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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

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Opinion No. 5943 (S.C. Ct. App. filed August 31, 2022)

Lower Court Case No. 2014-GS-32-03244

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THE STATE,

RESPONDENT,

V.

NICHOLAS BENJAMIN CHHITH-BERRY,

PETITIONER

APPELLATE CASE NO. 2019-000352

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 20, 2022. App. 94-95.

## QUESTIONS PRESENTED

I. Did the Court of Appeals err in determining the record was sufficient for the appellate court to determine the trial judge applied the correct burden of proof where the trial judge indicated he was denying immunity pursuant to the Protection of Persons and Property Act because the evidence was inconsistent?

II. To the extent the record was sufficient for meaningful appellate review, did the Court of Appeals err in affirming the trial court's denial of immunity from prosecution pursuant to the Protection of Persons and Property Act where the undisputed evidence showed Petitioner satisfied the common law elements of defense of others and the elements of the Act?

III. Did the Court of Appeals err in affirming the trial judge's suppression of testimony related to the deceased's prior shooting of two people four months prior to his death where (1) the evidence established the deceased's character through a specific instance, which was an essential element of Petitioner's claim of self-defense as it went directly to Petitioner's reasonable fear of the deceased, and (2) the significant probative value of the evidence was not substantially outweighed by the danger of confusing the issues?

IV. Did the Court of Appeals err by affirming the trial judge's failure to instruct the jury on the doctrine of imperfect defense of others to allow the jury to consider voluntary manslaughter if the jury were to determine that Petitioner's belief that his brother was in actual danger of losing his life or sustaining serious bodily injury was unreasonable where the evidence supported the instruction?

## STATEMENT OF THE CASE

On November 3, 2014, a Lexington County grand jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime. R. 756-757; R. 758-759. The state, represented by David Shawn Graham and Alton H. Eargle, Jr., called the case to trial before the Honorable Eugene C. Griffith, Jr., and a jury on December 12-15, 2016. R. 1. H. Wayne Floyd represented Petitioner. R. 1. After Judge Griffith denied Petitioner's request for immunity, the case proceeded to trial before a jury. Ultimately, the jury found Petitioner guilty of murder and possession of a weapon during the commission of a violent crime. R. 688, ll. 2-8. Judge Griffith sentenced Petitioner to fifty years imprisonment for murder and five years imprisonment for the weapon. R. 695, ll. 12-16; R. 760; R. 761.

On December 22, 2016, Petitioner filed a motion for new trial and reconsideration of sentence. R. 725. On July 11, 2018, Judge Griffith heard the motions. R. 697. At the conclusion of the hearing, Judge Griffith took the matters under advisement. R. 720, ll. 8-14. On March 4, 2019, Judge Griffith issued a written order denying the motion for new trial and granting the motion for reconsideration. R. 728. Judge Griffith reduced Petitioner's sentence for murder to forty years imprisonment. R. 728; R. 762.

On March 5, 2019, Petitioner served his notice of appeal. After briefing and oral argument on February 17, 2022, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Chhith-Berry, Op. No. 5943 (S.C. Ct. App. filed Aug. 31, 2022) (Howard Adv. Sh. No. 31 at 62); App. 1-17. On September 12, 2022, Petitioner filed a petition for rehearing, and the Court requested the state file a return. App. 18-44. The state filed its return on September 23, 2022. App. 45-92. The Court denied the petition for rehearing on October 20, 2022. App. 94. Petitioner now files this petition for writ of certiorari.

## ARGUMENT

I. The Court of Appeals erred in determining the record was sufficient for the appellate court to determine the trial judge applied the correct burden of proof where the trial judge indicated he was denying immunity pursuant to the Protection of Persons and Property Act because the evidence was inconsistent.

