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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

v.

NICHOLAS BENJAMIN CHHITH-BERRY,

PETITIONER.

Appellate Case No. 2019-000352

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S 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 May 19, 2014, petitioner murdered James Galloway (“victim”) in Lexington County. Petitioner was indicted for the murder and possession of a weapon during a violent crime (2014-GS-32-3244 & 3245). He proceeded to a jury trial December 12-15, 2016, before Judge Eugene C. Griffith, Jr, after which he was found guilty. He was eventually sentenced to 40 years. He appealed raising 4 issues. On August 31, 2022, the Court of Appeals affirmed. State v. Chhith-Berry, 437 S.C. 527, 878 S.E.2d 352 (Ct. App. 2022). A Petition for Rehearing was denied. He then filed a Petition for Writ of Certiorari in this Court.¹ This is Respondent’s Return to the same.

RESPONDENT’S STATEMENT OF FACTS

On Mother’s Day, May 11, 2014, petitioner, his brother Adam, and Adam’s girlfriend Kayla Bass tried to pick up Bass’s child with victim at victim’s mother’s residence. Victim confronted Adam at his car about Adam’s intoxicated state. Petitioner got out of the car, confronted victim, and was punched. Petitioner fell to the ground, urinated on himself, pulled a knife from his pants’ pocket, and threatened victim. Victim’s mother, Kathy Polk, broke up the altercation. Petitioner, Adam, and Bass then left. Over the next 9 days, Petitioner [several times] and Adam [1 time] texted associates requesting “a burner” [untraceable gun or phone] and .22 bullets to take care of or get rid of victim because victim “snucked” [sucker punched] petitioner in front of his brother on Mother’s Day. (R. 404-15; 236-38, 251-98; 431-93; 595; State’s Ex. 54, 55).² Petitioner also told Polk *and* Bass’s mother he was going to “take care of” or kill victim. (R. 404-28).

¹ Petitioner raises only 3 of the 4 issues he raised below. However, he has split issue 1 below into 2 issues before this Court, but it is the same issue raised to the Court of Appeals. State v. Chhith-Berry, *supra*. As a result, Respondent will address these 2 issues collectively in this Return.

²After victim’s murder, police found a sawed off .22 rifle in petitioner’s tote bag hid in a shed behind the house where victim was murdered. There were no bullets in the bag. Petitioner admitted at trial the gun was his. Petitioner was unable to get bullets before he saw victim on May 19th. (R. 236-38; 251; 431-93; 404-05; State’s Ex. 54, 55).

On the afternoon of May 19th, petitioner, Adam, and Bass drove to Kaysha Fontenot's home, who also had a child with victim. The 4 began drinking liquor, doing drugs, and talking. Bass was upset about something. Bass texted Haley Stone, the mother of 2 of Adam's children, and asked her to come over, which she did, but Stone did not drink or use drugs. (R. 193-218; 333-34; 243-44; 303-37). Fontenot then phoned victim, invited him over to see his son, but did not tell him that petitioner and Adam were there. She then told the others victim was coming over. Victim arrived shortly with Katie Leavitt driving. It was now 9:00 to 10:00 p.m. and dark.³ (R. 174-90; 193-218; 303-37). Katie remained in the car at the end of the driveway and had reservations about victim getting out because Adam's vehicle was there. Victim said he was just going to see his son and would be right back. Victim entered the home and saw petitioner and Adam, and stated to Fontenot: "Oh, so this is how it is going to be." Fontenot did not respond. Victim visited with his son in a bedroom. Petitioner and Adam went out on the front porch. (R. 174-90; 193-218; 303-37). Fontenot and Bass then went out on the front porch. Fontenot instigated a fight with Katie, and she and Bass then assaulted Katie outside her car causing Katie to flee in her car leaving victim stranded and isolated at Fontenot's home.⁴ Fontenot ran in the house and told victim, who was headed out the front door, Adam had just punched her in the face. Fontenot locked the front door and claimed she went in her children's room. (R. 174-90; 193-218; 303-37). Bass then assaulted victim in the front yard. Victim ignored the abuse but as it continued asked Adam to get his girlfriend off him. Adam refused. Victim pushed Bass off him, and she fell. Adam stated victim was not going to push Bass and instigated a fight with victim. (R. 174-90; 193-218; 303-37).

³ Haley Stone testified it was extremely strange all the "baby mommas" and boyfriends were there at the same time. (Tr. 303-37).

⁴Fontenot claimed, after Katie left, Adam then punched Fontenot in her face for no reason. She yelled: "*so now you want to fight me too.*" She then claimed she was attacked by Bass.

