credibly testified regarding his efforts to contact Applicant and have him visit during the long pendency in order to discuss the case. Third, Counsel's testimony clearly and credibly demonstrated familiarity with the facts of the case and that he was fully prepared for trial to the extent that any attorney could be. For all these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Strike Juror

Applicant alleges Counsel was ineffective for failing to strike a juror who was biased against Applicant and had pre-existing knowledge of the case. Jury selection is a process that inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) (citations omitted). "The selection of a jury is inevitably a call upon experience and intuition. The *trial lawyer* must draw upon his own insights and empathetic abilities." Id. (quoting Romero v. Lynaugh, 884 F.2d 871, 878 (5th Cir. 1989)). "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. (citing State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)). Consequently, in order to prevail upon a claim that the trial attorney should have struck a juror, the applicant "must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." Id. Further, "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodston v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

Larry Chestnut, Sr., Applicant's father, ("Senior") testified nobody talked to him during *voir dire*, but that he expressed to Counsel a concern about one of the jurors—namely that

foreperson James Spain had fired him from previous employment. Senior recalled Counsel replied he did not want to scratch a black juror.

Counsel testified he didn't know the juror in question. Counsel affirmed he asked Applicant if he wanted Mr. Spain on the jury and that Applicant must have expressed no concerns. Counsel noted he would have wanted a black juror. This Court interceded and inquired of Applicant's counsel whether there was any evidence to show the juror in question was biased or unfair. Applicant's counsel conceded there was nothing to show any problems in deliberation.

Applicant testified Spain knew of his situation. Applicant could not remember what was said about Mr. Spain during *voir dire*, only that Senior told Counsel there was a concern.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. First, Applicant provided no evidence to show that Counsel's failure to strike the juror prejudiced the defense, but only expressed a belief the juror was hostile. To the contrary, that the jury acquitted Applicant of the charge indicted and instead returned a verdict of guilt for the lesser-included offense of voluntary manslaughter reflects diligent and fair consideration of the facts of Applicant's case. Second, Applicant provided no evidence he asked Counsel to strike the juror and was refused; the only testimony was that Senior may have mentioned something about *Senior's* relationship with Spain to Counsel. Third, Counsel articulated a valid strategic reason for not exercising a strike against the juror insofar as he wished for a racially representative jury. For all these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

3. Failure to File a Speedy Trial Motion

Applicant alleges Counsel was ineffective for failing to file a motion for a speedy trial. The relevant facts are set forth in Section II.A.1, above. Applicant articulated multiple valid strategic reasons to not seek a speedy trial motion, no evidence exists to show Applicant ever

asked for one, and Applicant was out on bond during the pendency of trial. This Court finds no deficiency on the part of Counsel, nor prejudice therefrom, and accordingly Applicant's demand for relief by way of this allegation is **DENIED**.

4. Failure to File a Motion for Severance

Applicant alleges Counsel was ineffective for failing to file a motion for severance of his case from that of co-defendant Kendrick Chestnut. "Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right." Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001) (citing State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999)). "The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." Id., 346 S.C. at 559, 552 S.E.2d at 317. "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Id. (emphasis removed). "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." Id. (citing State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973)).

Counsel testified that there must be more than adverse co-defendants in order to prevail on a motion for severance. Counsel acknowledged prior statements by Kendrick to law enforcement gave rise to a Bruton³ issue, but that after an extensive Bruton hearing, the statements were redacted and excluded from trial. Counsel noted considerable time was spent redacting Kendrick's third statement to law enforcement.

³ Bruton v. U.S., 391 U.S. 123 (1968).

