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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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THE STATE,

Respondent,

v.

NICHOLAS BENJAMIN CHHITH-BERRY,

Appellant.

Appellate Case No. 2019-000352

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# RETURN TO PETITION FOR REHEARING

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Appellant previously appealed his Lexington County convictions for murder and possession of a weapon during a violent crime contending the trial court erred by (1) denying him immunity from prosecution pursuant to the Protection of Persons and Property Act; (2) prohibiting a witness from testifying about details of the deceased shooting 2 people prior to his death; (3) refusing to give an imperfect self-defense instruction; and (4) failing to grant his motion for a mistrial due to premature jury deliberations. On August 31, 2022, this Court unanimously affirmed. State v. Chhith-Berry, Op. No. 5943 (Howard Advance Sheets No. 31 at 62 (Ct. App. filed August 21, 2022). Appellant has now filed a Petition for Rehearing challenging only this Court's findings as to appellate issues (1), (2), & (3). This Court requested Respondent file a Response to the Petition for Rehearing. This is Respondent's Response pursuant to Rule 221, SCACR. The Petition for Rehearing should be denied because this Court did not overlook or misapprehend any point of fact or law. Rule 221(a), SCACR.

## FACTS

On Mother's Day, May 11, 2014, Appellant, his brother Adam, and Adam's girlfriend Kayla Bass drove to Kathy Polk's home in Lexington County to pick up Bass's child. James Galloway ("Victim") was the son of Polk and the father of Bass's child that Appellant and Bass were there to pick up. When Appellant, Adam, and Bass arrived, they were intoxicated. Victim walked out to the driver's side of the vehicle from his mother's porch and confronted Adam about picking up Victim's child while intoxicated. This was the second time Victim had warned Adam about picking up the child while intoxicated (R. 404-15). Appellant became angry and confronted Victim beside the vehicle stating Victim should stop disrespecting his brother. Victim punched Appellant who fell to the ground and urinated on himself. Appellant pulled a knife from his pocket, opened it, got up, and threatened Victim with the knife. Polk came off her porch and told Appellant to put the knife away, which he did. Appellant, Adam, and Bass, then left. (R. 404-15).

Later that day, and in the days that followed, Appellant began "texting" friends and associates trying to locate a "burner" and .22 bullets. A "burner" is an untraceable gun or phone. Appellant informed several friends or associates he needed the bullets to take care of "a problem." He informed 1 friend the problem or person he needed to take care of was Victim because Victim had "snucked him" [sucker punched him] in front of his brother Adam. Appellant's friends responded they did not have what he was looking for. One even tried to dissuade him from committing any act of violence. (R. 236-38; 251-298; 431-490; 492-93; See also 404-05; State's Ex. 54 & 55).

Appellant also communicated to Victim's mother, Polk, in her presence on a later date, that he [Appellant] was going to "take care" of Victim. Appellant also communicated to Bass's

mother that the next time she saw Victim, Victim "would not be breathing." "He would be dead." (R. 404-28).

On the afternoon and early evening of Victim's death, May 19, 2014, Appellant was again texting friends or associates asking for .22 bullets stating he wanted them "fronted" to him and he would pay after he took care of a certain problem.[1] After Victim's murder, police found a sawed off .22 caliber rifle in Appellant's tote bag hid in a shed behind the home where Victim was murdered. There were no bullets in the tote bag. Appellant later told police a friend had given him the gun to sell; however, he admitted at trial the gun was his. Appellant was unable to get the .22 bullets before he came into contact with Victim the night of May 19, 2014. (R. 236-38; 251-98; 431-90; 492-93; See also 404-05; State's Ex. 54 & 55).

On that same date, May 19th, in the afternoon, Appellant, Adam, and Bass drove to Kaysha Fontenot's home in the Pine Ridge area of Lexington County. Like Bass, Fontenot also had a child with Victim. Adam and Bass were invited to Fontenot's home, but Appellant was not. When the 3 arrived, Fontenot was not expecting Appellant, only Adam and Bass. When they arrived, the 3 of them and Fontenot began drinking shots of liquor and mixed drinks in the house. During their discussions, Fontenot learned Bass was upset about something. Appellant and Adam left the home and purchased Xanax. Once they returned, the group smoked marijuana, and Appellant took some of the Xanax. Appellant admitted after the murder he had 5 shots of liquor, 2 mixed drinks, 1 and ½ bars of Xanax, and some marijuana before the murder occurred. While at Fontenot's house, Bass texted Haley Stone, the mother of 2 of Adam's children, and asked Haley to come over to Fontenot's home. Haley came over. Haley did not drink anything or use any drugs because she brought a child. (R. 193-218; 233-34; 243-44; 303-37). Haley

[1] Appellant claimed at trial 1 of these text messages was written by Adam, using Appellant's phone, but admitted his brother did not have a "problem" that needed taking care of.

testified when she arrived at Fontenot's home, the group of people there except for herself were all drunk. She also noticed that Bass was also stoned on Xanax, and it appeared Appellant was also on Xanax. (R. 303-37).

While this group of people were at Fontenot's home, Fontenot phoned Victim and talked and they had some type of disagreement. However, Fontenot then invited Victim to come to her house. She testified Victim wanted to come over to see his son. Fontenot did not tell Victim the 2 men he had the confrontation with 9 days earlier, Appellant and Adam, were there along with Bass, the mother of another of Victim's children. After ending the call with Victim, Fontenot notified the others at her home that Victim was coming to see his son. Victim arrived shortly thereafter with a female friend, Katie Leavitt, who was driving her own car. It was now dark and around 9:00 to 10:00 p.m. Haley Stone found it extremely strange all of the "baby mommas" and "boyfriends" were there at the same house at the same time. (R. 174-90; 193-218; 303-37).

Katie Leavitt remained in her car at the end of the driveway. She had reservations about Victim getting out of her car because she saw Adam's vehicle there. Victim told Katie he was just going to see his son and would be right back. Victim got out of the car and entered Fontenot's house. When he saw Appellant and Adam, Victim stated to Fontenot: "Oh, so this is how it is going to be." Fontenot did not respond. Victim then went and visited with his son in a bedroom. While Victim was in the residence visiting with his son, Appellant and Adam went out on the porch alone together. (R. 174-90; 193-218; 303-37).

Fontenot and Bass also ended up sitting on the front porch. Fontenot testified Bass whispered something in Fontenot's ear that infuriated Fontenot so much that she got up and began yelling at Katie in her car. Fontenot went off the porch, approached Katie saying vulgar things about her, and the 2 women got into a fight outside Katie's car. Haley Stone testified Bass

also joined in the assault on Katie. At the end of the fight, Katie left driving her car leaving Victim stranded at Fontenot's home. At this point Adam punched Fontenot in the left side of her face for no reason. Fontenot yelled at Adam: "so now you want to fight me too." Fontenot was then physically attacked by Bass and dragged by her feet across a sidewalk. Fontenot got up and ran in her house. As she did, she told Victim, who was headed out of the house, that Adam had just punched her in the face. Fontenot locked the door to her home and went into her children's room to check on them and calm herself down. (R. 174-90; 193-218; 303-37).

Then Bass [Adam's girlfriend and the mother of 1 of Victim's children] began yelling at Victim and eventually got in Victim's face screaming, then slapping him, and then pushing him in the yard. Victim took the abuse and ignored it. Bass continued to assault and curse Victim. Victim stated to Adam to get his girlfriend off of him. Adam made no attempt to stop Bass from assaulting Victim. Victim eventually got tired of the abuse and pushed the intoxicated Bass off of him. Bass stumbled and fell to the ground. Adam stepped in and stated Victim was not going to push his girlfriend and Adam instigated a fist fight with Victim. (R. 174-90; 193-218; 303-37).

Haley Stone, the only sober witness present, testified Adam and Victim then got in a fist fight starting in the front yard that eventually led up on the front porch. Both men threw punches. (R. 303-37). Haley testified Adam was the person who started the fight and Victim threw the first punch to force Adam to back off. However, Adam would not back off once Victim hit him in the face. Punches were thrown in the front yard by both men. According to Haley, Victim backed up the front porch steps punching Adam as Adam pursued Victim. Victim was winning the fist fight as the men got up on the front porch and Victim ended up on top of Adam on the corner of the front porch. Haley testified Adam and Victim were mainly just wrestling at this point, but both men probably threw 2 punches at each other while down on the floor of the front

porch. It was at this point, Appellant took his knife out of his front pocket, opened it, approached Victim from behind, and stabbed Victim in the back. Victim fell off of Adam and was not moving. Adam got up and kicked Victim in the head. Appellant then continued to stab Victim a total of 25 times in all. There were 22 stab wounds to Victim's back. There was 1 stab wound under Victim's arm pit that came from behind Victim. There was 1 stab wound to the back of Victim's skull, which penetrated the skull, and 1 behind Victim's ear.[2] The pathologist testified 2 of the stab wounds could have resulted in paralysis to Victim in seconds because they struck his spinal-cord. Victim died there on the front porch. He bled to death from the numerous stab wounds. (R. 193-218; 239-49; 259-98; 303-37; 493-508).

Fontenot did not witness the stabbing but came out of the front door and found Victim lying on the porch bleeding profusely. She saw people [Adam, Bass, and Appellant] running around in her yard. She called 911, reported the stabbing and identified Appellant as the killer, and attempted CPR on Victim. (R. 193-218; State's Ex. [911 call]).

After the deadly assault, Appellant, Adam, and Bass eventually tried to flee from the crime scene in Adam's vehicle. However, they were blocked in by a police officer who was just arriving as Adam and Appellant were attempting to leave the driveway. Adam got out of his vehicle and complied with the officer's commands. Appellant got out of the vehicle but did not comply with the officer's commands and told the officer to "just shoot me." He was finally arrested in the driveway. (R. 219-28; State's Ex. 5).

The only injuries to Appellant were small cuts to both of his pinky fingers consistent with him having cut himself while stabbing Victim. Adam also had 1 small cut on his hand consistent

[2] Haley did not see the knife, but she saw Appellant come up behind Victim and strike Victim about 20 times real quick in the back while Adam and Appellant had Victim down on his stomach on the front porch. Adam then kicked Victim in the head. Haley saw Victim gasp for breath and then blood went everywhere out of Victim's body. (R. 303-37).

with having been cut by Appellant while getting out from under Victim when Appellant was stabbing Victim from behind. Adam also had a busted lip and lost a tooth from the first punch thrown in the yard. Appellant and Adam were both treated and released that day from the hospital. (R. 228-34; 239-49; 431-69).