Haley Stone, the only sober witness, testified Adam and victim got in a fist fight starting in the front yard leading up on the porch. (R. 303-37). Adam started the fight and victim threw the first punch to force Adam to back off. Adam would not back off once victim hit him in the face. Punches were thrown in the front yard by both men. *Victim* backed up the porch steps punching Adam as Adam pursued him. Victim was winning the fight as they reached the porch and victim ended up on top of Adam on the porch's corner. They were mainly wrestling at this point, but both men probably threw 2 punches while on the floor. It was at this point, while victim was distracted with Adam, petitioner took his knife out of his front pocket, opened it, approached victim from behind, and stabbed victim in the back. Victim fell off Adam and was not moving. Adam got up and kicked victim in the head. Petitioner continued to stab victim a total of 25 times in all. There were 22 stab wounds to victim's back, 1 under victim's arm pit coming from behind, 1 to the back of victim's head penetrating the skull, and 1 behind victim's ear.⁵ Two (2) of the wounds struck the spinal cord and could have resulted in paralysis in seconds. Victim died on the porch bleeding to death from the numerous stab wounds. (R. 193-218; 239-49; 259-98; 303-37; 493-508).

Fontenot came out the front door, called 911, reported the stabbing, and identified petitioner as the killer. (R. 193-218; State's Ex. [911 call]). Petitioner, Adam, and Bass tried to flee from the scene but were blocked in by arriving police. Adam and Petitioner were arrested in the driveway after petitioner told police "just shoot me". (R. 219-28).⁶ Police recovered the knife

⁵ Haley did not see the knife but saw petitioner come up behind victim and strike victim about 20 times real quick in the back while Adam and petitioner had victim down on his stomach on the 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).

⁶ The only injuries to petitioner were small cuts to his pinky fingers consistent with cutting himself while stabbing victim. Adam also had 1 small cut on his hand consistent with having been cut by petitioner while getting out from under victim when petitioner was stabbing victim. Adam also had a busted lip and lost a tooth from the first punch in the yard. Both men were treated and released that day. (R. 228-34; 239-49; 431-69).

in the yard with victim's blood on it, but not Adam's DNA. It did contain the DNA of another minor contributor. [Petitioner's DNA standard was not submitted to S.L.E.D.] (R. 398-99; 401).

When petitioner was first questioned, he gave police a false identity and denied using any alcohol or drugs. After admitting his identity, he gave multiple false statements at the scene about what had occurred. (R. 228-36; 239-49; 251-58).⁷ At the hospital, petitioner also gave multiple **false recorded statements** about what had occurred at the crime. (R. 251-98; 431-69 State's Ex. 43, 44). He first told police Adam was not aware of or "had no idea" about something, stopped himself, and stated he was talking about a different subject than the crime, when he made the statement about Adam having "no idea." (State's Ex. 43). He then gave a total of 5 false versions of what occurred during the crime. (R. 251-98; 431-69 State's Ex. 43, 44).⁸ Even though asked

⁷ Petitioner first stated he could not remember what happened. He later admitted he had had multiple mixed drinks, shots of liquor, marijuana, and Xanax. He told an EMT he took the Xanax: so he could relax before "he" [a male 3rd party] came over to Fontenot's home. Petitioner gave another version claiming victim was attacking petitioner and Adam with a knife, and petitioner had to kill victim and petitioner cut his fingers on victim's knife. (R. 228-36; 239-49; 251-58).

⁸ Petitioner claimed: (1) victim kicked in the front door when he arrived at Fontenot's; victim cut Adam with a knife; petitioner took the knife away and stabbed victim 1 time; petitioner claimed victim stabbed Adam and petitioner before he was able to stab victim 1 time; he only stabbed victim 1 time *in the side*, a quick in and out stab, and told victim to back off; he put the knife on the ground and police arrived; he had no explanation for any other stab wounds to victim and denied it was his knife used to stab victim and did not mention Adam and victim were in a fist fight: (2) victim had a knife or a gun and was pistol whipping or stabbing Adam, so, petitioner took the weapon from victim, realized it was a knife, and stabbed victim 1 time *in the back*, not the side: (3) victim had a .45 caliber pistol and put it to petitioner's head stating he was going to shoot him in the face; investigators told petitioner eyewitnesses did not see victim with a weapon at any time **and** petitioner had previously told them there was no gun used at any time by anyone, including victim; petitioner admitted victim had no gun on May 19th but claimed victim had a gun on Mother's Day and pointed it at his head; petitioner was informed no one had seen a gun on victim then, including Adam or Bass, and petitioner changed his story again: (4) *victim and petitioner* were arguing; Adam jumped on victim; victim and Adam started fighting; the fight went up on the porch and victim was eventually hitting Adam and petitioner thought victim had some kind of blade or object because Adam was bleeding so much; petitioner admitted he pulled his own knife and stabbed victim 1 time to the shoulder blade and could not explain how victim was

who was present at the crime scene, he never told police Haley Stone was there. Petitioner also spoke to his mother and brother from jail by phone and made incriminating statements. (R. 259-98; 298-301; 303-07; 339-44; 490-92; State’s Ex 35, 36 & 37)⁹

At trial, petitioner testified and claimed he came to the defense of Adam because he thought Adam was going to be killed by victim hitting Adam with his fists. Petitioner admitted the knife was his knife. He claimed he only remembered stabbing victim 1 time in the shoulder blade. 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). The jury deliberated approximately 30 minutes before convicting petitioner of both murder and the weapon charge.