**Relevant facts**

After the immunity hearing, the judge explained he had "a problem with the immunity question" because Petitioner's "testimony was consistent up until he took the one blow against [Galloway] and then it's very vague and his memory is very, very, very vague from that point forward." R. 158, ll. 8-12. Thus, the judge surmised that Petitioner's "proof doesn't get clear by a preponderance of the evidence that he needed to continue to defend his brother." R. 158, ll. 12-14. The judge thought "he failed to meet his burden of proof of proving he would be entitled to immunity because he only has recollection of one blow that he took to assist his brother if that's the case." R. 158, ll. 18-22. Based upon Petitioner's inability to recall what happened after he stabbed Galloway, the judge determined it was "a factual question." R. 159, l. 2. The judge opined the statute required one "to prove more past the initial blow." R. 160, ll. 6-12. Later, the judge revealed even more about his decision to deny immunity. He explained that the evidence went "both ways." R. 512, ll. 23-24. Thus, he determined it was "a factual question." R. 512, ll. 24-25.

The Court of Appeals erroneously held "the record [was] sufficient for this court to determine the trial court applied the correct burden of proof." State v. Chhith-Berry, Op. No. 5943 (S.C. Ct. App. filed Aug. 31, 2022) (Howard Adv. Sh. No. 31 at 62); App. 1-17. Further, the Court held "[t]he trial court clearly found that [Petitioner] failed to prove by a preponderance

of the evidence he was entitled to immunity pursuant to section 16-11-440(C)." State v. Chhith-Berry, Op. No. 5943 (S.C. Ct. App. filed Aug. 31, 2022) (Howard Adv. Sh. No. 31 at 62); App. 1-17. This was error.

**Discussion**

The judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). As this Court made clear, the judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." Id. "[A] circuit court, as the designated fact-finder ... must provide adequate findings to support its decision so an appellate court can perform its role of reviewing the ruling under an abuse of discretion standard." State v. McCarty, Op. No. 28116 (S.C. Sup. Ct. filed Sept. 21, 2022) (Howard Adv. Sh. No. 34 at 24).

Judge Griffith refused to sit as fact-finder in this case and denied immunity because he determined the facts presented were susceptible to going "both ways." The Court of Appeals ignored Judge Griffith's clear and unambiguous statements that he denied immunity because the evidence "went both ways," which made it "a factual matter" for the jury. This Court should grant certiorari to address yet another instance of a trial judge abdicating his role as fact finder on the issue of immunity from prosecution pursuant to the Protection of Persons and Property Act.

II. To the extent the record was sufficient for meaningful appellate review, the Court of Appeals erred in affirming the trial court's denial of immunity from prosecution pursuant to the Protection of Persons and Property Act where the undisputed evidence showed Petitioner satisfied the common law elements of defense of others and the elements of the Act.

**Relevant facts**

In May 2014, Petitioner was seventeen years old, weighed approximately 115 pounds, and stood almost five feet and four inches tall. R. 107, ll. 5-11. On May 11, 2014, Jamie Galloway, who was much bigger than Petitioner, punched Petitioner and beat him up. R. 108, ll. 3-5 (describing the deceased as close to 200 pounds); R. 111, ll. 13-15; R. 115, ll. 13-16; R. 115, ll. 17-18; R. 123, ll. 6-11. When Petitioner went to the ground, Galloway started kicking him. R. 123, ll. 14-15. As a result, Petitioner was terrified of Galloway. R. 111, ll. 10-15; R. 115, ll. 9-16. Additionally, Petitioner was aware that Galloway was on bond for "a few attempted murders" because he had shot two people, about which he had bragged to Petitioner. R. 111, ll. 16-21; R. 115, ll. 19-25; R. 116, ll. 19-21; R. 119, ll. 2-6; R. 120, ll. 1-5.

Petitioner's brother, Adam, was dating Kayla Bass. R. 109, l. 14. Bass wanted to visit Kaysha Fontenot; therefore Petitioner, Adam, and Bass went to Fontenot's house during the middle of May 2014. R. 109, ll. 11-24. Haley Stone was visiting Fontenot as well. R. 110, ll. 14-16. Petitioner was drinking alcohol – about five shots and a few drinks. R. 118, ll. 16-19. He also consumed one and a half bars of Xanax. R. 118, ll. 20-21.

Approximately an hour after Petitioner arrived at Fontenot's house, Galloway arrived. R. 110, ll. 21-23. Initially, Bass, Fontenot, and Katie, who had driven Galloway to Fontenot's house, fought. R. 112, ll. 4-5; R. 112, ll. 13-18; R. 130, ll. 14-19. Petitioner grabbed one of the women and told them to stop fighting. R. 112, ll. 5-6; R. 130, ll. 23-25. Galloway also pulled

one of the women away. R. 130, ll. 20-21. Fortunately, the fighting among the women stopped. R. 112, ll. 5-6.