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel accurately deduced that, with the Bruton issue resolved by way of redaction, there was no basis for a motion for severance. Applicant has presented no basis upon which any such motion could have or should have been granted. To the contrary, Applicant's case is precisely the sort of adversarial joint trial contemplated by Hughes and Dennis. Additionally, the Court notes the trial judge properly gave a cautionary instruction that "[t]he case of each Defendant and the evidence and law concerning that Defendant must be considered separately and individually." (Tr. 888-89; quotation at 888, ll. 15-17). Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

5. Failure to Object to Erroneous Jury Instruction: Inference from Use of Deadly Weapon

Applicant alleges Counsel was ineffective in failing to object to the trial court's instruction to the jury that it may infer malice from the use of a deadly weapon. Where evidence is presented that would reduce, mitigate, excuse or justify a homicide [or attempted homicide] caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). "Generally, a curative instruction is deemed to have cured any alleged error." State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (quoting State v. Walker, 336 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005)).

At trial, the trial court instructed the jury on self-defense and charged them with not only murder, but the lesser-included offense of voluntary manslaughter. The trial court also instructed the jury on malice:

It can either be expressed or inferred. Obviously expressed can be shown when a person speaks words or when a person prepared beforehand to do something. It can be inferred by conduct showing a total disregard for human life. *Inferred malice can arise when the deed is done with a deadly weapon.* Now, a deadly

weapon is any kind of article, instrument, substance which is likely to cause death or great bodily harm. Whether or not something has been used as a deadly weapon depends on the facts and circumstances of each case.

(Tr. 879, ll. 4-13) (emphasis added). Immediately after completion of jury instructions, the State alerted the Court to its error and to the change in law brought about by Belcher. (Tr. 893-95). The Court corrected its error and instructed the jury that “[m]alice cannot be inferred by the use of a deadly weapon. That is not part of a murder charge, so disregard that. It is not part of this case. Disregard that completely.” (Tr. 895-96; quotation at 896, ll. 5-8). The jury acquitted Applicant of murder, but convicted him of voluntary manslaughter.

The Court finds no possible prejudice from the erroneous Belcher charge. First, the trial court clearly and unequivocally cured its error upon prompt correction from the prosecution. Second, Applicant was convicted of voluntary manslaughter, for which malice is not an element; any error in the malice instruction could not have contributed to the verdict. See, e.g. State v. Burdette, Op. No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017). Accordingly, Applicant’s request for relief by way of this allegation is DENIED.

6. Failure to Object to Cure, Timely Request Self-Defense Language

Applicant alleges Counsel was ineffective in failing to timely object and demand the Court re-charge the jury on self-defense as part of its cure of the erroneous Belcher charge. “Because a trial court’s curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review.” White, 371 S.C. at 445, 639 S.E.2d at 163 (quoting State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999)).

After the trial court cured its error in its charge on malice, it inquired as to further objections or deletions on the malice charge, to which Counsel replied it had none. (Tr. 896, ll.

14-19). After an hour and forty minutes of deliberations, and upon request by the jury, the trial court re-charged the jury on the law of voluntary manslaughter, mere presence, and “hand of one, hand of all”. (Tr. 897-902). Once the jury again returned to deliberations, the trial court again inquired as to any exceptions, deletions, or additions to the charge, at which time Counsel requested the jury be re-charged on self-defense. (Tr. 902, ll. 11-21). Because the jury had not asked about self-defense, the trial court declined the request. (Tr. 902-03).

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. There is no indication of any confusion on the part of the jury as to the law regarding self-defense. As noted in Section II.A.6, above, the trial court properly cured its error in its malice charge—no further instruction was necessary. Additionally, the jury clearly did not rely on the erroneous malice charge as evidenced by their verdict for voluntary manslaughter, so any speculation as to what if any additional curative instructions could have been given is purely academic. As to the request raised after the jury’s requests for reinstruction, the Court finds Counsel raised his request in the appropriate form and at the appropriate time. For all of these reasons, Applicant’s request for relief by way of this allegation is DENIED.

7. Failure to Motion for Mistrial

Applicant alleges Counsel was ineffective in failing to move for a mistrial after the trial court’s erroneous malice instruction. “The decision to grant or deny a mistrial is within the sound discretion of the trial judge.” State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (2005). “The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes stated into the record by the trial judge.” Id., 365 S.C. at 34, 615 S.E.2d at 460. “The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed no other way.” Id. “A mistrial should only be granted when ‘absolutely

necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." *Id.* (quoting *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000)). "To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion." *Early v. State*, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016).