Questions presented I. & II.

Pretrial, petitioner moved for immunity pursuant to the Protections of Persons and Property Act. S.C. Code Ann. Section 16-11-410, *et. Seq* (“the Act”). (R. 105-33). The court conducted a hearing pursuant to State v. Manning, 418 S.C. 38, 791 S.E.2d 148 (2016), and heard the motion pursuant to Subsection C of the Act. (R. 105-60). Testimony was presented only from petitioner.

stabbed numerous other times; he claimed it was self-defense because *victim* tried to take the knife *away from petitioner* and *caused petitioner to stab himself 2 times in the hand*; admitted he threw the knife down in the yard: (5) When asked why he stabbed victim, petitioner also stated he stabbed victim because victim had “snucked” petitioner. Petitioner then claimed victim “snucked” Adam, and petitioner stabbed victim because victim “snucked” Adam *and* petitioner. He could not explain how victim ended up on the floor of the porch. (R. 251-98; 404-15; 431-69; State’s Ex. 43, 44). These versions were all inconsistent with his version at trial. (See discussion *infra*).

⁹ Petitioner admitted in 1 call victim had sucker punched him in front of his brother days before the murder, and victim had not threatened petitioner before the murder. He told his mother if victim had not done something he shouldn’t have, “he wouldn’t have died for nothing.” Petitioner complained police had seized his phone. He stated he stabbed victim because petitioner was not going to stand there and “watch his brother get his ass kicked” and expressed concern over how he would look to others if he stood by while his brother lost a fight. Petitioner also stated he stabbed and disliked victim because victim thought he was “all hard and shit” and “...I fucked that boy up bad.” “Fuck that nigger.” He stated he was glad victim was dead. When his mother stated no one deserves that, he said: “That nigger does.” (State’s Ex. 37). [All parties were Caucasian].

(R. 106-58). The State thoroughly impeached petitioner. (R. 117-54).¹⁰ At its conclusion, the court denied the motion for immunity finding as the fact finder, petitioner's version of the events at and during the murder was not credible; and even if believed up to the point of the 1st stab, i.e. victim got off Adam and stopped fighting, the remainder of his testimony thereafter was inconsistent with and did not establish defense of others as the threat to his brother had been removed, and it was unnecessary and unlawful to continue to stab victim 24 more times killing him; therefore, petitioner had failed to meet his burden of proof by a preponderance of the evidence. (R. 158-60).

The Evidence Presented at the Immunity Hearing

At the "immunity" hearing, petitioner called only himself as a witness and offered no other evidence in support of his claim to immunity under the Act. (R. 105-60). Petitioner *claimed* the following occurred on May 19th: He, Adam, and Bass traveled to Fontenot's. Once there, they began drinking and doing drugs. He had several shots of liquor, 4 or 5 mixed drinks, 1 and ½ bars of Xanax, and marijuana. While there, someone stated victim was coming over to see his son. Victim arrived and saw his son. At some point, some of the women started fighting and then 1 of the women got into it with victim. A fight started in the front yard between Adam and victim. Victim hit Adam and Adam tried to hit victim but was unsuccessful. Victim then punched Adam over and over in the yard with Adam backing up trying to protect himself. 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. Petitioner told victim to stop but he would not. Petitioner pulled a knife and stabbed victim 1 time

¹⁰ At the end of cross-examination, the State indicated it could cross-examine petitioner further on his recorded statements, but rather than do so, directed the court to those statements which it had already heard pre-trial in the Denno hearing. (R. 154). There is no evidence from Judge Griffith's holding he relied on those statements except those specifically mentioned in the immunity hearing.

in the shoulder blade, victim flinched as if he felt the stab, and fell off Adam but was still moving. He dropped the knife at this point and did not remember stabbing victim anymore. Adam got up and he and Adam had victim cornered on the porch, and they hit and kicked victim. He could not remember anything after that, did not know how victim was stabbed 25 times, and Adam could have done it, but he did not know or remember. (R. 106-58).

On cross-examination, petitioner admitted, on May 11th, he, Adam, and Bass went to pick up Bass's son at Polk's home. Victim came out and was complaining to Adam about picking up the child while drunk or high, and spat in his face. Petitioner got out of the car, confronted victim, and victim beat him up punching him several times until he was on the ground and kicking him. Petitioner pulled a knife on victim, but claimed it was to make victim stop beating him up. He admitted Polk could have ended this altercation, but he didn't recall. (R. 106-58). Petitioner was then asked a series of questions about his actions over the next several days where he sought to purchase a "burner" and .22 bullets. He could not remember trying to buy a gun or bullets to solve or take care of a problem, even though the text messages showed he did, or threatening victim's life several times to 3rd parties such as Polk and Bass's mother. He also could not remember others trying to dissuade him from using a gun to resolve his problem or dispute with victim, even though text messages showed this. When questioned about the date in question and the fight in the yard between Adam and victim, petitioner again repeatedly could not remember details of what occurred in the yard. He 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 he used to stab victim once. He couldn't remember if he stabbed victim 24 more times or if Adam 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 Adam, and he and Adam then began hitting and kicking victim

in the corner. When asked about his inconsistent statements, he again claimed he could not remember including what he told first responders, i.e. victim had the knife. He did not present any of the eyewitnesses at the “stand your ground” hearing. (R. 105-60).