At the crime scene, police recovered the knife Appellant used to murder Victim. It contained Victim's blood [DNA] on it. It did not contain Adam's DNA. However, it did contain the DNA of another minor contributor. (R. 398-99).[3]

Appellant gave multiple statements to police at the scene. He first gave police a false name, false age, and birthdate. He also denied any alcohol or drug usage. After finally admitting his real identity, he stated he could not remember what happened. He eventually admitted he had had multiple mixed drinks, shots of liquor, marijuana and Xanax. When asked why he took the Xanax: Appellant stated to an EMT that he took the Xanax: so that he could relax before "he" came over. Appellant did not state who "he" was, but he was referring to a 3rd party coming over to Fontenot's residence when he made this statement, not to himself. Appellant also gave another version of the events, in this one he claimed Victim was attacking Appellant and Adam with a knife, and that is why Appellant had to kill Victim. Appellant claimed that he cut his fingers on Victim's knife. (R. 228-36; 239-49; 251-58).

At the hospital, Appellant gave multiple false statements about what had occurred at the crime scene, a total of 5 versions. These were recorded statements. (R. 251-58; 259-98; State's Ex. 43 & 44 [Recorded statements]; R. 431-69). He first told police his brother Adam was not aware of or "had no idea" *about something*. He then stopped himself and stated he was talking

[3] While Victim's and Adam's DNA standards were submitted to SLED, Appellant's DNA standard was never submitted to SLED. (R. 401).

about a totally different subject, than the crime, when he made this statement about Adam having "no idea." (State's Ex. 43).

Appellant initially claimed Victim kicked in the front door when he first arrived at Fontenot's home. He then stated Victim cut Adam with a knife; he [Appellant] took the knife away from Victim; and then he [Appellant] stabbed Victim 1 time. Appellant claimed Victim stabbed his brother and also stabbed him before Appellant was able to stab Victim 1 time. He said he only stabbed Victim 1 time *in the side*, a quick in and out stab, and told Victim to back off. He then put the knife on the ground and the police arrived. Appellant had no explanation for any other stab wounds to Victim. He denied it was his knife used to stab Victim and did not mention Adam and Victim were in a fist fight. (R. 251-98; State's Ex. 43 & 44; R. 431-69).

Appellant then changed his story. In this version, Victim had either a knife or a gun and was pistol whipping or stabbing Adam with whatever weapon he had; and so he, Appellant, took the weapon away from Victim, and realized it was a knife, and stabbed Victim 1 time. He claimed he stabbed Victim *in the back* not the side. Police then stopped the interview, told Appellant they were going to interview Adam, and went and interviewed him. (State's Ex. 43).

After speaking with Adam, police resumed the interview with Appellant.[4] Appellant then claimed Victim had a semi-automatic pistol, a .45. In this version of events, Appellant stated Victim put the .45 to Appellant's head and stated he was going to shoot him in the face. At this point, investigators informed Appellant that eyewitnesses at the scene stated Victim did not have a weapon at any time, **and** Appellant had previously told investigators in another version that there was no gun used at any time by anyone, including Victim. Appellant then admitted Victim

[4] The first portion of this interview was suppressed by Judge Griffith because Appellant was sleepy or drowsy. That portion was redacted. The interview begins with Appellant describing Victim pointing a .45 caliber gun at his head. (State's Ex. 44).

had no gun on this occasion. Instead, Appellant then claimed Victim had a gun on Mother's Day, when he punched Appellant, and claimed Victim then pointed the gun at his head in Kathy Polk's front yard. (State's Ex. 44). Appellant was informed that no one had seen a gun on Victim on Mother's Day, including Adam or Bass. (State's Ex. 44).

Appellant then changed his story again. His final version told to police was that *Victim* ***and*** *Appellant* were arguing. Appellant could not remember what he and Victim were arguing about. (State's Ex. 44). Adam then jumped on Victim. Victim and Adam then started fighting. The fight went up on the porch and Victim was eventually hitting his brother on the porch and Appellant thought Victim had some kind of blade or object because Adam was bleeding so much. Appellant admitted he pulled his own knife and stabbed Victim 1 time. The stab was to the shoulder blade. Appellant could not explain how Victim was stabbed numerous other times. He claimed it was self-defense because *Victim* tried to take the knife *away from Appellant* and *caused Appellant to stab himself 2 times in the hand*. Appellant admitted he threw the knife down in the yard in the grass. (State's Ex. 44).

During this interview, when asked why he stabbed Victim, Appellant also stated he stabbed Victim because Victim had "snucked" him. (State's Ex. 44). The only time Victim "snucked" Appellant was on Mother's Day, May 11th, at Polk's residence when Appellant urinated on himself, which was 9 days earlier. (State's Ex. 44; R. 404-15). In this portion of the interview, Appellant claimed Victim also "snucked" Adam and that he [Appellant] stabbed Victim because Victim had "snucked" his brother and "snucked" Appellant. Appellant could not explain how Victim ended up on the floor of the porch. (State's Ex. 44). In all of these interviews, even though asked who was present at the crime, Chhith-Berry never told police that Haley Stone was present and witnessed the murder. (State's Ex. 43 & 44 [Recorded interviews]).

Appellant's cell phone was seized and his cell-phone records and text messages from his phone were obtained. It was in those records authorities learned Appellant had been attempting to obtain a "burner" and .22 ammunition to get rid of Victim for 10 days leading up to and including the day of the murder. Those records also included an admission by Appellant that he wanted to get rid of Victim because he had "snucked him" in front of his brother on Mother's Day. (R. 236-38; 251-58; 259-98; 431-469; 469-90; 493).

Appellant also spoke to his mother from jail over the phone and made incriminating statements in a recorded phone call. (R. 259-98; 298-301; 303-07; State's Ex 35 & 36; State's Ex. 37; R. 339-44; 490-92). Haley Stone and Adam can be heard in the background of this phone call at Appellant's mother's residence. Appellant admitted in the phone call that Victim had sucker punched him in front of his brother several days before the murder. But, Appellant admitted Victim had not threatened him before the murder. Appellant stated to his mother that if Victim had not done something he shouldn't have, "he wouldn't have died for nothing." Appellant complained police had taken his phone as evidence. Appellant stated he stabbed Victim because he was not going to stand there and "watch his brother get his ass kicked." Appellant expressed concern over how he would look to others if he stood by while his brother lost a fight. Plus, Appellant stated he stabbed and disliked Victim because Victim thought he was "all hard and shit." Appellant stated: "…I fucked that boy up bad." "Fuck that nigger." (State's Ex. 37).[5] Appellant stated he was glad Victim was dead. When his mother stated to him that no one deserves to be dead, Chhith-Berry responded: "That nigger does." (State's Ex. 37).

At trial, Appellant testified and claimed he came to the defense of his brother because he thought his brother was going to be killed by Victim hitting Adam with his fists. Appellant

[5] Although, Appellant repeatedly used this racial epithet to describe Victim, everyone involved in this case was Caucasian, including Victim, witnesses, and Appellant and Adam Berry.

admitted the knife was his knife. He claimed he only remembered stabbing Victim 1 time. After that, he did not remember anything. He claimed he could not remember any of the statements he gave first responders, police, or investigators. (R. 567-619).

Appellant also called as a witness Michael Sulier, who killed Adam in retaliation for Victim's murder several months before this trial. Sulier alleged that Adam told Sulier before Sulier killed Adam that he [Adam] participated in the murder of Victim by also stabbing Victim several times. However, Sulier was impeached by the State that he had written a letter to this same effect prior to his guilty plea to murder in an attempt to reduce the sentence he would have to serve for Adam's murder, i.e. Sulier alleged the victim Adam Berry provoked his own murder. Sulier also claimed on the witness stand that he acted alone in Adam's murder; however, he was then forced to admit that he had written a letter and posted on-line that others were also involved in Adam's murder in addition to himself. Sulier also admitted he obtained the murder weapon used to kill Adam the day before Adam's murder, i.e. showing pre-meditation, which undercut Sulier's claim Adam provoked his own murder. (R. 543-560).

Appellant did not call his brother's girlfriend, Bass, as a witness at trial. Bass was present on May 11th when Victim chastised her, Adam, and Appellant for picking up Victim's child while intoxicated and when Victim punched Appellant and he urinated on himself, 9 days before Victim's murder. Bass was also present, on separate occasions, when Appellant threatened Victim's life in front of Polk and Bass's mother. Bass also rode with Appellant and Adam to Fontenot's home on the day of Victim's death, and it was Bass who was angry when they arrived there. Bass also texted Haley Stone and asked her to come to Fontenot's residence. Bass also instigated the conflict between Fontenot and Katie Leavit in the driveway which led Katie to leave resulting in Victim being stranded at Fontenot's. And, it was Bass who then

attacked Victim and who caused the fight between Adam and Victim, shortly before Victim was murdered by Appellant. (R. 174-90; 193-218; 303-37).

The jury deliberated approximately 30 minutes before reaching a verdict of guilty on both indictments. Appellant was convicted of murder and the weapon charge.

**Issue I.**

**Did the trial judge err in denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act?**

In the Petition for Rehearing, Appellant alleges this Court overlooked or misapprehended points of fact and/or law. Appellant is simply wrong. This Court did not overlook or misapprehend any point of fact or law but correctly affirmed the trial court's denial of immunity under the Act.

*What Occurred Below*

Pre-trial, Appellant moved to suppress his statements made to police. A Denno[6] hearing was held, and the trial court took testimony from the police officers, first responders, and investigators who questioned Appellant at the scene, in transport, and at the hospital. Judge Griffith heard the statements Appellant made about the killing at the scene and at the hospital, including taking a break to listen to the recorded statements. (R. 16-61, Court's Ex. 1 & 2). After hearing another pre-trial issue,[7] Judge Griffith then took more testimony on the issue of the admissibility of Appellant's statements. And, after hearing argument, ruled preliminarily

[6] Jackson v. Denno, 378 U.S. 368 (1964).