However, Galloway took off his shirt, showing his desire to fight, and punched Adam. R. 112, ll. 11-12; R. 112, ll. 24-25; R. 131, ll. 8-15; R. 131, l. 22 – R. 132, l. 1. Galloway continued swinging at Adam. R. 112, l. 25 – R. 113, l. 2; R. 133, ll. 1-21. Eventually, Adam, who was backing up, fell to the ground. R. 113, l. 2; R. 134, ll. 1-25. Adam tried to get away from Galloway, but he managed to get trapped in the corner of the porch. R. 113, ll. 3-8; R. 134, l. 1 – R. 136, l. 23. Adam fell to the floor of the porch, and Galloway continued his relentless assault. R. 113, ll. 5-8; R. 113, ll. 10-13; R. 137, 15-18.

Fearing for his brother's life, Petitioner stabbed Galloway once in the shoulder blade with his pocketknife. R. 113, ll. 8-9; R. 113, ll. 14-16; R. 116, ll. 4-6; R. 116, ll. 10-14; R. 138, ll. 12-15. Petitioner explained that he was defending his brother, Adam. R. 114, ll. 2-9; R. 114, ll. 17-19. "[B]lood [was] leaking from [Adam's] face." R. 114, ll. 3-4. Adam was "trapped on the porch" while Galloway beat him down. R. 114, ll. 8-9. Galloway collapsed to the side, which allowed Adam to stand up at that point. R. 113, ll. 17-19; R. 144, ll. 3-5. Adam and Petitioner then began striking Galloway. R. 113, ll. 20-22; R. 144, ll. 13-17. Petitioner was unable to remember what happened after the two began hitting Galloway. R. 113, ll. 17-24. After hearing Petitioner's testimony, the judge denied Petitioner's request. R. 158, ll. 8-22; R. 159, l. 2.

**Discussion**

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The statute provides for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A).

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C). "A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). As previously stated, the judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019).

Recently, this Court explained that it had interpreted "another applicable provision of law" found within section 16-11-450(A) to include the common law of self-defense. State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 496 (2019) (citing State v. Scott, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018)). "This means a defendant may seek immunity from prosecution under the Act by 'demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence.'" Id. at 118, 838 S.E.2d at 496 (quoting Curry, 406 S.C. at 372, 752 S.E.2d at 267). This Court explained that "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence." Glenn, 429 S.C. at 118, 838 S.E.2d at 496. "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id. Where section 16-11-440(C) is applicable, "it replaces the duty to retreat element required to establish self-defense." Id. "In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." Id.

Furthermore, when considering whether the defendant was in a place where he had a right to be as required by the Act, the trial court must consider proximate cause or a causal connection to the incident. Id. "[T]o bar a victim of crime from claiming immunity based on a hyper-technical reading of the statute would lead to absurd results when his presence in the place he was attacked had no relation to the incident itself." Id. Additionally, "a proximate cause analysis must also be applied to the unlawful activity element of subsection (C)." Id.

Petitioner was entitled to immunity under the Act because he satisfied the elements of defense of others and section 16-11-440(C). The trial judge erred in finding otherwise, and the Court of Appeals erred in affirming the trial judge's erroneous finding.

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

Additionally, not only does the Act contemplate immunity when a person acts in defense of another, but the defense of others is a common law doctrine that falls within the ambit of

"another applicable provision of law" found within section 16-11-450(A). "Under 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); see also Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). When a person acts in defense of another, the person "is in the same situation and upon the same plane as those who act in defense of themselves." State v. Hewitt, 205 S.C. 207, 207, 31 S.E.2d 257, 258 (1944). Only those facts "which excuse the killing in defense of self likewise excuse a killing in defense of [another]." Id.; see also, State v. Harvey, 110 S.C. 274, 96 S.E. 399, 400 (1918); State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969); State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985).