Judge Griffith found petitioner was not credible in his claim he could not recall anything after the 1st stab [the shoulder blade] and certain facts about what occurred in the yard. Judge Griffith found there was no explanation from petitioner why victim was stabbed numerous times after the 1st stab; and even if petitioner’s testimony was believed up to that point, his testimony after that was inconsistent with, and not credible as to a claim of defense of others. Petitioner’s testimony was not credible as to the events surrounding victim’s death, and since that was the only evidence, he had failed to prove by a preponderance of the evidence entitlement to immunity. (R. 158-60). The Court of Appeals affirmed finding there was a sufficient record from which it was clear Judge Griffith, acting as the fact finder, could and did determine petitioner had not met his burden of proof to show he was entitled to immunity by a preponderance of the evidence where petitioner had testified that after the 1st stab to the shoulder blade, victim fell off his brother and was no longer attacking Adam, and could not explain how or why victim was stabbed 24 more times. While the law allowed one to “continue to shoot” [or stab] until the threat was eliminated, State v. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978), it did not allow one to continue to shoot [or stab] after the threat was eliminated, in this case 24 more times killing the victim. Chhith-Berry, 437 S.C. at 536-38, 541-45, 878 S.E.2d at 357-58; 360-61, *quoting* State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016), *quoting* 40 C.J.S. *Homicide* Section 189 (2014).

Analysis

Petitioner first argues [Question I.] that the record is insufficient for an appellate court to determine if Judge Griffith applied the correct burden of proof, and he abrogated his fact-finding

role.¹¹ The Court of Appeals correctly ruled against petitioner on this issue. Chith-Berry, *supra*. The record shows Judge Griffith applied the correct burden of proof, by a preponderance of the evidence, and did not abdicate his fact-finding role but denied immunity because petitioner's testimony was not credible and inconsistent with a claim of defense of others; therefore, he failed to meet his burden of proof that he was entitled to immunity by a preponderance of the evidence. (R. 158-60).¹² As a result, certiorari should be denied as to Question I. Id.

Petitioner next argues [Question II.] that Judge Griffith erred in declining to find he was entitled to immunity under the Act, because based on his testimony alone there was evidence he acted in defense of others. Judge Griffith did not err because he heard and saw petitioner's testimony and determined it was not credible; and, it was inconsistent with a claim of defense of others because by petitioner's own admission, there was no need to stab victim after the 1st stab wound to the shoulder blade; victim fell off his brother and stopped fighting; therefore, he

¹¹ Petitioner argues the Court of Appeals erred in affirming because Judge Griffith 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). Judge Griffith did not state there was a factual question until after he found petitioner was not credible **and** had not met his burden of proof on immunity under the Act. (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 this Court that petitioner was not entitled to immunity under the Act, the issue was one for the jury. This statement must be read in the context it was made. Judge Griffith was stating because he did not find petitioner's testimony credible **and** further 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, he 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. (R. 158). There is no merit to this argument

¹² To the extent this Court finds the record is insufficient Judge Griffith did not apply to correct standard of proof or abandoned his fact-finding role, then the remedy would be remand to Judge Griffith for another immunity hearing or further fact finding as this Court held in State v. Cervantes-Pavon, 426 S.C. 442, 452-53, 827 S.E.2d 564 (2019) and State v. McCarty, 437 S.C. 355, 375-76, 878 S.E.2d 902 (2022).

appropriately found petitioner failed to prove by a preponderance of the evidence he was entitled to immunity under the Act. The Court of Appeals correctly affirmed. Id. As Judge Griffith and the Court of Appeals 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 blade.

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 Curry, 406 S.C. at 370, 752 S.E.2d at 266. 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). "[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, *supra*; (quoting Curry, 406 S.C. at 372, 752 S.E.2d at 266).¹³ The burden of proof of establishing entitlement to immunity under the Act rests upon the party asserting the right to immunity, and the burden is by a preponderance or greater weight of the evidence. Curry; State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). This jurisprudence makes the trial court, not the

¹³ Petitioner seems to argue the court must accept his testimony as credible because no one else testified pre-trial. That is not the law. The record reflects Judge Griffith found petitioner's testimony was not credible *and* even if one accepted petitioner's testimony, it might be consistent with defense of others up until the 1st stab [to the shoulder blade], but based on petitioner's own testimony, it was unnecessary to continue to stab victim 24 more times. (Tr. 158-60).

