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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Assigned Judge: Darrell Scott Fisher, Circuit Court Judge
Disposition Judge: G.D. Morgan, Jr., Circuit Court Judge

Appellate Case Nos. 2023-000182 and 2023-001149

The State of South Carolina, Respondent,

v.

Luis Armando Alvarez, Appellant/Petitioner.

AND

The State of South Carolina, Respondent,

v.

Juan Carlos Alvarez, Appellant/Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel submits that he has preserved the issues discussed herein for appeal and that he timely filed a petition for rehearing after the Court of Appeals issued an opinion in this case. The Court of Appeals filed its decision on June 25, 2025, and the Petitioners petitioned for rehearing on July 7, 2025. On July 17, 2025, the Court of Appeals filed an Order denying the Petition for Rehearing. This Petition follows.

QUESTIONS PRESENTED

I. Did the Court of Appeals incorrectly hold that there was "no evidence" to support a self-defense jury instruction?

II. Did the Court of Appeals incorrectly hold that even if the trial court's accomplice liability charge was improper, it was harmless?

III. Did the Court of Appeals incorrectly hold that the trial court's failure to instruct the jury on the Petitioners' right to remain silent until after the jury reached its verdict was not preserved for appellate review?

STATEMENT OF THE CASE

This case involves a four-on-two man fight in a parking lot of Club Vibe where Javier Solis, Orlando Lopez, Orlando Lopez's friend, and Jhefrey Colorado ambushed the Petitioners. The Petitioners were each charged with two counts of attempted murder: one count with respect to Javier Solis, and the other count with respect Orlando Lopez, and two counts of possession of a weapon (*to wit*, a knife) during a violent crime. (R. pp. 16-17, 22-23, 28-29, 34-35). There was more than "any evidence" from which it could be reasonably inferred that the Petitioners acted in self-defense, yet the Court of Appeals ignored this evidence. *See State v. Day*, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000); *Sate v. Alvarez*, 2025-UP-204, at pp. 2-3.

Over the Petitioners' objections, the trial court instructed the jury that "criminal intent can arise from action or a failure to act. It may arise from negligence, recklessness, or indifference to duty or to consequence that is considered by the law to be the equivalent of criminal intent." (R. p. 572, lines 7-12; p. 573, lines 9-13). It also instructed the jury that it could find the Petitioners guilty of attempted murder as a principal of "who is present aiding, abetting, or assisting in the crime" or as an accomplice upon proof that attempted murder was a "natural and probable consequence" of acts done in carrying out a common plan or scheme. (R. p. 575, line 10-p. 577, line 6). This approach has been rejected by courts across the country. *See Specht v. Indiana*, 838 N.E.2d 1081, 1090 (Ind. Ct. App. 2005) ("While we agree with the State that the *attempted murder* instruction in this case does properly instruct on the basic elements of attempted murder, … the jury was never specifically instructed that it had to find that [the defendant], as a non-shooting accomplice, specifically intended that the victim be killed when he *aided* in the crime of attempted murder"); *Sharma v. Nevada*, 118 Nev. 648, 656-57, 56 P.3d 868, 873 (Nev. Sup. Ct. 2002) (reversing the conviction of an alleged aider and abettor for attempted murder (which required a

showing of specific intent to kill) because the jury received a "natural and probable consequences" instruction but was not told that the accomplice "must have aided and abetted the attempt *with the specific intent to kill*"). The Court of Appeals incorrectly held that even if the trial court's charge was improper, it was harmless. *Sate v. Alvarez*, 2025-UP-204, at pp. 3-4.

The Petitioners did not testify at trial. The trial court charged the jury, but it failed to give the "no inference charge" regarding the Petitioners' right to remain silent until after the jury reached its verdict. (*See* R. p. 561, line 20-p. 580, line 14). The Court of Appeals incorrectly held that trial counsel did not timely object, therefore the issue was not preserved for appellate review, and to the extent the State exacerbated the error during its closing arguments, it was harmless. *Sate v. Alvarez*, 2025-UP-204, at p 4.

STATEMENT OF THE FACTS

In the early morning of September 22, 2018, the Petitioners were at Club Vibe ("the Club"), sitting at the bar, when Orlando Lopez ("Lopez") walked in the back door with two others. (R. p. 203, lines 7-9; p. 206, line 20-p. 207, line 4). Lopez sat near the Petitioners. (R. p. 185, line 22-p. 186, line 1; p. 229, lines 13-19). The Clubs owners, Bladimir Acosta ("Acosta") and Paula Patina ("Patina"), were friends with Lopez, Javier Solis ("Solis"), and Solis's wife, who was also at the Club. (R. p. 184, lines 15-16; p. 204, lines 14-17; p. 260, lines 12-14; p. 282, lines 6-8). Acosta played a song from the Petitioners' home country, Honduras. (R. p. 186, lines 4-6; p. 319, lines 13-15; p. 345, lines 10-12). Lopez testified that he commented, "What an ugly song," and one of the Petitioners replied, "Shut up your mouth" "little Columbian son of a bitch." (R. p. 184, lines 15-16; p. 186, lines 4-5). There was also testimony that one of the Petitioners replied "Columbian, watch, watch what you say" without the offensive phrase. (R. p. 186, lines 4-8; p. 203, lines 13-16; p. 207, line 17-p. 208, line 8). Jhefrey Colorado ("Colorado") testified that he saw Lopez and

the Petitioners argue inside the bar. (R. p. 231, lines 4-6). Lopez was drinking alcohol that night. (R. p. 185, lines 6-13; p. 231, lines 12-14) (Lopez had two drinks of the liquor Aguardiente in the "very short period of time" he was at the Club); (R. p. 217, lines 14-24) (Lopez had two or three drinks of whiskey and coke).