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The facts and legal reasoning relevant to the disposition of this allegation are largely the same as that set forth in Sections II.A.5 & 6, above—the Court cured its erroneous malice instruction and the jury demonstrably did not rely upon the instruction. As such, there was no adequate basis for Counsel to move for a mistrial and, even if there was, no conceivable prejudice. Applicant's assertion that "[a] bell cannot be unrung" is entirely without merit and runs contrary to well-settled caselaw—the overwhelming majority of bells can be judiciously muffled. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

8. Failure to Object to Erroneous Jury Instruction: Mutual Combat

Applicant alleges Counsel was ineffective in failing to object to the trial court's instructions to the jury on the doctrine of mutual combat. "The law to be charged to the jury is to be determined by the evidence at trial." *State v. Smith*, 391 S.C. 408, 413, 706 S.E.2d 12, 14 (2011) (citing *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)). Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. *State v. Smith*, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005). "Fighting is sufficient legal provocation to warrant giving a voluntary manslaughter charge." *State v. Grubbs*, 353 S.C. 374, 381-82, 577 S.E.2d 493, 497 (Ct. App. 2003) (citing *State v. Davis*, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983)). "If the defendant is engaged in mutual

combat, self-defense is unavailable unless the defendant withdraws from the conflict before the killing occurs.” State v. Taylor, 356 S.C. 227, 232, 589 S.E.2d 1, 3 (2003) (citing by footnote State v. Graham, 260 S.C. 449, 450-51, 196 S.E.2d 495, 495-96 (1973)). The doctrine of mutual combat is applicable only where there is a pre-existing dispute, an antecedent agreement to fight, and where both parties are equally armed with deadly weapons. Id., 356 S.C. at 233, 589 S.E.2d at 4.

The facts elicited at trial altogether showed that the altercation between Applicant and Victim began after Applicant physically assaulted Christie Hucks, who was seven months pregnant at the time, and then assaulted another of Victim’s sisters, Cindy Evans, when she tried to assist Christie. Victim produced a knife and ordered Applicant to leave the women alone. Applicant then retreated to the kitchen, where he armed himself with a pair of scissors. Both men suffered severe injuries, with Applicant hospitalized for nearly a month and Victim killed.

In closing argument, Counsel emphasized that Applicant withdrew to the kitchen, was pursued by the armed Victim, and there had a right to arm himself and engage the physically intimidating Victim in self-defense. (Tr. 841-44). Counsel emphasized that Victim prevented Applicant from retreating out of the house and that Applicant had no choice but to fight. (Tr. 848-49). Counsel argued Applicant had no duty to retreat, but attempted to anyway, only for Victim to pursue him into the kitchen. (Tr. 849-50). Counsel again circled back around to his argument that even if the jury believed Applicant brought about the difficulty by attacking Christie, that “it was over and done with when he started to leave, when he started to walk out to leave to go get his daughter, and [Victim] confronts him with a knife.” (Tr. 853, ll. 1-3).

The trial court instructed the jury on mutual combat as part of its instruction on self-defense:

If the defendant voluntarily participated in mutual combat for the purposes other than protection, the killing of the victim would not be self-defense. This is true even if during the combat the defendant feared death or serious bodily injury. However, *if before the killing is committed the defendant withdraws and tried in good faith to avoid further conflict and either by word or act makes that fact known to the victim, he would be without fault in bringing on the difficulty.*

For mutual combat, there must be a mutual intent and willingness to fight. This intent may be shown by the acts and conduct of the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with a deadly weapon.

(Tr. 884, ll. 11-25) (emphasis added). Counsel did not object to the charge.