jury, the finder of facts of when the burden of proof has been met for the entitlement of immunity under the Act. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013), *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 his guilt beyond a reasonable doubt, the Act does not provide a presumption of immunity. Rather, a defendant must establish his entitlement to immunity by proof of the greater weight of the evidence. Curry; Duncan. Preponderance of the evidence is evidence which, as a whole, shows 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 slightly in favor of the government, 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. McCarty, 437 S.C. at 375-76, 878 S.E.2d 902, *citing as e.g. State v. Andrews*, 427 S.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. Douglas, 411 S.C. at 316, 768 S.E.2d at 238. Credibility simply means believability. Judge Griffith found that here, petitioner's testimony was not credible. (R. 158-60). This finding is supported by the record. (R. 106-58).¹⁴ Further, this Court has held the trial court in addition to making

¹⁴ Petitioner could not remember significant facts about how victim was killed. He claimed he blacked out and only stabbed victim 1 time, in the shoulder blade. Victim was stabbed 25 times. Petitioner could not explain how or give a credible reason why victim was stabbed 24 more times including 2 times in the spine, 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. Petitioner could not remember significant events occurring in the yard before his brother and victim ended up on the porch. His memory also became convenient when discussing what occurred in the days before

credibility determinations is also to weigh the evidence and make specific factual findings before reaching a decision as to immunity. McCarty, *supra*; Andrews, 427, S.C. at 181, 830 S.E.2d 12; Cervantes-Pavon, 426 S.C. at 451, 827 S.E.2d at 569. Judge Griffith did exactly that. Further, he did not rely on any evidence from the trial because he ruled at the end of the pre-trial hearing. Judge Griffith did not abuse his discretion in finding petitioner was not credible and in finding petitioner had not proven defense of others and entitlement to immunity under the Act by a preponderance of the evidence. Oates; Douglas.¹⁵ As Judge Griffith correctly found, and as the Court of Appeals agreed, even if one were to accept petitioner's testimony up to the 1st stab, petitioner had still not proven by a preponderance of the evidence he was entitled to immunity under the Act, because based on petitioner's own testimony, after the 1st stab to the shoulder blade, victim got off his brother and stopped fighting; therefore, the threat was removed, and petitioner was not entitled to continue to stab victim, and it was unnecessary to stab victim 24 more times and kill him. Chhith-Berry, *supra*.¹⁶ Judge Griffith did not state that it was up to the jury, not him,

victim's murder. He could not remember texting friends to locate a "burner" and .22 bullets to "take care of" victim, indicating his malice toward victim or threatening victim's life. He could not remember any statements made at the scene or hospital. Almost on every critical point, especially those proving murder and disproving defense of others, he could not remember or recall facts or events (R. 106-58). He also admitted he was intoxicated at the time of the crime, calling into question his recall of any facts, admitting he had several mixed drinks, several shots of liquor, marijuana, and Xanax before the murder. His credibility was in question from the start.

¹⁵ Although not mentioned by Judge Griffith in his holding that petitioner's testimony was not credible and petitioner had not met his burden of proof to show entitlement to immunity under the Act by a preponderance of the evidence, petitioner 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 during the "stand your ground hearing." Petitioner's testimony was simply not credible in any respect.

¹⁶ *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."); *See* Andrews, 427 S.C. at 182; 830 S.E.2d at 14 (While the trial court

to determine whether petitioner was entitled to immunity. *Compare* McCarty. He addressed *petitioner's claim* he was entitled to immunity under the Act because he acted in defense of another, and found, not only was petitioner not credible on this issue, but also petitioner had failed to meet his burden of proof on this issue.¹⁷ The Court of Appeals correctly affirmed. Chhith-Berry, *supra*.

Question presented III.

During the trial, petitioner sought to introduce specific details of a prior incident victim was involved in occurring on January 9, 2014, before his death on May 19th. The State objected on the ground petitioner, by his own admission, did not know about those specific details. (R. 161-62; 517-22). During his case in chief, petitioner 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 the testimony. The Court of Appeals affirmed under Rule 403. Chhith-Berry, 437 S.C. at 538-40, 545-46; 878 S.E.2d at 358, 361-62. Petitioner alleges Judge Griffith abused his discretion in not admitting this testimony and the Court of Appeals erred. Petitioner is wrong.

What Occurred Below Relevant to this Issue

Petitioner testified pre-trial that on the day of victim's death, he was afraid of victim for 3 reasons: (1) victim had beat him up on May 11th; (2) he knew victim's reputation for violence,

may not have set forth every detail of its analysis, the record was adequate to determine it applied the correct burden and made findings that supported its denial of immunity under our case law).