[7] Appellant also moved pretrial to admit testimony from Michael Sulier, who murdered Adam Berry after Victim's murder but before this trial. The court took proffered testimony from Sulier and heard argument on whether his testimony was admissible. (R. 61-90).

Appellant's statements were free and voluntary and would be admissible before the jury, subject to some possible redactions of prejudicial information. (R. 90-105).

Appellant then moved pre-trial for immunity from prosecution pursuant to the Protections of Persons and Property Act. S.C. Code Ann. Section 16-11-410, *et. seq*. (R. 105-33). Judge Griffith conducted a pretrial hearing pursuant to State v. Manning, 418 S.C. 38, 791 S.E.2d 148 (2016), and heard the motion for immunity pursuant to Subsection C of S.C. Code Ann. Section 16-11-440. [8] (R. 105-60). Testimony was presented at the hearing only from Appellant. (R. 106-58). The State thoroughly cross-examined and impeached Appellant at the hearing. (R. 117-54). At the conclusion of its cross-examination, the State indicated it could cross-examine Appellant further on his recorded statements to police, but rather than do so, directed the court to those statements which Judge Griffith had already heard pre-trial in the Denno hearing. (R. 154). At the conclusion of the hearing, Judge Griffith denied the motion for immunity pursuant to the Act. (R. 158-60). Judge Griffith found Appellant's version of the events at and during the murder was not credible. (R. 158-60). Therefore, he denied immunity as the fact finder finding Appellant had failed to meet his burden of proof under the Act to prove he was entitled to immunity by a preponderance of the evidence. (R. 158-60).

*The Evidence Presented at the Pre-trial Hearing*

At the "stand your ground" hearing, Appellant called only himself as a witness. (R. 106-58). He offered no other evidence in support of his claim that he was entitled to immunity under the Act. (R. 105-60). He testified that on the date in question he, his brother Adam, and Bass traveled to Fontenot's house. Once there, they began drinking, smoking marijuana, and doing

[8] Subsection (A) of Section 16-11-440 has no application here. *See* Curry, 406 S.C. at 370, 752 S.E.2d at 266 (the presumption of subsection (A) does not apply if the victim has an equal right to be in the dwelling or residence); Manning, 418 S.C. 38, 791 S.E.2d 148 (similar).

drugs. He admitted he had several shots of liquor and 4 or 5 mixed drinks. He also had 1 and ½ bars of Xanax and smoked some marijuana. While at the house, someone stated Victim was coming over to Fontenot's to see his son. Once Victim arrived, Victim saw his son. Initially, there were no problems between any of the men. At some point, some of the women started fighting each other and then 1 of the women got into it with Victim. A fight then started in the front yard between Adam and Victim. According to Appellant, Victim hit Adam and Adam tried to hit Victim but was unsuccessful. Appellant testified Victim then punched his brother Adam over and over in the yard with Adam backing up trying to protect himself. Appellant testified the fight went up on the porch and Victim continued to punch Adam into a corner of the porch. Then Victim was on top of Adam punching him and Adam was protecting himself from the punches but was getting hit. Appellant claimed he told Victim to stop but he would not. Appellant testified he pulled a knife and stabbed Victim 1 time in the shoulder blade, Victim flinched as if he felt the stab wound, and Victim fell off of his brother but was still moving. Appellant believed he dropped the knife at this point. He did not remember stabbing Victim anymore, only 1 time in the shoulder blade. He testified his brother got up off the ground and he and his brother then had Victim cornered on the porch and they began to hit and kick Victim together. Appellant testified he could not remember anything after that. He did not know how Victim was stabbed 25 times. He said his brother could have done it, but he did not know. He just could not remember. (R. 106-58).

On cross-examination, Appellant admitted that on May 11th, at another location, he, Adam, and Bass went to pick up Bass's son at Victim's mother's home. Victim came out to the car and was complaining to Adam about picking up the child while drunk or high on drugs. According to Appellant, Victim spat in his brother's face. Appellant stated his brother rolled up

his car window. Appellant admitted he got out of the car and confronted Victim face to face, and Appellant claimed Victim beat him up punching him several times until he was down on the ground and kicking him. Appellant admitted he pulled a knife on Victim, but claimed it was to make the victim stop beating him up. Appellant admitted Victim's mother could have ended this altercation, but he didn't remember. (R. 106-58).

Appellant was then asked a series of questions about his actions over the next several days where he sought to purchase a "burner" [a disposable gun] and .22 bullets. He testified he could not remember trying to buy a gun or trying to buy bullets to solve or take care of a problem, even though there were written text messages showing he did exactly that. He also could not remember threatening Victim's life several times to 3rd parties such as Victim's mother and Bass's mother. Appellant also testified he could not remember others trying to dissuade him from using a gun to resolve his problems or dispute with Victim, even though there were text messages to this effect. (R. 106-58).

When the Solicitor questioned Appellant about the date in question, and about the fight in the front yard between Appellant's brother Adam and Victim, Appellant again repeatedly could not remember details of what occurred in the yard. (R. 106-58).

Appellant also could not remember anything after he stabbed Victim 1 time in the shoulder blade. He could not explain how Victim was stabbed 24 more times with the same knife used to stab Victim in the shoulder blade. He couldn't remember if he stabbed Victim 24 more times or if his brother picked up the knife and stabbed Victim 24 more times. He did admit after he stabbed Victim 1 time, in the shoulder blade, Victim got off his brother, and Appellant and his brother then began hitting and kicking Victim in the corner. (R. 106-58).

When asked about the various inconsistent statements he gave after the killing, Appellant again claimed he could not remember. He could not remember what he told the first officer on the scene. He could not remember what he told the EMS first responder. He could not remember what he told another officer, that he claimed Victim attacked he [Appellant] and his brother [Adam] with a knife. He basically could not remember anything. (R. 106-58).

Appellant did not present any of the other eyewitnesses to the killing of Victim at the "stand your ground" hearing. He did not call Bass, Fontenot, or Stone. (R. 105-60). He did not present any physical evidence from the crime scene. (R. 105-60). He did not call any of the officers who investigated the case or the pathologist. (R. 105-60). He did not call any of the detectives who questioned him at the hospital or introduce any of his recorded statements. (R. 105-60).

Judge Griffith, who heard and witnessed Appellant's testimony, found after hearing the testimony that Appellant was not credible. He found Appellant was not credible in his claim that he could not remember what happened after the first stab to Victim's shoulder blade and he was also not credible when he testified that he could not remember certain facts about what occurred in the yard before the 1st stab wound was inflicted. Judge Griffith found there was no explanation from Appellant why Victim was stabbed numerous additional times after the first stab, and this was inconsistent and not credible as to the claim of defense of others. Judge Griffith found that Appellant's testimony was not credible as to the events surrounding Victim's death, and since that was the only evidence presented at the hearing, Appellant had failed to prove by a preponderance of the evidence that he was entitled to immunity under the Act. (R. 158-60).

This court correctly affirmed the trial court's denying the Appellant immunity from under the Act because as the fact finder Judge Griffith found Appellant's testimony regarding how the killing occurred was no credible; and, Appellant had failed to prove it was necessary to stab the victim numerous time after the initial stab wound to the shoulder blade in defense of another; therefore, Appellant failed to meet his burden of proof by a preponderance of the evidence.

Appellant argues in his Petition for Rehearing that this Court erred because Judge Griffith erred in declining to find he was entitled to immunity under S.C. Code Ann. Section 16-11-440 (C) because based on his testimony alone there was evidence he acted in defense of others. Judge Griffith did not err because he saw and heard Appellant's testimony and determined it was not credible; therefore, he appropriately found Appellant failed to prove by a preponderance of the evidence that he was entitled to immunity under the Act. Further, this Court and Judge Griffith directly addressed Appellant's claim of immunity under the Act through the defense of "defense of others" and correctly and properly found Appellant had not met his burden of proof in that regard. As Judge Griffith and this Court found, even if Petitioner's initial testimony is believed that he was acting in defense of his brother when he stabbed victim in the shoulder, Petitioner did not prove by a preponderance of the evidence or by any credible testimony that it was necessary to continue to stab the victim after the stab wound to the shoulder.

***Standard of Review***

A claim of immunity under the Act requires a pre-trial determination using a preponderance of the evidence standard, which this Court reviews under an abuse of discretion standard. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016)(quoting State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). An abuse of discretion occurs when a circuit court's ruling is based on an error of law or, when grounded in factual conclusions, is without

evidentiary support. Id. "In other words, the abuse of discretion standard of review does not allow this Court to reweigh the evidence or second guess the [circuit] court's assessment of witness' credibility. State v. Oates, 421 S.C. 1, 13, 803 S.E.2d 911, 918 (Ct. App. 2017); State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237-38 (Ct. App. 2014).

***Law / Analysis***

"[T]he General Assembly did not intend," to require the circuit court "to accept the accused's version of the underlying facts" in determining a motion for immunity under the Act. Oates, 421 S.C. at 13, 803 S.E.2d at 918; (quoting Curry, 406 S.C. at 372, 752 S.E.2d at 266). In accordance with South Carolina Supreme Court' and Court of Appeals' jurisprudence, the burden of proof of establishing entitlement to immunity under the Act rests upon the party asserting the right to immunity, the appellant, and the burden of proof is by a preponderance or greater weight of the evidence. Curry, 406 S.C. 364, 752 S.E.2d 263; State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). This same jurisprudence makes the trial court, not the jury, the finder of facts of when the burden of proof has been met for the entitlement of immunity from prosecution under the Act. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013) (S.C. Code Ann. Section 16-11-440(A), does not contain any substantive provisions of law to be charged to the jury, but rather, it is a procedural subsection under which the circuit court may grant immunity from prosecution before a trial begins if the court finds the defendant acted lawfully in self-defense), *affirmed as modified on other grounds*, 415 S.C. 475, 783 S.E.2d 808 (2016). Unlike the constitutional right that a defendant is presumed innocent until the government has established a defendant's guilt beyond a reasonable doubt, the Act does not provide a presumption of immunity. But rather, a defendant must establish his entitlement to immunity by proof of the greater weight of the evidence. Curry, *supra*; Duncan, *supra.*

Preponderance of the evidence is evidence which, as a whole, shows that the fact sought to be proved is more likely true than not true. *See Blacks Law Dictionary* 1064 (5th Ed. 1979). If after considering all of the evidence presented, the weight of the evidence remains even or if it tips even or so slightly in favor of the government, then the defendant has failed to meet his burden of proof and is not entitled to immunity under the Act. Curry; Duncan.