An individual who provokes or initiates an assault may not assert self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." Id. In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), this Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. This Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

Also, in Hendrix, 270 S.C. at 659-660, 244 S.E.2d at 506, this Court held the second and third elements of self-defense were easily met as "the conclusion that he was actually in immediate danger of losing his own life was inescapable." When the deceased arrived at the scene, he walked toward defendant who leveled a shotgun at the deceased and told him to "back off." Id. at 660, 244

S.E.2d at 506. The deceased then retrieved his shotgun and returned to confront the defendant. Id. Although some witnesses testified the deceased never pointed his gun at the defendant and others testified he did, this Court concluded that under *any* version of the evidence "it [was] clear that an actual, imminent danger confronted the [defendant] a danger which, unless met with an immediate response, held the promise of death for the [defendant]." Id.

Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). "Similarly, the accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him." Id. (citing State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "[I]f it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him." Rash, 182 S.C. at 42, 188 S.E. at 438. Furthermore, an individual has the right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); see also State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). Additionally, "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." Hendrix, 270 S.C. at 661, 244 S.E.2d at 507.

Turning first to the defense of others, Petitioner satisfied each element of the defense. In order to evaluate Petitioner's ability to exercise defense of others, it is necessary to examine whether Adam, Petitioner's brother, was entitled to exercise self-defense. First, Adam was not at fault in bringing on the difficulty. The evidence showed Galloway struck Adam first. According to the undisputed evidence, Galloway removed his shirt, showing a willingness to fight. He then punched

Adam in the face. Thus, Adam was not the initial aggressor and was not at fault in bringing on the difficulty.

Second, Adam was in actual imminent danger of losing his life or sustaining serious bodily injury or actually believed he was in such danger. Petitioner's undisputed testimony showed Galloway was steadily punching Adam. Although Adam was defending himself with an occasional punch, he spent most of his time trying to block Galloway's fists and retreat from the onslaught. Petitioner saw Adam was bleeding profusely from his face as he endured Galloway's assault. Galloway was enormous, especially in comparison to Adam and Petitioner. Thus, a reasonable inference – and the only inference to be gleaned from the undisputed testimony – was that Adam was in actual imminent danger of losing his life or sustaining serious bodily injury or actually believed he was in such danger.

Third, to the extent Adam's fear was based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. Galloway's unrelenting barrage of punches to Adam, particularly to his face, would lead a reasonably prudent man to believe he was in imminent danger of losing his life or sustaining serious bodily injury. To the extent Adam was in actual fear of imminent danger, the circumstances required a man of ordinary prudence, firmness, and courage to strike back in self-defense. Galloway was beating Adam ruthlessly and single-mindedly. Galloway attacked Adam in the front yard showing he had little regard for anyone else, including the laws governing our society. In light of Petitioner's knowledge of Galloway's prior attempt to kill two people and Galloway's brutal assault on Adam, a reasonably prudent man in the same situation would have struck back in self-defense.

Judge Griffith expressed a "problem with the immunity question" because Petitioner was unable to show he "needed to continue to defend his brother" after the first blow. By agreeing with

Judge Griffith's conclusion, the Court of Appeals ignored controlling case law. "[W]hen 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. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978).

Petitioner was entitled to immunity under the Act where the undisputed evidence showed he stabbed Galloway in defense of his brother, Adam, who was entitled to the protections afforded by the common law doctrine of self-defense. The judge's findings to the contrary require reversal.

Even if this Court were to determine that Petitioner is not entitled to immunity under the Act pursuant to his satisfaction of the elements of the defense of others, Petitioner was entitled to immunity under the Act because he satisfied the elements section 16-11-440(C). First, both brother and Petitioner were in a place where they had a right to be. Brother and Appellant were visiting the homeowner. It was undisputed that Galloway punched brother first. Therefore, Adam was attacked. As discussed supra, Galloway's vicious assault would lead any reasonable person to believe it was necessary to meet force with force. Petitioner admitted that he was consuming alcohol underage and abusing prescription drugs at the time. However, the state did not argue – and could not argue – that Petitioner's illegal conduct was the proximate cause of Galloway's death. In fact, Petitioner's illegal use of alcohol and prescription drugs was not even connected to Galloway's unprovoked and merciless attack on brother. Therefore, Petitioner satisfied each of the elements of the immunity statute as well. The trial judge and the Court of Appeals erred in denying immunity to him.