¹⁷ Petitioner completely ignores the fact that by his own admission the threat to his brother was removed after the first stab wound. Victim fell off Adam and stopped fighting his brother. Petitioner and his brother then ganged the victim in the corner of the porch while they had victim on the floor of the porch. As the Judge Griffith and the Court of Appeals 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*.

including the fact victim had 2 prior attempted murders, “he shot two people”; and (3) victim was much bigger than him. (R. 111-12; 115-16).¹⁸ Victim **did not** tell petitioner that he had been jumped by several men and that was why he shot the 2 men in the prior incident. Petitioner testified his brother Adam got into a fight with victim on May 19th and was losing, and he stabbed victim with his 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 the denial of immunity, the State moved *in limine* whether petitioner would be allowed to ask State’s or other witnesses about what they knew about the prior incident involving victim on January 9th in *the Vista* in Columbia, where victim was charged with attempted murder. (R. 160-62). The State conceded petitioner 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 petitioner did not know was not relevant to victim’s state of mind on the date of the murder or petitioner’s reasonable apprehension of fear. (R. 160-62).

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). Tonya Griffin, Bass’s mother, testified *before the jury* that victim was wearing an ankle monitor and she told Petitioner, 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,¹⁹ and victim was much bigger than petitioner. (R. 416-7; 422). Kathy Polk also testified victim punched petitioner and knocked him to the ground on Mother’s Day, and victim

¹⁸ Petitioner 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). Victim bragged to him about shooting the 2 people, and told petitioner the reason he came back to the scene of the prior incident was just so he could shoot 2 people. (R. 117-54).

¹⁹ Petitioner 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).

was much larger than petitioner. (R. 404-14). During trial, the State introduced petitioner's recorded statements. He told police **victim already had 2 or 3 attempted murders** and was known to be on "meth" and "you know" how people on meth act. He stated victim had a record of abusing women. He stated victim put a gun to his face on a prior occasion. (State's Ex. 43; 44).

When petitioner began his case in chief, he proffered the testimony of Edwards, the bartender. Edwards claimed the following: On January 9, 2014, a woman came into the bar claiming her boyfriend had assaulted her in the parking lot. Edwards went outside and met a man he believed to be victim and asked him to leave the area. Victim left and Edwards was later informed victim had returned. Edwards and 2 men went outside and walked up to victim. Edwards and the men confronted victim. At some point victim pulled a gun and shot him in the leg and 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 admitted 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, 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 a witness under subpoena who would testify the incident did not occur as Edwards represented. Petitioner did not proffer the testimony of any other victim or witness of the prior incident. (R. 531).

After hearing the entire proffer, Judge Griffith ruled he had already admitted evidence: (1) victim was out on bond for 2 counts of attempted murder; (2) petitioner 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 petitioner on May 11th; and (5) victim was someone you would not want to pick a fight with. (R. 530-32). Judge Griffith found however that *the details of the prior incident on January 9th from Edwards* were confusing and would confuse the jury and were too far removed in time and occasion from the incident involving petitioner 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 following 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 petitioner was aware of were also admissible**, because petitioner knew about those charges and those particular facts. (R. 530-32).

As a result, when petitioner testified, the jury heard additional testimony that victim was charged with attempted murders and petitioner knew of those 2 pending charges on the date of the incident and what petitioner knew about certain facts underlying those charges. (R. 579). Petitioner testified before the jury that on May 19th, he knew victim had already shot 2 people in the past with a gun. (R. 578). Petitioner also testified victim beat petitioner up on Mother's Day, and victim was twice Petitioner's size. (R. 569-71). Petitioner testified he was so afraid of victim after victim beat him up, he urinated on himself. (R. 579-79). As a result of these factors, petitioner testified he was afraid of victim, i.e. he had a reasonable apprehension of fear of victim, on the date of victim's death. (R. 570-71). Petitioner testified before the jury he stabbed victim because he thought victim was going to beat his brother to death **with his fists**, because victim was so big. (R. 578, see also 569-83; & 583-619). Petitioner did not testify before the jury that he stabbed

victim because he thought the victim was going to pull a gun. (R. 569-619). He denied victim had a knife or a gun. (R. 569-619). Importantly, petitioner was not prohibited by the court from testifying before the jury about anything petitioner knew on the date of victim's death about **either** victim's reputation for violence **or** any specific acts of violence committed by victim.²⁰ Petitioner also argued the same evidence in closing argument. (R. 631). The State did as well. (R. 657). The jury was also instructed on consideration of victim's reputation for or prior acts of violence in determining whether petitioner acted lawfully in defense of a third person or in self-defense. (R. 677). Petitioner now argues Judge Griffith erred in not admitting Edward's testimony as to the details and facts of the January 9th incident which petitioner knew nothing about on May 19th. Judge Griffith did not err but appropriately followed the evidentiary law of South Carolina, and the Court of Appeals correctly affirmed Day, supra. Certiorari must be denied.

Analysis

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). "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. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

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*

²⁰ Petitioner testified at the "immunity" hearing he knew victim carried guns and had bragged to him about shooting 2 people and that he went back to the bar just to shoot some people. Petitioner 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 victim's reputation for violence. Petitioner testified before the jury he stabbed victim because he thought victim was going to beat his brother to death with his fists. (R. 569-83; 584-619).

of the crime offered by the accused, or by the prosecution to rebut the same...