At the evidentiary hearing, Counsel expressed his understanding that a mutual combat charge was possible and appropriate where the combatants were equally armed and equally willing to fight. Counsel noted the evidence showed Victim was armed with a knife and Applicant was armed with scissors. Counsel explained a person may withdraw from mutual combat. Counsel explained the entire strategy for self-defense was emphasizing that Applicant disengaged and the Victim followed despite disengagement. As such, the withdrawal element of the mutual combat charge was a helpful instruction to his theory of the case. Under intense redirect examination, Counsel firmly stood by his judgment that the charge was appropriate.

Applicant testified Victim was his best friend and that there had been no "bad blood" or prior agreement to fight. Though the fight only lasted a matter of minutes, the injuries resulted in Applicant's hospitalization for 25 to 26 days, including a week in intensive care, and the death of Victim.

The Court finds no prejudice from Counsel's representation for a variety of reasons. First, the Court finds Counsel articulated a valid strategic reason not to object to the mutual combat charge. Aside from some effort to disabuse the jury of the idea that Applicant injured Christie and Cindy, the crux of Applicant's defense was to argue that he retreated from the

difficulty such that he was restored to a position that he could justifiably and legally defend himself. Counsel's articulated judgment that the withdrawal portion of the mutual combat instruction was helpful, while precarious, is valid considering the totality of the circumstances.

Second, the Court finds that even if Counsel should have objected to the mutual combat instruction, the jury's return of a verdict of guilt for voluntary manslaughter, rather than murder, indicates an affirmative finding against mutual combat and obviates any prejudice that could have followed from the erroneous instruction. In order to find mutual combat, the jury would have had to have found antecedent mutual willingness to fight. Antecedent willingness is mutually exclusive with the "sudden heat of passion" required for a voluntary manslaughter conviction.⁴

Third, the Court finds that notwithstanding the prior two points, any error from instructing the jury on mutual combat was harmless. As noted above, the crux of Applicant's defense was his effort to withdraw from the confrontation with Victim, only for Victim to pursue him into the kitchen. The mutual combat instruction contained language making clear that where a defendant withdraws and tries in good faith to avoid further conflict, he may yet still be without fault in bringing on the difficulty. As such, the instruction did not muddy or confuse the central

⁴ The Supreme Court in State v. Taylor notes that a finding of mutual combat does not preclude a finding of manslaughter, but does so (1) in a case regarding a murder, (2) on the basis of an old mutual combat charge not thoroughly reviewed in State v. Andrews due to deficient issue preservation, and (3) before formally adopting "antecedent agreement to fight" as a factual prerequisite to a mutual combat charge. Taylor, 356 S.C. at 232, 589 S.E.2d at 3-4 (citing Andrews, 73 S.C. 257, 53 S.E. 423 (1906)); see also, State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973). This Court has extensively considered and contemplated how any set of facts might provide for an "antecedent agreement to fight" with deadly weapons that could still result in the "sudden heat of passion" necessary to convict an individual for voluntary manslaughter—this Court cannot conceive of any. Nor can this Court find any authority other than Taylor's off-hand remark to show a case where both "sudden heat of passion" and "mutual combat" were together charged, either in this jurisdiction or in Texas and Colorado, on whose precedents Taylor relied. The antecedent agreement to mutual combat with deadly weapons is tantamount to malice aforethought, not the sudden heat of passion. See, e.g. Ward v. Commonwealth, 116 S.W. 786, 788 (Ky. Ct. App. 1909) ("A duel has none of the elements of sudden heat and passion."); State v. Romero, 111 N.M. 99, 101, 801 P.2d 681, 683 (N.M. Ct. App. 1990) (citing Ward); Baker v. Supreme Lodge K. P., 60 So. 333, 334 (Miss. 1913) ("A duel, as the term is ordinarily understood, and as used in this policy, 'is the fighting together of two persons by previous concert with deadly weapons to settle some antecedent quarrel,' and has none of the elements of sudden heat and passion.")

question before the jury—did Applicant withdraw from the confrontation or did go to the kitchen seeking a weapon? Despite inquiries for additional instruction, the jury never expressed any confusion regarding the law of self-defense or mutual combat. The verdict is clear and consistent with the evidence.