III. The Court of Appeals erred in affirming the trial judge's suppression of testimony related to the deceased's prior shooting of two people four months prior to his death where (1) the evidence established the deceased's character through a specific instance, which was an essential element of Petitioner's claim of self-defense as it went directly to Petitioner's reasonable fear of the deceased, and (2) the significant probative value of the evidence was not substantially outweighed by the danger of confusing the issues.

**Relevant facts**

Prior to trial, the state moved in limine to exclude testimony about Galloway's two attempted murder charges. R. 160, l. 19 – R. 161, l. 4. The prosecutor admitted that if Petitioner testified he could "talk about his knowledge about Jamie Galloway and the attempted murder charge and all that kind of stuff." R. 160, ll. 21-23. However, he wanted to prevent defense counsel from "being able to ask every other person about it because, one thing, it doesn't matter," and the prosecutor did not believe it was "appropriate." R. 160, l. 23 – R. 161, l. 1. According to the state, Galloway's prior attempts to shoot and kill two people were not relevant unless Petitioner testified that he knew about it. R. 161, l. 10. Defense counsel argued the evidence was relevant because it went to whether Petitioner's belief of imminent danger was reasonable. R. 161, ll. 22-24. Galloway's prior charges made Petitioner's belief that Galloway was violent reasonable. R. 161, l. 25 – R. 162, l. 1.

Judge Griffith indicated he had no desire to "try two cases to just to get one done." R. 521, ll. 24-25. However, he agreed to hear from the defense's witness, Orville Edwards, in camera. R. 522, ll. 13-15. In January 2014, Edwards was a bartender at The East Room. R. 523, ll. 13-17. "[A] young lady" entered the bar "crying, saying her boyfriend was beating her up out in the parking lot." R. 524, ll. 1-3. Edwards and two others went outside and told Galloway that he could

either leave or the police would be called. R. 524, ll. 3-5; R. 525, ll. 8-11. Galloway left, but he returned. R. 524, ll. 7-11; R. 525, ll. 14-17. Edwards and the two others went back outside when they learned that Galloway had returned. R. 524, ll. 17-19; R. 525, ll. 23-25. As Edwards was approaching Galloway to tell him to leave yet again, someone yelled "he's got a gun." R. 524, ll. 17-20. Upon hearing that Galloway was armed, Edwards grabbed Galloway and tried to wrestle him to the ground to get the gun. R. 524, ll. 22-24; R. 526, ll. 15-20. During this melee, Galloway shot Edwards in the leg. R. 524, l. 24. Galloway then stood up and shot Edwards' friend, Jake, in the chest "and popped off a few more rounds into the crowd as he backed up to his car and got in and sped away." R. 524, ll. 24 – R. 525, l. 2.

After the judge heard Edwards' proffered testimony, he determined the evidence would "confuse the jury." R. 530, ll. 16-17. Acknowledging there was testimony that Galloway was charged with two counts of attempted murder, that "he had a propensity to not be one to fight with," and "there was an incident in front of the car at the mother-in-law's house on Mother's Day before this incident," the judge explained he did not "want to get into more specific facts of that conduct because of [his] concern of confusing the jury over the factual issue because this [was] getting into trying a second case and Mr. Berry's case is Mr. Berry's case." R. 530, l. 20 – R 531, l. 5. Additionally, the judge surmised that the East Room incident that occurred four to five months prior to the deceased's death was "too far removed to be allowed." R. 531, ll. 8-12; R. 531, ll. 19-22.

The Court of Appeals held that although testimony about the specific facts of Galloway's attempted murder charges was probative of his violent nature, its probative value was limited because it was cumulative to evidence already admitted, including that Galloway was out on bond for attempted murder at the time of his death and that Galloway had previously struck Appellant. However, more important to the Court was the solicitor's unsupported claim that "the testimony at

issue was disputed."[1] The Court relied heavily upon the solicitor's assertion that he was prepared to rebut Edwards' testimony with a witness who would have testified that Galloway acted in self-defense. According to the Court, "[t]he jury would have had to grapple with disputed facts in a separate and untried self-defense case in which Galloway, the victim in [Appellant]'s trial, was the defendant." Accordingly, the Court concluded that Appellant and the state presenting conflicting testimony about the specific facts would have required the jury to try two cases to get just one done. This would have likely confused the jury and this danger substantially outweighed the probative value of the testimony in the Court's view.