(emphasis added).²¹ Moreover, Rule 405, SCRE, addresses 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*.

Day, 341 S.C. at 419-20, 535 S.E.2d 431 (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); Douglas, 411 S.C. at 324, 768 S.E.2d at 242. "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." Day, 341 S.C. at 420, 535 S.E.2d 431; State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); Douglas, 411 S.C. at 324, 768 S.E.2d at 242.

Petitioner argues the Court of Appeals erred in affirming Judge Griffith not allowing Edwards' testimony. Neither the Court of Appeals nor Judge Griffith erred. First, Judge Griffith admitted in evidence the prior incident occurring on January 9th and the following: (1) Specific

²¹ Further, Rule 404(b), SCRE, states evidence of a prior bad act is not admissible to show action in conformity therewith unless a specific exception is met, which is not relevant in this case.

instances of violent conduct of the victim; (2) victim was out on bond for 2 counts of attempted murder; (3) victim was wearing an ankle monitor because he was out on bond for attempted murder; (4) victim had shot 2 people with a gun in the prior incident; (5) victim was someone you would not want to fight with; (6) victim had assaulted petitioner 10 days before victim's murder; (7) petitioner knew of specific instances of victim's violent conduct; (8) petitioner was aware victim was out of bond for 2 counts of attempted murder; (9) petitioner knew victim was wearing an ankle monitor because of the same; (10) petitioner knew victim had shot 2 people with a gun; (11) victim "thought he was all hard and shit;" (12) victim had a record for assaulting women; (13) victim was allegedly on meth. Judge Griffith admitted this evidence because **these facts petitioner was aware of at the time of the incident for which he was on trial.** This evidence was from petitioner, State's witnesses, and recorded statements. (R. 416-17; 578 State's Ex. 43 & 44). What Judge Griffith held was not admissible was Edwards' testimony regarding *the details* of the prior shooting of *which petitioner was unaware*. This was not an abuse of discretion. Id.

In the present case, it is undisputed the prior incident *was not directed against petitioner*. He was not there. As a result, in keeping with the Rule and 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 victim on the date of his murder, or (2) show a reasonable basis for fear of victim by petitioner. Day; Meckler; Douglas. They show neither.

First, the details of the prior incident of January 9, as related by Edwards, do not reasonably show victim's state of mind on May 19, in any way whatsoever. Haley Stone, the only sober witness on May 19th, testified victim and Adam were in a fist fight. Victim did not pull a gun and shoot anyone. Victim was not attacked by a group of men, dragged to the ground, and pull a gun and shoot anyone. (R. 303-37). Petitioner testified victim and Adam were in a fist fight. Victim

was punching Adam with his fists, and petitioner was afraid victim would kill Adam with his fists because victim was bigger than Adam. Petitioner testified he stabbed victim because he was afraid victim would beat his brother to death with his fists. He did not see victim pull a gun. He did not testify he was afraid victim would pull a gun. (R. 569-619). As a result, the facts of the prior incident do not reasonably show *victim's state of mind* on the date of his death. Day; Douglas; State v. McCray, 413 S.C. 76, 92-95, 773 S.E.2d 914, 923-924 (Ct. App. 2015)(2 witnesses' testimony regarding prior incident of victim were "situation specific" and unrelated to victim's state of mind at the time of the crime). Even if the fact victim had shot 2 people previously could show victim's state of mind on the date of his death, that incident was admitted in evidence.

As to the 2nd exception, petitioner completely ignores the court admitted the prior incident and what he knew about it, because it could form the basis of petitioner's reasonable apprehension of fear. Day; Meckler; Douglas.²² It was undisputed petitioner knew victim had shot 2 people with a gun, was out on bond for 2 counts of attempted murder, and wearing an ankle monitor. The court also admitted other evidence of why petitioner feared victim including the prior assault *and* the difference in sizes of petitioner and victim. Petitioner was not prohibited from introducing any

²² Petitioner argues Day and Meckler require admission because the prior incidents in those cases were 4 and 3 months before the murders. 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 Day was seeking to show victim was acting under the same drug induced paranoia on the date of his death, as in the prior incident, showing both victim's state of mind and Day's reasonable apprehension of fear. In Meckler, Meckler was improperly not allowed to testify about a prior incident she was aware of and witnessed involving victim and person she was defending on the date of the killing, where it caused her reasonable apprehension of fear of victim and again showed victim's state of mind on the date of his death. In the present case, as discussed above, *Edward's testimony* does not establish victim's state of mind on the date of his death, **and** petitioner was not prohibited from testifying regarding the facts he knew of the prior incident which could have caused him to form a reasonable apprehension of fear of victim, and those facts were admitted before the jury and not disputed.

other evidence of what he knew about victim, including about the prior incident, that could have caused a reasonable apprehension of fear. He simply chose not to testify to it.