As the fact finder, necessarily, the trial court [Judge Griffith] must determine the credibility of the witnesses who have testified at an immunity hearing under the Act, including the defendant. State v. McCarty, Opinion No 28116, Howard Advance Sheets (Filed September 21, 2022) *citing as e.g.* State v. Andrews, 427s.C. 178 181, 830 S.E.2d 12, 13 (2019). The abuse of discretion standard does not allow an appellate court to reweigh the evidence or second-guess the circuit judge's assessment of a witness' credibility. State v. Douglas, 411 S.C.307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014), *cert. dismissed as improvidently granted*, 416 S.C. 627, 788 S.E.2d 686 (2016). Credibility simply means believability.

Judge Griffith found that here, Appellant's testimony was not credible. (R. 158-60). This finding is fully supported by the record. (R. 106-58).

Appellant could not remember significant facts about how Victim was killed. Appellant claimed he blacked out and only stabbed Victim 1 time. Appellant claimed he stabbed Victim 1 time in the shoulder blade. Victim was stabbed 25 times. Appellant could not explain how or give a credible reason why Victim was stabbed 24 more times including 2 times in the spine and 1 time in the back of the skull and 1 time behind an ear. Victim died from the numerous stab wounds he received to his back and skull. Appellant could not remember significant events that occurred in the front yard before his brother and Victim ended up on the front porch. His memory also became convenient when discussing what occurred in the days leading up to

Victim's murder. Appellant could not remember texting friends and trying to locate a "burner" and .22 bullets to "take care of" Victim, indicating his malice toward Victim. Appellant could not remember conversations in which he threatened Victim's life in the days leading up to the Victim's murder. Appellant could not remember any statements he made to police whether at the scene or at the hospital. Almost on every critical point, especially those that proved murder and disproved his claim of defense of others, Appellant could not remember or recall facts or events. (R. 106-58).

Appellant also admitted he was intoxicated at the time of the offense, calling into question any of his recall of certain facts. Appellant admitted he had imbibed several mixed drinks, several shots of liquor, marijuana, and 1 & ½ bars of Xanax before the murder occurred. As a result, Appellant's credibility was in question from the start.

Under South Carolina law, flight is also evidence of guilt. State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606 (1999)("Evidence of flight has been held to constitute evidence of guilty knowledge and intent."). Appellant and his brother attempted to flee the scene and were only unsuccessful in this attempt to flee because they were blocked in leaving the driveway by the first responding officer.

Further, at the pre-trial hearing, Appellant admitted he threw away the knife before attempting to leave the scene. "The attempted destruction of evidence is regarded as a relevant incriminating circumstance." Beckham, 334 S.C. 302, 513 S.E.2d 606 (referencing State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946)); State v. Al-Amin, 353 S.C. 405, 578 S.C. 32 (Ct. App.

2003)(the attempted destruction or concealment of evidence is relevant incriminating evidence); State v. Wells, 162 S.C. 509, 161 S.E. 177 (1931)(similar).[9]

Further, South Carolina Supreme Court authority provides the trial court in addition to making credibility determinations is also to weigh the evidence and make specific factual findings before reaching a decision as to immunity. State v. McCarty, Opinion No. 28116, Howard Advance Sheets, (Filed September 21, 2022); State v. Andrews, 427, S.C. 178, 181, 830 S.E.2d 12, 13 (2019); State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). Judge Griffith did exactly that.

Judge Griffith did not abuse his discretion, in determining Appellant's testimony was not credible and Appellant had not proven defense of others and entitlement to immunity under the Act by a preponderance of the evidence. Oates, 421 S.C. at 13, 803 S.E.2d at 918; Douglas, 411 S.C. at 316, 768 S.E.2d at 237-38. As a result, this appellate ground had no merit and was appropriately denied by this Court in its Opinion. State v. Chhith Berry, *supra*.

In his Petition for Rehearing, Appellant argues this Court misapprehended the law because Judge Griffith found Appellant credible up to the point of the first stab wound. Respondent disagrees. Respondent believes a fair reading of the record is that Judge Griffith was stating even if you believe Appellant's version of events up to the first stab wound, his testimony after that is not credible **and** it was unnecessary for him to stab the victim 24 more times. Petitioner's testimony at the pre-trial hearing was after he stabbed Victim in the shoulder, the victim fell off of his brother Adam and stopped fighting. The victim did not die from a stab

[9] Although not mentioned by Judge Griffith in his holding that Appellant's testimony was not credible and Appellant had not met his burden of proof to show entitlement to immunity under the Act by a preponderance of the evidence, Appellant had given numerous false statements to police and first responders about the killing that Judge Griffith had already heard in the Denno hearing and which were referred to by the Solicitor in his cross-examination of Appellant during the "stand your ground hearing." Appellant's testimony was simply not credible in any respect.

wound to the shoulder blade. Appellant admitted he and his brother continued to punch and kick the victim as they had him cornered on the porch. As this Court correctly found in its Opinion and as Judge Griffith found below, Appellant failed to prove he was entitled to immunity under the Act because based on his admission he continued to stab the victim 24 more times after there was no longer any need to defend his brother. Additionally, Appellant claimed he did not remember what happened after the first stab wound, or even who stabbed the victim 24 more times, which is completely non-credible. When the sole witness presented to prove immunity under the Act is found not to be credible, then the defendant has not met his burden of a preponderance of the evidence to prove entitlement to immunity under the Act.

Here, Judge Griffith made a credibility determination, also weighed the evidence, and made findings on salient points, determined Appellant was not entitled to immunity under the Act under the defense of others, and this Court considered whether the evidence supported those findings and correctly affirmed. State v. McCarty, Opinion No. 28116, Howard Advance Sheets, (Filed September 21, 2022), *citing as c.f.* State v. Marshall, 428 S.C. 11, 20, 832 S.E.2d 618, 623 (Ct. App. 2019)("In the instant case, the circuit court found numerous inconsistencies called Marshall's credibility into question and resulted in Marshall failing to establish entitlement to immunity by the preponderance of the evidence"); Id.at 21, 832 S.E.2d at 623 ("Based upon our review of the record we find the circuit court properly weighed the evidence presented and did not abuse its discretion in denying immunity under the Act."). Judge Griffith did not state that it was up to the jury, not him, to determine whether the defense of others applied. *Compare* McCarty, *supra*. Judge Griffith directly addressed *Appellant's claim* that he was entitled to immunity under the Act because he acted in defense of another, and found, not only was

Appellant not credible on this issue, but also Appellant had failed to meet his burden of proof on this issue. State v. Chhith-Berry, *supra*.

In the Petition for Rehearing, Appellant argues extensively that it is irrelevant that he could not remember stabbing the victim 24 more times. Appellant claims if he was justified in stabbing Victim 1 time, he could stab him 24 more times. This Court addressed this issue and addressed it correctly. First this Court stated:

> Additionally, "[u]nder the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Long*, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997).

After recognizing the Act protects those who truly act in self-defense and in defense of others, this Court stated and held as follows as to this case:

> Further, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978)). However, "[a] person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body." *Id.* (quoting 40 C.J.S. *Homicide* § 189 (2014)).
>
> Here, the record is sufficient for this court to determine the trial court applied the correct burden of proof. The trial court clearly found that Chhith-Berry failed to prove by a preponderance of the evidence he was entitled immunity pursuant to section 16-11-440(C). *See Andrews*, 427 S.C. at 181, 830 S.E.2d at 13 ("[T]he relevant inquiry is . . . whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence."). The record also supports the trial court's finding that Chhith-Berry was not entitled to immunity under section 16-11-440(C). Chhith-Berry had the burden of proving by a preponderance of the evidence that he reasonably believed his actions were necessary to prevent death or great bodily injury; his testimony was the only evidence he presented at the immunity hearing. Chhith-Berry testified that he stabbed Galloway once in the shoulder and that caused Galloway to fall off of Berry and stop fighting. Despite Chhith-Berry's testimony that Galloway stopped fighting after the first stab wound, Galloway sustained another twenty-four unaccounted-for stab wounds. Because of Chhith-Berry's inability to explain Galloway's twenty-four additional stab wounds, the trial court ruled that Chhith-Berry was not entitled to immunity under section 16-11-440(C) because he failed to prove "by a preponderance of the

> evidence that he needed to continue to defend [Berry.]" Indeed, even if Chhith-Berry was entitled to intervene on behalf of Berry, he was not entitled to continue stabbing Galloway after Galloway stopped fighting. Consequently, the record contains evidence the trial court applied the correct burden of proof and made findings that supported its denial of immunity. Accordingly, we affirm the trial court's finding that Chhith-Berry was not entitled to immunity. *See Andrews*, 427 S.C. at 182, 830 S.E.2d at 14 ("[W]hile the [trial] court may not have set forth every detail of its analysis in the record, the record [wa]s nevertheless adequate for a reviewing court to determine that the [trial] court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of [our supreme court's] precedent.").

Chhith-Berry, *supra*. Appellant completely ignores the fact that by his own admission the threat to his brother was removed after the first stab wound. Victim fell off his brother and stopped fighting his brother. Appellant and his brother then ganged the victim in the corner of the porch while they had victim on the floor of the porch. As this Court correctly found, the law does not allow one to continue to stab another in defense of a third party after it is apparent the threat to the third party is removed. Hendrix, *supra*; Marin, *supra*. This Court appropriately affirmed Judge Griffith on this issue.

In the Petition for Rehearing, Petitioner also complains that Judge Griffith considered evidence outside the immunity hearing and this Court misapprehended that fact and the law on this issue. Again, Appellant is wrong. In its Opinion in this case, this Court stated as follows:

> "[T]he [trial] court's [immunity] ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different." *Cervantes-Pavon*, 426 S.C. at 452-53, 827 S.E.2d at 569 (quoting *Sifuentes v. State*, 746 S.E.2d 127, 131 n.3 (Ga. 2013)).