**Discussion**

Generally, evidence of a person's character or a trait of character is not admissible to prove action in conformity therewith on a particular occasion. Rule 404(a), SCRE. However, "[e]vidence of a pertinent trait of character of the victim offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor" is allowed Rule 404(a)(2), SCRE. Whenever "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." Rule 405(a), SCRE. "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." Rule 405(b), SCRE.

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[1] While arguing to suppress the evidence, the state claimed to have "other witnesses who are gonna come up and say it didn't happen the way that this happened, the way that he's gonna claim that it happened." R. 520, ll. 19-21. The State claimed to have a witness under subpoena who would say "Galloway was being beaten and while in the process of being beaten he pulled a gun and shot defending himself." R. 521, ll. 17-23. However, the state never proffered this alleged witness.

> In 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 in 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, 419-420, 535 S.E.2d 431, 436 (2000); see also State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924); State v. Amburgey, 206 S.C. 426, 429, 34 S.E.2d 779, 780 (1945).

The trial judge erred in refusing to permit Petitioner to present evidence of the facts giving rise to the deceased's two counts of attempted murder. Pursuant to Rule 404(a)(2), the evidence was admissible because it was a pertinent trait of character of the victim offered by an accused. Further, pursuant to Rule 405(b), SCRE, Petitioner was permitted to offer "specific instances" of the deceased's conduct because it was an essential element of his defense. Finally, the evidence proffered by Petitioner was admissible pursuant to the principles expressed in Day, supra. The deceased's act of shooting two people and firing indiscriminately into a crowd was "evidence of other specific instances of violence on the part of the deceased ... [that were] directed against others [and] were so closely connected in 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." See Day, 341 S.C. at 419-420, 535 S.E.2d at 436. The evidence was admissible to prove Petitioner had a reasonable apprehension of violence from the deceased, which was an essential element of his defense. See id. at 421, 535 S.E.2d at 437. The time frame for the deceased's shooting two people at the East Room was four months prior to his death, which was the same time period of the conduct ruled admissible in Day, supra. Thus, contrary to the judge's ruling, the time frame was not too remote.

Turning to the trial judge's ruling that the evidence would be confusing to the jury – and the only way the issue was analyzed by the Court of Appeals, a review of the applicable rule and relevant case law reveals that the jury should have heard about Galloway's prior attempted murder charges. Pursuant to Rule 403, SCRE, evidence must "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id.; State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of confusion to the jury presented by the evidence. Very little case law exists in South Carolina regarding this aspect of Rule 403, SCRE. In Wilson v. Rivers, 357 S.C. 447, 453-454, 593 S.E.2d 603, 606 (2004), this Court held it was error to exclude the testimony of a biomechanics expert based on a contention that the testimony would be confusing. The case involved an automobile accident and the question before the jury was whether the plaintiff's back problems were caused by the accident. Id. at 449, 593 S.E.2d at 603-604. The defendant sought to introduce the testimony of an expert in the field of biomechanics to refute the plaintiff's claims. Id. at 450, 593 S.E.2d at 604. This Court held the testimony would not have been confusing to the jury

because the expert considered the "damage to the car," "depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion." Id. at 453, 593 S.E.2d at 606. The expert discussed "fully explained the method he used to reach his conclusion and did not contradict himself." Id. at 453-454, 593 S.E.2d at 606. See also State v. Lyles, 379 S.C. 328, 340, 665 S.E.2d 201, 207 (Ct. App. 2008) (analyzing whether "potentially insinuating a key witness for the state is a drug dealer and drugs were present next to the victim" could "cloud the issues"); Kennedy v. Griffin, 358 S.C. 122, 128-129, 595 S.E.2d 248, 251 (Ct. App. 2004) (examining whether "evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury" in a case asking the jury to decide whether the plaintiff, who was involved in an automobile accident and had marijuana in his system, was entitled to recover damages from the other driver).

Once a court has determined the probative value and the danger of confusion to the jury posed by the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the confusing effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)).