What Judge Griffith excluded was Edwards' details of the prior incident. Petitioner admitted pretrial, **and** before the jury, the only thing he knew about the prior incident was victim shot 2 people with a gun and was charged with 2 attempted murders. What the jury didn't hear was a group of men with no lawful authority grabbed and tackled victim on January 9th, punched him, struggled over a gun with him, and 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 Edwards claimed. Judge Griffith did not abuse his discretion in not admitting the details of the prior incident, which petitioner knew nothing about and could not have formed a basis for a reasonable apprehension of fear of victim. Rule 405(b), SCRE. Day; Meckler. *See also Douglas* (admission of details of victim's prior violent behavior defendant did not know about was harmless given other evidence of victim's prior violent behavior defendant did know about 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).

Further, Judge Griffith was correct. Admitting Edwards' testimony could have confused the jury and the issues in the case. Rule 403, SCRE.²³ There would have been a trial within a trial over whether victim was at fault in the prior incident or not. *See United States v. Wellons*, 32 F.3d

²³ If Edwards testified, the jury could have believed victim was not at fault *or* been unsure victim was guilty of attempted murder. The State was also prepared to call a witness disputing Edwards' version of how the prior shooting occurred.

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 and misdirect the jury from the issues before it)(citing United States v. Waloke, 462 F.2d 824, 830 (8th Cir. 1992)(upholding exclusion, under Rule 403, of extrinsic evidence, offered by defendant, of collateral matters relating to victim’s character, where such evidence was properly admissible under Rule 405(a))²⁴; United States v. Piche, 981 F.2d 706 (4th Cir. 1992)(FRE 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).²⁵

Finally, petitioner testified before the jury he stabbed victim because he thought victim was going to beat his brother to death with his fists. (R. 569-83). He did not testify he thought the victim was going to pull a firearm, so he stabbed him. (R. 569-83). Petitioner admitted victim did not have a gun but was beating his brother with his fists. (R. 569-83). As a result, Edwards’ details of the prior incident could not have shown victim’s state of mind on May 19th or petitioner’s reasonable apprehension of fear. Day; Meckler. Judge Griffith did not abuse his discretion. Id.

Regardless, any error in failing to admit Edward’s testimony was harmless and not prejudicial. The jury knew victim was out on bond for 2 counts of attempted murder, and was charged with shooting 2 people. Douglas, *supra*. Further, Petitioner was better off without Edwards’ inconsistent testimony. As a result, any error was harmless.

Question presented IV.

Below, petitioner requested a jury charge on imperfect self-defense reducing murder to manslaughter. (R. 624, Req. Ch. #4). After considering it, Judge Griffith declined to give the

²⁴ *Abrogated on other grounds*, Byrd v. United States, 138 S.Ct. 1518 (2018).

²⁵ *See also* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008).

instruction as it was not a correct statement of the law. (R. 686).²⁶ The court did not err in not instructing imperfect self-defense, because this State does not recognize it and a trial judge must charge the current and correct statement of the law; thus, the Court of Appeals correctly affirmed. Chhith-Berry, 437 S.C. at 540-41, 546-47, 878 S.E.2d at 359-60, 362-63.

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). Petitioner alleges Judge Griffith erred in failing to charge imperfect self-defense, and the Court of Appeals erred in affirming. Petitioner is wrong.

South Carolina has not adopted imperfect self-defense, and it is not the law of this state. State v. Sams, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014); State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982)(rejecting the doctrine in this situation). Judge Griffith could not have erred in declining to instruct the jury on *imperfect self-defense* nor could the Court of Appeals erred. Taylor, 356 S.C. at 231, 589 S.E.2d at 3 (the court is only required to charge the current and correct law of S.C.); Finley, 277 S.C. at 551, 290 S.E.2d at 809(no error in not charging "theory of imperfect self-defense" it is not the law of this State); Sams, 410 S.C. at 315, 764 S.E.2d at 517 (S.C. 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 Sams

²⁶ Petitioner raised the instruction again in his new trial motion. Judge Griffith stood by his decision not to give the instruction because it was not a correct statement of the law, and he appropriately charged self-defense/defense of others including tailoring his instruction to this case. (R. 703-05).

holding that S.C. has not adopted imperfect self-defense); Ivey v. Catoe, 36 Fed. Appx. 718, n. 8 (4th Cir. 2002)(*Unpublished*)(S.C. does not recognize imperfect self-defense)(citing Finley).²⁷ Further, as recognized in Sams and Scott, even if South Carolina were to at some future day adopt imperfect self-defense, 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 517.²⁸ Judge Griffith fully charged voluntary manslaughter. (R. 670-72). The Court of Appeals appropriately denied this claim. Scott; Sams.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

January 9, 2023

²⁷ 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*)(no IAC 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.E.2d at 809).

²⁸ The South Carolina cases petitioner cites held the defendant was entitled to an instruction on voluntary manslaughter, not imperfect self-defense. Petitioner also admitted below that this Court has never held a person is entitled to a charge on imperfect self-defense in this factual scenario.