Chhith-Berry, *supra*. While Appellant is correct that questions of counsel alone are not evidence, Appellant's responses to counsel's questions are evidence. At the evidentiary hearing, it was not contested by defense counsel or Appellant that Victim suffered 25 stab wounds in all. This present argument is being raised for the first time in the Petition for Rehearing and is not

preserved for appellate review. (See BOA). *See* Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989)(appellant may not use reply brief to raise an issue not argued in the appellate brief); Rule 221(b), SCACR (no new arguments may be made in the Final Brief but must be raised in the initial brief): In re Bruce O, 311 S.C. 514, 429 S.E.2d 458 (Ct. App. 1993)(appellant may not use oral argument to raise issue not raised in brief).[10] During cross-examination, Appellant stated that he could not explain how victim was stabbed 24 other times. Defense counsel did not object to the question as not based in fact. The question contained no false representation. Petitioner also testified he only remembered stabbing Victim 1 time in the shoulder blade, and Victim flinched and got off Adam and stopped fighting his brother. Appellant testified he could not remember if he stabbed Victim 24 more times or if his brother stabbed Victim 24 times. (R. 106-58).[11] This Court correctly held:

> Because of Chhith-Berry's inability to explain Galloway's twenty-four additional stab wounds, the trial court ruled that Chhith-Berry was not entitled to immunity under section 16-11-440(C) because he failed to prove "by a preponderance of the evidence that he needed to continue to defend [Berry.]" Indeed, even if Chhith-Berry was entitled to intervene on behalf of Berry, he was not entitled to continue stabbing Galloway after Galloway stopped fighting. Consequently, the record contains evidence the trial court applied the correct burden of proof and made findings that supported its denial of immunity. Accordingly, we affirm the trial court's finding that Chhith-Berry was not entitled to immunity. *See Andrews*, 427 S.C. at 182, 830 S.E.2d at 14 ("[W]hile the [trial] court may not have set forth every detail of its analysis in the record, the record [wa]s nevertheless adequate for a reviewing court to determine that the [trial] court applied the correct burden of

[10] In his Final Brief to this Court, Appellant only mentioned the 25 total stab wounds to Victim on another issue, Issue III., but did not contest there were 25 total stab wounds to Victim either. (FBOA). This present argument is being raised for the first time in the Petition for Rehearing and cannot be preserved by raising it for the first time in a post-Opinion motion.

[11] Respondent would note Judge Griffith could not have considered any evidence *admitted at trial* in making his immunity determination because he made his determination of the lack of immunity under the Act on the record at the conclusion of the immunity hearing. As previously stated, Judge Griffith had heard multiple *pre-trial hearings* on the admissibility of Appellant's numerous statements to law enforcement and first responders, and a hearing on the admissibility of a witness' testimony, but Judge Griffith's ruling indicates he only relied on Appellant's testimony at the immunity hearing in denying immunity under the Act.

> proof and made findings that supported its denial of immunity consistent with a correct application of [our supreme court's] precedent.").

Chhith-Berry, *supra*.

Finally, Appellant argues this Court erred in affirming Judge Griffith because he stated after finding Petitioner was not credible and did not meet his burden of proof by a preponderance of the evidence, that there was "a factual question" for the jury (R. 159) and later that the evidence "went both ways." (R. 512). There is no merit to this argument. Judge Griffith did not state there was a factual question for the jury until after he found Appellant's immunity testimony was not credible **and** Appellant had not met his burden of proof that he was entitled to immunity under the Act under the defense of others. (R. 158). There is nothing wrong with this parsed statement because as discussed above Judge Griffith did not abdicate his role as fact finder, and once he made the credibility, weight, and factual determinations and legal conclusions as required by our Supreme Court that Appellant was not entitled to immunity under the Act, the issue was one for the jury. This statement must be read in the context that it was made. Judge Griffith was stating because he did not find Appellant's testimony credible **and** further Appellant had not met his burden of proof on the issue of defense of others by a preponderance of the evidence for the reasons previously stated, Appellant was not entitled to immunity under the Act, and therefore, as a result, it was a factual question for the jury. (R. 158). Further, the court's much later statement that the evidence "went both ways" was not made until the directed verdict stage at pages **512-13** of the record, long after his pre-trial determination of credibility, weight, and factual and legal determinations Appellant was not entitled to immunity under the Act upon which this Court relied in its Opinion. (R. 158). There is no merit to this argument in the Petition for Rehearing.

## Issue II.

**Did the trial judge err in excluding the testimony of specific details of the deceased's prior shooting of two people prior to his death that Appellant knew nothing about?**

*The Actual Issue*

During trial, Appellant sought to introduce specific details of a prior incident Victim was involved in which occurred on January 9, 2014, before Victim's murder on May 19, 2014, which details Appellant did not know about. The State objected on the ground Appellant, by his own admission, did not know about those specific details. (R. 161-62; 517-22). During his case in chief, Appellant proffered the testimony of a bartender, Orville Edwards, who was an alleged victim and witness to the prior incident involving Victim. (R. 523-30). After hearing Edwards' proffer, Judge Griffith denied admission of Edwards' testimony. Appellant alleged on appeal that Judge Griffith abused his discretion in not admitting Edwards' testimony. (IBOA). This Court correctly affirmed. State v. Chhith-Berry, *supra*.

*What Occurred Below Relevant to this Issue*

At the pre-trial "stand your ground" hearing, under oath, Appellant testified that on the day of Victim's death, he was afraid of Victim for 3 reasons: (1) Victim had beat him up about 10 days earlier [the Mother's Day incident]; (2) he knew Victim's reputation for violence, including the fact that Victim had 2 prior attempted murders, "he shot two people"; and (3) Victim was much bigger than Appellant. (R. 111-12; 115-16). Appellant later clarified number (2) above, "…I just knew he had - - he was known to have guns and shoot people. That's - - I didn't know that for a fact about whether he had or anything." (R. 116, ll. 19-21). Appellant testified Victim bragged to him about shooting the 2 people. Victim **did not** tell him that he had been jumped by several men and that was why he shot the 2 men in the prior incident. And,

Victim told Appellant the reason he came back to the scene of the prior incident was just so he could shoot 2 people. (R. 117-54).

As stated under the previous ground, Appellant testified at the pre-trial hearing that on May 19, 2014, his brother Adam got into a fight with Victim and was losing the fight. Appellant testified he stabbed Victim with his [Appellant's] knife because he was afraid Victim was going to beat his brother to death with his fists. (R. 107-17). "All I wanted him to do was just stop hitting my brother." (R. 117, ll. 4-5).

After Judge Griffith denied immunity under the Act, pre-trial, the State moved *in limine* to take up *in camera* whether Appellant would be allowed to ask State's witnesses or other witnesses about what they knew about the prior incident involving Victim on January 9, 2014 in the Vista in Columbia, S.C., where Victim was charged with attempted murder. (R. 160-62). The State conceded that during the trial Appellant could introduce anything he knew about the prior incident including the charges, but the details of what other witnesses knew about the prior incident, that Appellant did not know, was not relevant to Victim's state of mind on the date of the murder or Appellant's reasonable apprehension of fear. (R. 160-62). The court and the parties agreed that prior to questioning any witness about the prior incident, Judge Griffith would hear an *in camera* proffer of the testimony and then rule on whether the evidence was admissible. (R. 160-62).[12]

[12] Two State's witnesses testified *in camera* on this issue; Katie Leavitt and Kaysha Fontenot. However, neither actually witnessed the prior incident on January 9, 2014, and only knew Victim had been charged with 2 counts of attempted murder. Both testified they did not know his reputation for violence. (R. 183-90; 209-12, 218). Judge Griffith ruled they could not be asked about the January 9th incident because they did not see it; all they actually knew was Victim had pending charges or indictments. (R. 213-18). *See* State v. Murphy, 216 S.C. 44, 56 S.E.2d 736 (1949)(prior conviction of victim for murder is not reputation evidence); State v. Dill, 48 S.C. 249, 26 S.E. 567 (1897)(defense is allowed to introduce victim's reputation for violence, known to the defendant; but indictment against victim for murder was not reputation).

Haley Stone then testified *before the jury* including that Victim was someone you did not want to get in a fight with. (R. 321; 333). She was not asked *in camera* about anything.

Tonya Sue Griffin, Bass's mother, testified *before the jury* that Victim was wearing an ankle monitor and she told Appellant, Adam, and Bass they could go to the police and have Victim picked up after the Mother's Day assault because Victim was wearing an ankle monitor.[13] (R. 416-17). Griffin testified Victim was much bigger than Appellant. (R. 422). Victim's mother, Kathy Polk, also testified Victim punched Appellant and knocked Appellant to the ground on Mother's Day, and Victim was much larger than Appellant. (R. 404-414).

During the trial, the State introduced Appellant's recorded statements to police and published them. (State's Ex. 43 & 44). In his 1st recorded statement, Appellant told police **Victim already had 2 or 3 attempted murders**. (State's Ex. 43). Appellant also told police Victim was known to be on "meth" and "you know" how people on meth act. (State's Ex. 43). Appellant also told police Victim had a record of abusing women. (State's Ex. 43). In his 2nd recorded statement, Appellant told police Victim put a gun to Appellant's face on a previous occasion. (State's Ex. 44).

When, Appellant began his case in chief, he proffered the testimony of Orville Edwards. Edwards testified he was a bartender at a bar, the East End, in the Vista of Columbia, S.C. On January 9, 2014, a woman came into the bar claiming that her boyfriend had assaulted her in the parking lot. Edwards said he went outside and met a man he believed to be Victim and asked him to leave the area. He testified Victim left and Edwards was later informed he had returned. Edwards testified he and 2 men went outside and walked up to Victim. He admitted he had no

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[13] Appellant then stated to Tonya Griffin that they did not need the police, and the next time Griffin saw Victim he would be dead. (R. 416-17; 421-22; 426).

legal authority to do this and that the men confronted Victim. He testified that at some point Victim pulled a gun and shot him in the leg and shot another man with him in the chest and fired into the crowd of people outside. However, on cross-examination Edwards admitted he did not call police when the man he alleged was Victim returned to the area. Instead, he and 2 men, without any legal authority went outside and confronted the man he believed to be Victim in the parking lot. There was also a crowd of people outside watching. Edwards did not initially see a gun, but someone in the crowd yelled: "he has a gun" and the 3 men, including Edwards, grabbed Victim. Edwards admitted after they grabbed Victim there was a struggle and Edwards punched Victim multiple times. Edwards did not know if the other 2 men punched Victim, but they could have, because it turned into just a "big brawl." Edwards at first denied, then admitted, that Victim went to the ground in "the brawl", and it was when Victim got up or was getting up off the ground that he shot Edwards in the knee and shot his friend. (R. 523-30).