For all these reasons, the Court finds no ineffectiveness on the part of Counsel, and Applicant's request for relief by way of this allegation is DENIED.

9. Failure to Present a Defense Case⁵

Applicant alleges Counsel was ineffective for failing to present a case in his defense. A criminal defendant is not required to present evidence, and an attorney may properly determine the best defense is to put the State to its burden of proving the charges beyond a reasonable doubt. Jackson v. State, 329 S.C. 345, 352, 495 S.E.2d 768, 771-72 (1998) (finding defense counsel not ineffective for not presenting any witnesses at trial); see also State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975) ("A basic principle of criminal law is that the State has the burden of proof as to all of the essential elements of the crime."). And again, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

At trial, discussing the issue of "last argument," Attorney Long put on the record the dilemma he presented to Applicant and Counsel:

Now, if they put up testimony – my client has no criminal record, there's nothing – there's no reason in the world for him not to testify for himself [. . .] if they put up evidence. If they don't put up evidence, then he's got a reason not to testify because I get to argue last, and he agrees with that a hundred percent.

⁵ The Court here addresses together the overlapping allegations regarding failure to present a defense.

(Tr. 751-52). Long boasted he "dropped a monster bomb on them by bringing that up, but that's just the way it is." (Tr. 753, ll. 6-7).

Attorney Long testified that he did not talk to Counsel before trial and that he wouldn't have told him anything had Counsel asked, in light of attorney-client privilege. Long told Counsel at trial that Kendrick Chestnut would testify against Applicant in the event Applicant presented evidence in his defense such that both defendants lost "last argument." Long expressed his considerable respect for Counsel and described him as "one of the best."

Counsel explained he originally intended to call Applicant as a witness in his own defense, but changed plans after attorney Russell Long, counsel for co-defendant Kendrick Chestnut ("Kendrick"), indicated that if they lost last argument then Kendrick would take the stand and testify against Applicant. Counsel recalled he discussed the issue for hours with Applicant and Applicant's family after Long disclosed his own strategic thinking. Counsel explained that while Applicant's testimony as to his own injuries would have been helpful, and he would have been able to conduct cross-examination, Kendrick's testimony would have been absolutely devastating. Counsel additionally noted Applicant never told him before trial that anybody else was responsible for the killing. Counsel further explained while he knew Kendrick had to be considered adverse, Counsel was unsure whether he would testify prior to Long's disclosure. Counsel affirmed the final decision to not present evidence was Applicant's and that Counsel agreed with the decision.

Applicant testified to his version of events. Applicant denied ever grabbing his girlfriend Christie Hucks. Applicant explained the dispute started over a birthday card that included a picture discovered by Christie; when Applicant returned home he was ambushed by Christie and her family with an allegation of cheating. Applicant noted that Victim was drunk, and that the two had never quarreled before the night of the killing. Applicant asserted Victim was armed

with a knife and called Applicant a racial epithet before swinging at him; Applicant swung back, but Applicant was cut by Victim. Applicant then retreated to the kitchen. Applicant denied ever touching scissors during the fight, but instead asserted he suffered substantial blood loss and blacked out. Additionally, Applicant admitted he did not wish to see Kendrick get in trouble, and that his care for Kendrick's outcome at trial played a factor in his decision not to testify or otherwise present evidence.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel clearly articulated a strategic decision of enormous gravity, made in close consultation with Applicant and Applicant's family. The Court will not disturb or question Counsel's judgment that the harm of Kendrick's testimony would have outweighed the value of Applicant's testimony. Accordingly, Applicant's demand for relief by way of this allegation is **DENIED**.