Here, most importantly, there is no evidence that Galloway acted in self-defense when he tried to kill two men at The East Room. The only mention of such was by the solicitor when he claimed that Galloway did so. Such a claim is disingenuous at best because his very office was prosecuting Galloway for two counts of attempted murder. At worst, the solicitor was violating the Rules of Professional Conduct by prosecuting Galloway for attempted murder when he knew the charges were not supported by probable cause. Rule 3.8(a), RPC, Rule 407, SCACR. Certainly, the solicitor was not maintaining criminal charges against a man he knew had acted in self-defense.

Nevertheless, what is most important to analyzing the issue presented is that the state never presented any actual evidence that Galloway acted in self-defense. The Court of Appeals' reliance on the solicitor's unsupported claim must not stand, and this Court should grant certiorari to address the error.

The evidence of the deceased's conduct – shooting two people in the parking lot of The East Room during an altercation – was probative of the deceased's violent nature. The probative value of the evidence was extremely high because it went directly to an element of Petitioner's defense, which required a showing that he (and Adam) was in reasonable apprehension of fear of imminent death or great bodily injury from the deceased. While the judge opined the information would confuse the jury, the information was very straightforward. The state conceded the jury was aware the deceased faced two counts of attempted murder because the state presented Petitioner's statements to law enforcement during its case-in-chief, which contained information about the charges. Permitting the jurors to hear from Edwards was unlikely to cause confusion among the jurors regarding the issues in the case. Edwards would have provided context to the jurors on the facts supporting the criminal charges lodged against the deceased, which the jurors easily would have understood. Edwards' testimony was short, straightforward, and unequivocal. Thus, the danger of confusing the jurors was very low. Balancing the high probative value of the evidence against the low danger of confusion required admission of the testimony regarding the deceased's specific instances of conduct giving rise to his two charges of attempted murder. The trial judge and the Court of Appeals erred in finding otherwise.

IV. The Court of Appeals erred by affirming the trial judge's failure to instruct the jury on the doctrine of imperfect defense of others to allow the jury to consider voluntary manslaughter if the jury were to determine that Petitioner's belief that his brother was in actual danger of losing his life or sustaining serious bodily injury was unreasonable where the evidence supported the instruction.

**Relevant facts**

During his closing argument, the prosecutor argued that even if Petitioner believed his brother was in danger of losing his life or serious bodily injury, he was still guilty of murder because the deceased was stabbed twenty-five times. R. 640, ll. 7-12. According to the solicitor, it may have been defense of others if Petitioner had stabbed the deceased only once, but that "malice kick[ed] in" when the stab wounds numbered twenty-five. R. 640, ll. 7-12; see also R. 653, ll. 12-13. Using photographs of Adam, the prosecutor asked if he looked like "a man who was beat to death" or someone who had "serious bodily injury." R. 647, ll. 8-11.

During the charge conference, the trial judge indicated he was "gonna consider Number 4" of the requests submitted by defense counsel. R. 624, l. 17. Specifically, the requested instruction provided:

> If you find that the Defendant believes he or another person was in danger of serious injury or death and believes that deadly force was necessary to avoid this danger but that you also find that either of these beliefs was not reasonable then you should consider whether the threat constituted adequate legal provocation as that erm is used in defining the crime of Voluntary Manslaughter.

R. 755. However, the judge did not give the instruction.[2]

**Discussion**

"In some jurisdictions there is recognition of an imperfect right of self-defense which will not excuse one from criminal liability, but which will mitigate a homicide from murder to

[2] When defense counsel renewed his request, the judge indicated that he "thought [he] did" give the instruction by "hid[ing] it" "in the second element." R. 685, ll. 5-22.

manslaughter." William S. McAnnich, et al., The Criminal Law of South Carolina 635-636 (6th ed. 2013). One of the ways in which this issue may develop is when "the defendant may have had an honest but unreasonable belief in the necessity to use deadly force." Id. at 636. Additionally, imperfect self-defense may exist where a defendant "may have used excessive force." Id.

> The basic rationale of such cases proceeds as follows: a person who acts under an honest but unreasonable belief in the necessity to use deadly force to defend himself, or who uses excessive force has not acted with malice aforethought, the predicate of any murder conviction; however, he has committed an unlawful and intentional killing, so he is guilty of manslaughter.