After the proffer, the State also informed the court it had another witness under subpoena who would testify the incident did not occur as Edwards represented to the court. Appellant did not proffer the testimony of any other victim or witness of the prior incident. (R. 531).

After hearing the proffer of Edwards' testimony, including the direct and cross-examination, Judge Griffith ruled he had already admitted evidence that: (1) Victim was out on bond for 2 counts of attempted murder; (2) Appellant knew Victim was out on bond for several counts of attempted murder; (3) Victim was wearing an ankle monitor at the time of the incident on trial; (4) Victim had assaulted Appellant on Mother's Day; and (5) Victim was someone that one would not want to pick a fight with. (R. 530-32). Judge Griffith found however that the details of the prior incident on January 9, 2014 from the bartender were confusing and would confuse the jury and were too far removed in time and occasion from the incident involving

Appellant to be admissible under State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), *which Judge Griffith had carefully reviewed*, and other cases which had followed Day. (R. 530-32). However, Judge Griffith ruled evidence of the fact that Victim had 2 pending charges for attempted murder was admissible, and **those details of the prior incident Appellant Chhith-Berry was aware of were also admissible**, because the Appellant knew about those charges and those particular facts. (R. 530-32).

As a result, when Appellant testified, the jury heard additional testimony from Appellant himself that Victim was charged with attempted murders before his death and Appellant knew of those 2 pending charges for attempted murder on the date of the incident and what Appellant knew about certain facts underlying those charges. (R. 579). Appellant testified before the jury that on the date of Victim's death Appellant knew the victim had already shot 2 people in the past with a gun. (R. 578). Appellant also testified the victim beat Appellant up on Mother's Day at Polk's residence, and the victim was twice Appellant's size. (R. 569-71). Appellant testified he was so afraid of the victim that on Mother's Day, after the victim beat him up, Appellant urinated on himself. (R. 579-79). As a result of these factors, Appellant testified he was afraid of the victim, i.e. Appellant had a reasonable apprehension of fear of the victim, on the date of the victim's death. (R. 570-71). Appellant testified before the jury that he stabbed the victim because he thought the victim was going to beat his brother to death **with his fists**, because the victim was so big. (R. 578, see also 569-83; & 583-619). Appellant did not testify before the jury that he stabbed the victim because he thought the victim was going to pull a gun. (R. 569-619). He denied the victim had a knife or a gun. (R. 569-619). Importantly, Appellant w*as not prohibited by the court* from testifying before the jury about anything Appellant knew on the

date of the victim's death about **either** the victim's reputation for violence **or** any specific acts of violence committed by the victim.[14]

Appellant also argued the same evidence, the fact that the victim was out on bond for 2 attempted murders and had shot 2 people, in closing argument. (R. 631). The prosecutor also mentioned the same evidence in his closing argument. (R. 657). And, the jury was instructed on the same, i.e. consideration of the victim's reputation for or prior acts of violence in determining whether the defendant acted lawfully in defense of a third person or in self-defense. (R. 677).

Appellant now argues in the Petition for Rehearing that this Court and Judge Griffith erred in not admitting the testimony of the bartender, Orville Edwards, as to the details and facts of the January 9, 2014 incident which details Appellant knew nothing about on the date of the victim's death. (IBOA). Judge Griffith did not err but appropriately followed the evidentiary law of South Carolina. Day, *supra*. And, this Court properly affirmed Judge Griffith. Chhith-Berry, *supra*.

This Court properly affirmed on this issue because Judge Griffith did not err in not allowing a witness to present the details of the victim's involvement in a prior shooting on January 9, 2014, because Judge Griffith allowed in evidence the facts of the same prior shooting that Appellant was aware of, and which could have directly affected Appellant's reasonable fear of the victim. It was only facts which Appellant was not aware of at the time of the victim's death that Judge Griffith would not allow another witness to testify to, which was the appropriate

[14] As previously noted, Appellant had testified at the "stand your ground" hearing that he knew the victim carried guns and the victim had bragged to him about shooting 2 people. Appellant also testified the victim told him he went back to the bar on January 9, 2014, just to shoot some people. Appellant did not testify to these details before the jury. However, he was not prohibited from doing so by Judge Griffith. He simply chose not to. He also chose not to ask or call any witness to testify to the victim's reputation for violence. Appellant testified before the jury he stabbed the victim because he thought the victim was going to beat his brother to death with his fists. **(R. 569-83; 584-619).**

ruling given the evidence presented at the hearing on this issue. Regardless, failure to admit the details of the prior incident was harmless beyond a reasonable doubt where the prior incident and what Appellant knew of it was before the jury and uncontested.

***Standard of Review***

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion and prejudice to the accused. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011); State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.: *see also* State v. Brockmever, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). "Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused." State v. Day, 341 S.C. 410, 420, 535 S.E.2d 431, 436 (2000).

***Law/Analysis***

Rule 404(a)(2), SCRE, provides, in pertinent part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except …[e]vidence of a pertinent trait of character of the *victim* of the crime offered by the accused, or by the prosecution to rebut the same…

(emphasis added). Further, Rule 404(b), SCRE, states:

> Evidence of other crimes, wrongs, or acts is not admissible *to prove the character of a person in order to show action in conformity therewith*. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

(emphasis added). Moreover, Rule 405, SCRE, addresses the following methods of proving character:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases where character or a trait of character is an *essential element* of a charge, claim, or *defense*, proof may also be made of specific instances of that person's conduct.

(emphasis added). However,

> [i]n the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other *specific instances of violence* on the part of the deceased are not admissible unless they were directed against the defendant, or if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate *the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm.*

State v. Day, 341 S.C. 410, 419-20, 535 S.E.2d 431 (2000)(emphasis added); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005), *affirmed on other grounds*, 379 S.C. 12, 664 S.E.2d 477 (2008)(same); State v. Douglas, 411 S.C. 307. 324, 768 S.E.2d 232, 242 (Ct. App. 2014)(exact same).[15] Whether in a homicide case a specific instance of conduct by the deceased is so closely connected in point of time or occasion to the crime so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused. State v. Day, 341 S.C. 410, 420, 535 S.E.2d 431, 436 (2000); State

[15] This has been the rule both before and after the adoption of the SCRE. State v. Day, 341 S.C. 410, 420, 535 S.E.2d 431, 436 (2000); State v. McCray, 413 S.C. 76, 92-95, 773 S.E.2d 914 (Ct. App. 2015); State v. Douglas, 411 S.C. 307, 768 S.E.2d 232, 242 (Ct. App. 2014); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005); State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945); State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924); State v. Moody, 94 S.C. 26, 78 S.E. 737 (1913); State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906); State v. Thrailkill, 71 S.C. 142, 50 S.E. 551 (1905); State v. Dill, 48 S.C. 249, 26 S.E. 567 (1897).

v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Douglas, 411 S.C. 307. 324, 768 S.E.2d 232, 242 (Ct. App. 2014).

Appellant argues this Court erred in affirming on this issue. Appellant argues Judge Griffith erred in not allowing the testimony of the bartender of the details of the victim's shooting of 2 other individuals outside a bar in the Vista on January 9, 2014, which specific details Appellant knew nothing about. Appellant is simply wrong.

First of all, Judge Griffith admitted the prior incident which occurred on January 9, 2014, i.e. that the victim had shot 2 people and was charged with 2 counts of attempted murder and was out on bond for those charges and wearing an ankle monitor. Judge Griffith admitted the following testimony and evidence during the trial from both the State and from Appellant:

(1) Specific instances of violent conduct of the victim;

(2) The victim was out on bond for 2 counts of attempted murder;

(3) The victim was wearing an ankle monitor because he was out on bond for 2 counts of attempted murder;

(4) The victim had shot 2 people with a gun in the incident the victim was out on bond for;

(5) The victim was someone you would not want to fight with;

(6) the victim had assaulted Appellant approximately 10 days before the victim's murder;

(7) Appellant knew of specific instances of violent conduct of the victim;

(8) Appellant was aware the victim was out of bond for 2 counts of attempted murder;

(9) Appellant knew the victim was wearing an ankle monitor because the victim was out on bond for 2 counts of attempted murder;

(10) Appellant knew the victim had shot 2 people with a gun;

(11) The victim "thought he was all hard and shit;"

(12) The victim had a record for assaulting women;

(13) The victim was on methamphetamine.

Judge Griffith admitted this evidence because **these were the facts Appellant was aware of at the time of the incident for which Appellant was on trial.** The jury heard this evidence not only from Appellant, but also from witnesses for the State, and from Appellant's own statements to police admitted in evidence. (R. 416-17; State's Ex. 43; State's Ex. 44; R. 578). What Judge Griffith held was not admissible was the testimony of the bartender regarding *the specific details* of the shooting outside the bar in the Vista, on January 9th, *of which Appellant was unaware*. This was not an abuse of discretion.

In the present case, it is undisputed the prior incident on January 9, 2014 was not directed against Appellant. Appellant was not even there. As a result, in keeping with prior precedent, the facts of the prior incident are not admissible unless they are so closely connected in time or place to the present incident in order to: (1) reasonably show the state of mind of the victim on the date of his murder, or (2) show a reasonable basis for fear of the victim by the Appellant. Day, 341 S.C. at 419-20, 535 S.E.2d 431; Meckler, 368 S.C. 1, 626 S.E.2d 890; Douglas, 411 S.C. at 324, 768 S.E.2d at 242.