10. Failure to Proffer Evidence to Preserve "Last Argument" Issue for Appeal

Applicant alleges Counsel was ineffective for failing to proffer evidence in order to support its argument as to "last argument." Under the common law, "in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument." State v. Beaty, ___ S.C. ___, 813 S.E.2d 502, 510 (2018) (citations omitted). "[I]f two or more defendants are jointly tried, if any one defendant introduces evidence, the State has the final closing argument." Id. (citing State v. Huckie, 22 S.C. 298 (1885)). Same goes if any defendant introduces evidence through a prosecution witness. Id., 813 S.E.2d at 510-11.

At trial, recognizing the predicament explored in Section II.A.9, above, Counsel raised the issue of last argument to the trial court. (Tr. 749, ll. 1-8). The Court replied:

I'll be glad for you to put anything on the record that you would like to, you know, argue against precedent, but obviously there is a long established rule in

the State of South Carolina that says when defendants are jointly tried and any one of them introduces evidence, the State is entitled to the closing argument, the last argument. So, that's clearly extremely, a lengthy time period, been the law of the State of South Carolina.

(Tr. 749, ll. 16-23). Long then argued against precedent to request last argument in the event Applicant testified. (Tr. 755-56). Counsel also argued in support of Long's motion, stating "I can control what happens to Mr. Long. That should never happen. I have absolutely no legal right to control what happens to his client, and to affect his ability to make a decision for his client." (Tr. 757-58). The Court acknowledged the predicament, but denied the motion, relying on State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). (Tr. 758-60).

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. The decision whether to prioritize last argument or presenting testimony is one made in every criminal trial that occurs in the State of South Carolina. There is no question Applicant would have himself lost "last argument" had he testified in his own defense; the issue was whether *Kendrick* and attorney Long would have been able to retain last argument in the event Applicant testified. Despite the tremendous strategic choice he faced, Counsel could not motion or proffer to argue against precedent to achieve a right for Kendrick, only his own client, and there was no possibility of retaining last argument for Applicant if he testified. The impetus to present a proffer on Long's motion for last argument fell only on Long. Furthermore, even had Counsel been able to present some kind of proffer on the issue, it would not have changed the outcome at trial, and the Court is not convinced it would have changed the outcome on appeal. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

11. Failure to Properly Advise Applicant as to Whether to Testify

Applicant alleges Counsel was ineffective in failing to properly advise him as to whether to testify. This allegation is largely resolved by the same law, facts, and reasoning set forth in

Section II.A.9, above; the Court again finds Counsel fully and accurately explained the strategic costs and benefits of testifying to Applicant. Additionally, the Court finds Applicant knowingly, intelligently, and voluntarily decided against presenting evidence or testifying based both on the advice of counsel and his personal desire to see a good outcome for Kendrick. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

III. CONCLUSION

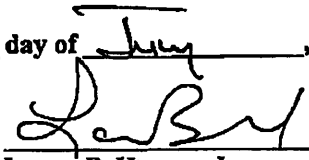
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

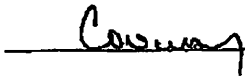
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP 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 17 day of July, 2018.


LARRY B. HYMAN, JR.
Presiding Judge
Fifteenth Judicial Circuit


South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 Larry T. Chestnut,)
 S.C.D.C. No. 352116,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2016-CP-26-00652

**ORDER DENYING APPLICANT'S MOTION
 PURSUANT TO RULE 59(e), SCRPC**

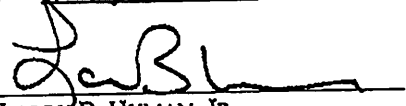
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 COURT REPORTER
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This matter comes before the Court by way of Applicant's "Motion to Alter or Amend Judgment" filed on August 10, 2018. Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant's motion, this Court is not persuaded to alter or amend the judgment.

IT IS THEREFORE ORDERED:

1. That Applicant's motion is denied and the application is dismissed pursuant to the Court's order filed July 20, 2018.
2. Applicant shall remain in the custody of the South Carolina Department of Corrections

AND IT IS SO ORDERED this 19 day of Feb, 2019.


 LARRY B. HYMAN, JR.
 Presiding Judge
 Fifteenth Judicial Circuit

Conrad, South Carolina