Id. Imperfect self-defense "operates to negate malice, an element the state must prove to establish murder." State v. Faulkner, 483 A.2d 759, 761 (Md. Ct. App. 1984). "As a result, the successful invocation of this doctrine does not completely exonerate the defendant, but mitigates murder to voluntary manslaughter." Id. Maryland also recognizes imperfect defense of others. Bowman v. State, 650 A.2d 954, 955 (Md. Ct. App. 1994). Maryland's pattern jury instructions provide that "if the defendant actually believed that the person defended was in immediate and imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, the defendant's actual, though unreasonable, belief is a partial defense of others and results in a verdict of voluntary manslaughter rather than murder." Id. at 955 n.1.

Pursuant to imperfect self-defense doctrine, the crime is reduced from murder to manslaughter (1) where the defendant had a genuine, but unreasonable fear of imminent danger, (2) where the defendant acted in self-defense, but was the aggressor, or (3) where the defendant acted in self-defense, but used excessive force. State v. Sams, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014). "South Carolina has not expressly adopted the doctrine of imperfect self-defense." Id.

Nevertheless, South Carolina has adopted implicitly the doctrine of imperfect self-defense in at least two circumstances. In the first scenario, this Court held a trial judge erred in failing to

instruct the jury on voluntary manslaughter based upon evidence showing the deceased, who was a police officer, used excessive force in effectuating an arrest. State v. Linder, 276 S.C. 304, 308, 278 S.E.2d 335, 337 (1981). In reviewing whether Linder was entitled to a voluntary manslaughter instruction, this Court explained that "[u]nder either version of the facts the jury could find that Linder had failed to establish each element of the self-defense." Id. However, this Court concluded that "under Linder's version of the facts the jury could find sufficient provocation for a heat of passion by concluding that the officer used unnecessary force under the circumstances." Id. at 307-308, 278 S.E.2d at 337. "While a lawful arrest in a lawful manner will not constitute sufficient legal provocation to incite heat of passion, a killing may be only manslaughter where a legal arrest is attempted in an unlawful manner because the passion may be aroused by the use of unnecessary violence." Id. at 308, 278 S.E.2d at 337.

Second, this Court held a defendant was entitled to a jury instruction on voluntary manslaughter based upon a failure to satisfy each element of self-defense. After re-iterating that voluntary manslaughter and self-defense are not mutually exclusive, this Court explained that a voluntary manslaughter instruction must be given where "the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion." State v. Gilliam, 296 S.C. 395, 397, 373 S.E.2d 596, 597 (1988). Gilliam claimed he and the deceased were arguing when the deceased made threatening statements. Id. at 396, 373 S.E.2d at 597. The deceased then shot at Gilliam. Id. Gilliam pulled his own gun and shot the deceased. Id. This Court explained Gilliam's testimony that the deceased threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion. Id. at 397, 373 S.E.2d at 597.

This Court has not addressed "imperfect defense of others." While this Court appears to have rejected imperfect self-defense where the actual belief in danger was not reasonable, State v.

Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982), the Court agreed that a jury instruction on self-defense was proper where the facts alleged to support a claim of self-defense provided evidence of heat of passion based upon sufficient legal provocation, see Gilliam, supra. Thus, where the evidence supported an actual belief in danger to another, but the belief was unreasonable, an instruction on imperfect defense of others was required. The instruction was necessary in this case to combat the solicitor's closing argument in which he informed the jurors that Adam was not in imminent danger of death or serious bodily injury based upon the injuries he actually sustained and his failure to call out for help. Had the jury agreed with the solicitor that Adam was not in actual danger of losing his life or sustaining serious bodily injury, but also believed that Petitioner entertained the belief, then the instruction on how to view such evidence – as reducing murder to voluntary manslaughter – was required. Petitioner respectfully requests this Court adopt the doctrine of imperfect self-defense as an extension of this Court's opinion in Gilliam, supra, and hold the trial judge erred failing to instruct the jury as requested.

## CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order fully briefing on the issues presented.

Respectfully Submitted,

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Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of November, 2022.