First, the details of the prior incident of January 9, 2014, as related by the bartender, do not reasonably show the victim's state of mind on May 19, 2014 in any way whatsoever. Haley Stone, the only sober witness on May 19th, testified the victim and Adam were in a fist fight. The victim did not pull a gun and shoot anyone. The victim was not attacked by a group of men, dragged to the ground, and pull a gun and shoot anyone. (R. 303-37). Appellant's sworn version of events before the jury was similar. (R. 569-19). He testified the victim and Adam were in a fist fight. He testified the victim was punching Adam with his fists, and he was afraid the victim would kill Adam with his fists because the victim was bigger than his brother. Appellant testified he stabbed the victim because he was afraid the victim would beat his brother to death with his

fists. (R. 569-619). He did not see the victim pull a gun. He did not testify he was afraid the victim would pull a gun. (R. 569-619). As a result, the facts of the prior incident on January 9, 2014 in the Vista as related by the bartender do not reasonably show *the victim's state of mind* on May 19, 2014, the date of his death. Day, 341 S.C. at 419-20, 535 S.E.2d 431; Douglas, 411 S.C. at 324, 768 S.E.2d at 242; State v. McCray, 413 S.C. 76, 92-95, 773 S.E.2d 914, 923-924 (Ct. App. 2015)(testimony of 2 witnesses regarding prior incident of the victim were "situation specific" and unrelated to victim's state of mind at the time of the homicide). Further, even if the fact that the victim had shot 2 people with a gun previously could show the victim's state of mind on the date of his death, the incident itself was admitted before the jury. The jury knew the victim had shot 2 people with a gun, was charged with 2 attempted murders, and was out on bond for those charges.

As to the 2nd exception, Appellant completely ignores that Judge Griffith admitted in evidence the fact that the prior incident occurred and that Appellant knew about the prior incident, because it could form the basis of Appellant's reasonable apprehension of fear of the victim. Day, *supra*; Meckler, *supra*; Douglas, *supra*.[16] It was undisputed at trial, that Appellant

[16] Appellant argues in his brief that Day and Meckler require admission of the bartender's testimony because the prior incidents in those cases were 4 months and 3 months before the murders. Appellant is wrong. Both cases are distinguishable from this case. Further, time alone is not dispositive regarding admissibility of a prior incident. McCray, 413 S.C. at 92-95, 773 S.E.2d at 923-924. In Day, the prior incident was admissible because the defendant was seeking to show at trial that the victim was acting under the same drug induced paranoia on the date of his death, as in the prior incident, showing both the victim's state of mind on the date of his death and the defendant's reasonable apprehension of fear. In Meckler, the defendant was improperly not allowed to testify about a prior incident she was aware of and witnessed involving the victim and the person she was defending on the date of the killing, where it caused her reasonable apprehension of fear of the victim and again showed the victim's state of mind on the date of his death. In the present case, as discussed above, *the details of the prior incident* do not establish the victim's state of mind on the date of his death, **and** Appellant was not prohibited from testifying regarding the facts he knew of the prior incident which could have

knew the victim had shot 2 people with a gun and the victim was out on bond for 2 counts of attempted murder and wearing an ankle monitor. These facts were introduced by both the State and Appellant, discussed in closing arguments by both sides, and the court instructed the jury on this evidence and its purpose. Judge Griffith also admitted other evidence of why Appellant feared the victim including the prior assault on Mother's Day *and* the difference in sizes of Appellant and the victim. Appellant was not prohibited from introducing **any other evidence of what he knew about the victim, including what he knew about the prior incident that could have caused a reasonable apprehension of fear of the victim.** He simply chose not to testify to it before the jury.

What Judge Griffith excluded was the testimony of the bartender of the details of the prior incident of January 9, 2014 of which Appellant knew nothing about, because those details could not have formed the basis for Appellant to have a reasonable apprehension of fear of the victim. Appellant admitted in his pretrial testimony **and** before the jury that the only thing he knew about the prior incident was the victim shot 2 people with a gun and was charged with 2 attempted murders. These facts were before the jury and undisputed. What the jury didn't hear was a group of men with no lawful authority grabbed and tackled the victim on January 9, 2014, punched him, struggled over a gun with him, and the victim shot 2 of those men. Additionally, the State had a witness under subpoena who was going to testify the prior incident did not even happen the way the bartender claimed. Judge Griffith did not abuse his discretion in not admitting the details of the prior incident which Appellant knew nothing about and could not have formed a basis for Appellant's reasonable apprehension of fear of the victim. State v. Day, *supra*; State v. Meckler, *supra*. *See also* State v. Douglas, 411 S.C. 307, S.E.2d (Ct. App.

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caused him to form a reasonable apprehension of fear of the victim, and those facts were admitted before the jury and not disputed.

2014)(admission of testimony of police officers of details of victim's prior violent behavior that defendant did not know about was harmless given the other testimony and evidence of the victim's prior violent behavior that the defendant did know about that was admitted); Hayes v. Jones, 2014 W.L. 1119460 (E.D.N.C. 2014)(*not reported in F.Supp.3d*)(since petitioner did not know about victim's prior violent crime conviction it was not admissible to prove petitioner's state of mind at the time of the homicide); State v. Corn, 307 N.C. 79, 85, 296 S.E.2d 261, 266 (N.C. 1982)(since appellant did not know about victim's prior conviction it was not admissible as to appellant's state of mind and it was clearly not reputation evidence).

Appellant, by his own admission, was not aware of the details surrounding the incident on January 9, 2014. He was not aware the bartender and 2 other men had come out of a bar and confronted the victim and grabbed him and took him to the ground. He was not aware the bartender punched the victim with his fists several times during the brawl. Nor was he aware that as the victim was struggling to get up off the ground and free from the 3 men who attacked him, the bartender was shot in the leg and another person was shot in chest. Since *these particular details* were not known by Appellant, *these details* could not have caused Appellant to form an apprehension of fear of the victim. See Rule 405(b), SCRE. The facts of this prior incident **that Appellant was aware of**; i.e. that the victim had shot 2 people with a gun, was charged with 2 attempted murders arising out of the incident, and was out on bond for 2 attempted murders wearing an ankle monitor, were admitted before the jury and uncontested by the State. The particular facts that could cause Appellant to form an apprehension of fear of the victim were admitted in evidence. SCRE 405(b). As a result, Judge Griffith did not abuse his discretion. Even, if this Court addressed this issue and not just SCRE 403, it has no merit on appeal.

This Court in its Opinion gave Appellant the benefit of the doubt on the above issue and held even assuming the proffered evidence was admissible under 405(b), SCRE, the trial court did not abuse its discretion in determining the testimony's probative values was substantially outweighed by the danger of confusing the jury. Chhith-Berry, *supra* at n. 9. This Court was correct on this specific issue. So was Judge Griffith. Admitting the bartender's testimony could have confused the jury and the issues in the case. Rule 403, SCRE. If the bartender had been allowed to testify, the jury would have heard the victim was confronted by 3 men and a large crowd, outside a bar, before this prior shooting. The 3 men who confronted the victim were not police officers. The 3 men grabbed the victim and took him to the ground. The victim was punched by the bartender multiple times. The victim did not pull a gun until there was a struggle with 3 other men. The bartender testified there was a struggle over the gun and the bartender was shot in the leg and another individual was shot in the chest. Hearing from the bartender, the jury in Appellant's case could very well have believed the victim was not at fault in the incident *or* would have been unsure the victim was guilty of attempted murder. Plus, the State **was** prepared to call in rebuttal, a witness who would testify the incident did not even occur as the bartender contended. Petitioner complains this witness did not testify, but the Deputy Solicitor as an officer of the Court informed Judge Griffith he was prepared to call this very witness who would contradict the bartender on how the shooting at the bar occurred. As Judge Griffith found and this Court held, there would have been a trial within a trial over whether the victim was at fault in the prior incident or not. *See* United States v. Wellons, 32 F.3d 117, n. 3 (4th Cir. 1994)(even if evidence was admissible under Rule 405(a) it was properly excluded under Rule 403 because of its likelihood to confuse the jury and misdirect the jury from the issues before it)(citing United States v. Waloke, 462 F.2d 824, 830 (8th Cir. 1992)(upholding exclusion,

pursuant to Rule 403, of extrinsic evidence, offered by the defendant, of collateral matters relating to the victim's character, where such evidence was properly admissible under Rule 405(a))[17]; United States v. Piche, 981 F.2d 706 (4th Cir. 1992)(Fed. Rule of Evid. 405(b) "possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.")(quoting Rule 405 Advisory Committee's Note), *superseded on other grounds*, United States v. Ziadeh, 104 Fed. Appx. 869 (4th Cir. 2004); State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008)(in murder prosecution, evidence victim and key witness for the prosecution had used or sold drugs was irrelevant to the facts of case, where there was no evidence drugs played any part in the commission of any crime charged; there was no probative link between the proffered testimony (that drugs were offered for sale outside of the apartment several months before the shooting, and that a small quantity of partially-smoked marijuana was found near the victim), and pending charges. By insinuating a State's witness was a drug dealer and drugs were present next to the victim, such evidence could unfairly impugn the character of the victim and the witness; the risk of confusion or misdirection required an analysis under Rule 403, SCRE, and given the tenuous probative link, the prejudicial effect outweighed any value the evidence may have held). As this Court correctly held:

> More importantly, the testimony at issue was disputed and could have easily confused the jury. Edwards's testimony itself was inconsistent, and the State was prepared to rebut Edwards's testimony with a witness who would have testified Galloway acted in self-defense. The jury would have had to grapple with disputed facts in a separate and untried self-defense case in which Galloway, the victim in Chhith-Berry's trial, was the defendant. The trial court aptly recognized Chhith-Berry and the State presenting conflicting testimony about the specific facts of Galloway's attempted murder charges would have required it to "try two cases to just get one done." Subjecting the jury to conflicting testimony about the facts of Galloway's attempted murder charges likely would have confused the jury, and that danger substantially outweighed any probative value the testimony could have provided. Therefore, the trial court did not abuse its discretion by admitting

[17] *Abrogated on other grounds*, Byrd v. United States, 138 S.Ct. 1518 (2018).

> evidence of Galloway's attempted murder charges but prohibiting witness testimony about the specific facts. Accordingly, we affirm the trial court's decision to prohibit the testimony.

Chhith-Berry, *supra*. This Court's holding is supported by the record. What the jury heard in Appellant's trial was what Appellant knew about the prior incident and what could have formed the basis for Appellant's apprehension of fear of the victim. Day, *supra*. The victim had shot 2 people with a gun, was charged with 2 counts of attempted murder, was out on bond for those charges, and wearing an ankle monitor. The jury also heard the other evidence Appellant claimed to have caused his reasonable apprehension of fear of the victim, including the prior assault on Mother's Day and the victim's size in relation to Appellant. Finally, as noted by this Court in its Opinion, Chhith-Berry, *supra*, at n. 10, **Appellant was not prohibited from testifying about anything else that he knew about the victim and the prior shooting that might have caused his reasonable apprehension of fear of the victim.** Appellant could have testified before the jury that Victim bragged about shooting people and stated he returned to the bar because he "just wanted to shoot people"; however, Appellant either forgot to or chose not to testify about these details before the jury as he did at the immunity hearing. As a result, Judge Griffith did not abuse his discretion in excluding the testimony of the bartender as to the alleged details of the prior incident of which Appellant knew nothing about on the date of the victim's death and could not have formed the basis for a reasonable apprehension of fear. Day, *supra*.

Finally, Appellant testified before the jury that he stabbed the victim because he thought the victim was going to beat his brother to death with his fists. (R. 569-83). Appellant did not testify before the jury that he thought the victim was going to pull a firearm, so he stabbed him. (R. 569-83). In fact, Appellant admitted under oath that the victim did not have a gun but was beating his brother with his fists. (R. 569-83). As a result, the details of the prior incident on

January 9, 2014, could not have shown the victim's state of mind on May 19, 2014. State v. Day, *supra*. And, those details did not contribute to Appellant's reasonable apprehension of fear of the victim. Day, *supra*; Meckler, *supra*. What was important was what Appellant knew on the day of the crime, that the victim had previously tried to kill 2 people, which was before the jury. Judge Griffith did not abuse his discretion. Id. As a result, this Court correctly affirmed Judge Griffith.

*Harmless Error*

Regardless, any error in failing to admit the specific details of the prior incident as related by the bartender was harmless and could not be prejudicial. Appellant testified before the jury that he was aware the victim had been charged with 2 counts of attempted murder and the details of those 2 charges that he, Appellant, was aware of. (R. 578). Appellant told the jury the victim had shot 2 people with a gun. (R. 578). Appellant was not prohibited from relating any other detail of the prior incident or the victim that he knew about on the day of the murder. Appellant's statement to police, which was played for the jury, states the victim was charged with several counts of murder. (State's Ex. 43). Bass's mother testified before the jury that the victim was *wearing an ankle monitor* at the time of the Mother's Day incident, and she informed Bass and Appellant they should contact police regarding the victim striking Appellant on Mother's Day because he was out on bond (R. 416-17). It was undisputed by the State that the victim was out on bond for 2 counts of attempted murder and was charged with shooting 2 people in that incident. The defense argued this evidence in closing argument. (R. 631). The prosecutor also mentioned the same evidence in his closing argument. (R. 657). And, the trial court instructed the jury on the same, i.e. consideration of the victim's reputation or prior acts of violence in determining whether Appellant acted lawfully in defense of a third person or in self-

defense. (R. 677). There was no prejudice to Appellant from the bartender in the Vista not being allowed to testify to *the details of the prior incident* that Appellant did not know about. *See* State v. Douglas, 411 S.C. 307, S.E.2d (Ct. App. 2014)(admission of testimony of police officers of details of victim's prior violent behavior that defendant did not know about was harmless given the other testimony and evidence of the victim's prior violent behavior that the defendant did know about that was admitted).

Further, Appellant was better off without the details of the prior incident. If the bartender had been allowed to testify, the jury would have heard the victim was confronted or surrounded by 3 men and a large crowd outside a bar before this shooting. The 3 men who confronted or surrounded the victim were not police officers. The 3 men grabbed the victim and took him to the ground. The bartender punched the victim several times. The bartender testified it was a "brawl." The victim did not pull a gun until the men assaulted him. The bartender testified there was a struggle for the gun and the bartender was eventually shot in the leg and another individual in the chest. Hearing from the bartender, the jury in Appellant's case could very well have believed the victim was not at fault in the incident *or* would have been unsure the victim was guilty of attempted murder. Instead, what the jury heard in Appellant's trial, was what Appellant actually knew, the victim had shot 2 people with a gun and was charged with 2 counts of attempted murder, was out on bond for 2 counts of attempted murder, and was wearing an ankle monitor because of the prior incident. The failure to admit the bartender's testimony, was harmless. As this Court correctly found, this appellate issue has no merit and must be denied.

**Appellant's Issue III.**

**Whether the trial judge correctly declined to charge imperfect self-defense?**

This Court correctly affirmed on this issue because Judge Griffith did not err in failing to instruct the jury on the doctrine of imperfect defense because it is not a correct statement of the law of this State. Chitth-Berry, *supra*.

*What Occurred Below*

After the conclusion of the evidence, Judge Griffith held a charge conference. Appellant had provided written requests to charge. Appellant requested Judge Griffith instruct the jury on "imperfect self-defense." Judge Griffith denied the request as it was not a correct statement of the law in South Carolina. This Court correctly affirmed Judge Griffith because he could not have erred in failing to instruct the jury on the doctrine of imperfect self-defense reducing murder to manslaughter, because South Carolina does not recognize the doctrine of imperfect self-defense and a trial judge must charge the current and correct statement of the law. Chhith-Berry, *supra*.

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

"[T]he trial judge is required only to charge the current and correct law of South Carolina." State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003)(citing Cohens v. Atkins,

333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998)). Appellant alleges Judge Griffith erred [abused his discretion] in failing to charge the jury on imperfect self-defense. Appellant is wrong.

As this Court correctly recognized in its Opinion in this case, South Carolina has not adopted imperfect self-defense. State v. Sams, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014). Imperfect self-defense is not the law in South Carolina. State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982)("the theory of 'imperfect self-defense,' which reduces murder to manslaughter 'is not the law of South Carolina.'")(cited in Sams, 410 S.C. at 315; 764 S.E.2d at 517). Therefore, Judge Griffith could not have erred [abused his discretion] in declining to instruct the jury on imperfect self-defense [Defendant's requested instruction #4] because it was not a current and correct statement of the law of South Carolina. Taylor, 356 S.C. at 231, 589 S.E.2d at 3(the trial judge is only required to charge the current and correct law of South Carolina); Finley, 277 S.C. at 551, 290 S.E.2d at 809(the trial judge did not err in refusing to charge the jury on the "theory of imperfect self-defense" as that is not the law of South Carolina); Sams, 410 S.C. at 315, 764 S.E.2d at 517, (South Carolina has not adopted the "theory of imperfect self-defense" reducing murder to manslaughter); State v. Scott, 414 S.C. 482, 488, 779 S.E.2d 529, 532 (2015)(recognizing the holding in Sams that South Carolina has not adopted imperfect self-defense); Ivey v. Catoe, 36 Fed. Appx. 718, n. 8 (4th Cir. 2002)(*Unpublished*)(South Carolina does not recognize the doctrine of imperfect self-defense)(citing Finley, 277 S.C. at 551, 290 S.E.2d at 809); *see also* State v. Wiggins, 330 S.C. 538, n. 18, 500 S.E.2d 489, n. 18 (1998)(explaining the holding in Finley); Taylor v. Warden at Allendale, 2014 W.L. 4716443 (D.S.C. 2014)(*Unpublished*)(counsel was not ineffective in failing to request imperfect self-defense jury instruction as that is not the law of South

Carolina)(quoting Finley, 277 S.C. at 551, 290 S.E2d at 809). As a result, this appellate ground has no merit and must be denied.

Respondent disagrees with Appellant's argument in his Petition for Rehearing that South Carolina has recognized imperfect self-defense in certain situations, but not this one.[18] The case law shows, as this Court found, South Carolina has not recognized imperfect self-defense. The issue in the cases cited by Appellant was not whether South Carolina should or does recognize imperfect self-defense, but whether the appellant in that particular case was entitled to an instruction on voluntary manslaughter. *See* State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981); State v. Gilliam, 296 S.C. 395, 373 S.E.2d (1988);

Further, as noted by this Court in the Opinion in this case, the South Carolina Supreme Court recognized in Sams, *supra* and Scott, *supra*, even if South Carolina were to at some future day adopt imperfect self-defense as the law, which it has not done, it is of no moment to Appellant's case as it "…would, at most, entitle him to an instruction on voluntary manslaughter, which he already received." Scott, 414 S.C. at 488, 779 S.E.2d at 532 (quoting Sams, 410 S.C. at 316, 764 S.E.2d at 517, (citations omitted)). Judge Griffith fully charged the jury on the lesser included offense of voluntary manslaughter. (R. 670-72). As a result, there is no merit to this appellate ground. Scott, *supra*; Sams, *supra*.

[18] Appellant concedes in his Petition for Rehearing that South Carolina has not recognized imperfect self-defense in the factual situation in this case.

## CONCLUSION

For the above stated reasons, the Petition for Rehearing must be denied.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

September 23, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LEXINGON COUNTY
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case No. 2019-000352

THE STATE, .....RESPONDENT

v.

NICHOLAS BENJAMIN CHHITH-BERRY .....APPELLANT.

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**PROOF OF SERVICE**

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I, J. Anthony Mabry, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing and Proof of Service have been forwarded to Appellant's counsel, Susan B. Hackett, Esq., via email today, September 23, 2022 to shackett@sccid.sc.gov, and Ms. Hackett's legal assistant, Chris Stock cstock@sccid.sc.gov

I further certifiy that all parties required by Rule to be served have been served. This 23rd day of September 2022.

s/J. Anthony Mabry
J. Anthony Mabry

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## Brandy Rankin

**From:** Brandy Rankin
**Sent:** Friday, September 23, 2022 4:07 PM
**To:** 'Hackett, Susan'
**Cc:** 'Stock, Chris'; Anthony Mabry
**Subject:** Nicholas Benjamin Chhith-Berry - Appellate Case No. 2019-000352 - Return to Petition for Rehearing and Proof of Service
**Attachments:** Return to Petition for Rehearing Chhith-Berry - Adobe Version (03110383xD2C78).pdf; Proof of Service Return to Petition for Rehearing (03110351xD2C78).pdf

**Follow Up Flag:** Worldox

Dear Ms. Hackett,

Mr. Mabry needed to make a correction in the Return sent to you earlier. Therefore, please find the corrected Return to Petition for Rehearing with Proof of Service. These documents will be filed today with the South Carolina Court of Appeals along with a copy of this email.

Sincerely,

Brandy Rankin

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