Solis testified that he was not sitting near the Petitioners, but the Petitioners "passed my side" when they used the bathroom. (R. p. 289, lines 20-24). He also saw "gestures" and the Petitioners speaking to Patina. (R. p. 287, line 20-p. 288, line 4). Although he did not know what was being said, it upset him, so he confronted the Petitioners. (R. p. 287, line 25-p. 288, line 4; p. 288, line 25; p. 289, lines 1-6). Solis was also drinking alcohol that night. (R. p. 281, line 22-p. 282, line 1) (Solis drinking Tequila from 10:00 pm to 2:00 am).

Tension was high inside the Club. Lopez and Solis sued the Club and its owners because the fight "started there."

Q: Well, it's true thought that you actually sued Club Vibe, right?
A: Yes.
Q: And that you sued [the owners], correct?
A: Yes.
Q: And that it's based on what happened in that club that night?
A: Yes.
Q: So you are holding them responsible for what happened to you?
A: Yes. Because it started there.

(R. p. 213, lines 11-22; *see also* R. p. 321, lines 14-18).

Lopez, Colorado, and Solis contradicted each other about what happened in the parking lot outside of the Club. Lopez testified that he announced that he was leaving the Club, but did not have time to make it to his car before the Petitioners attacked him:

Q: And when you left, did you leave alone?
A: Yes.
Q: And when you left, were the [Petitioners] still in the bar?
A: Yes.
Q: Once you left, where did you go?

A: I was going towards the car, but I did not have the time to get there.
Q: Okay. So when you say you were going towards the car, whose car?
A: It was to my car to go to my house.
Q: Okay. So you were going to your car?
A: Yes, sir.
Q: And was – at this point in time, was Jhefrey Colorado with you?
A: No. He was outside. I found him outside when I was going towards the car.
Q: So you saw Jhefrey Colorado outside after you left the club?
A: Yes. He was outside.
…
Q: … [W]ere you alone when you left the club and outside in the parking lot?
A: Yes. Alone.
Q: … [W]hat happened after you left the bar in the parking lot?
A: I was going towards the car and I felt someone behind. I looked and it was [the Petitioners] already attacking me.

(R. p. 187, line 8-p. 188, line 6; p. 188, lines 15-25). On cross examination, Lopez admitted that he was outside with Colorado, but still asserted that the Petitioners did not let him get to his car before attacking him:

Q: … [Y]ou said you decided to leave [the Club]?
A: Yes.
Q: And that you went outside by yourself?
A: By myself.
Q: And you immediately went to your car?
A: I was going towards the car.
Q: Okay. And you were getting ready to leave?
A: Yes.
Q: And you didn't because that's when you felt you got stabbed?
A: Yes. They didn't let me get into the car.
Q: But that's not actually what happened either, right?
A: That's what happened.
Q: Well, that's what you're telling us today, but what actually happened was you stopped to smoke a cigarette outside?
A: Yes.
Q: Right next to your car?
A: Yes.
Q: And you even were out there with Jhefrey Colorado?
A: Uh-huh.
Q: But when you were asked by [the prosecutor], you said you went directly to your car and you didn't leave, and you couldn't leave because you were stabbed?
A: Yes.

Q: But that's not actually what happened because you were out there for a little while - - 5 minutes, 10 minutes, 20 minutes. You even ---
A: No. No. Jhefrey [Colorado] asked me if I had a light. And I was going to the car for the light, and that's when they got onto me.
Q: Okay. But you –
A: I looked for the light. And when I was going to leave, they didn't let me get into the car.

(R. p. 208, line 9-p. 209, line 21). On further cross examination, when confronted with his deposition testimony, Lopez admitted that he was outside for about five minutes before the Petitioners came out:

Q: Sir, you testified when [the prosecutor] asked you did you – that [the Petitioners] immediately came out behind when you walked out in the parking lot, correct?
A: Yes.
Q: But when you were giving a deposition under oath, you said that you were outside for about five minutes.
A: Yes. I smoked a cigarette and they came out from the back.

(R. p. 220, lines 16-24).

Colorado testified that he left "just after" Lopez. (R. p. 230, lines 10-15). When he got outside, he first went to his car to look for a cigarette. (R. p. 230, lines 20-23). He could not find any, so he walked over to Lopez to see if he (Lopez) had a cigarette. (R. p. 231, lines 20-25). Lopez was inside his car at this time. (R. p. 232, lines 3-13). Lopez told Colorado that he did not have a cigarette, although law enforcement body camera footage showed a pack of cigarettes underneath Lopez's vehicle. (R. p. 232, lines 13-15; p. 385, line 22-p. 386, p. 386, line 5). Colorado testified that because Lopez did not have any cigarettes, they walked to his (Colorado's) car to see if they could find one. (R. p. 232, lines 13-15). They could not find a cigarette, and Lopez went to his car. (R. p. 246, line 24-p. 244, line 1). Colorado testified that Lopez had an argument with the Petitioners, who were then outside the Club. (R. p. 244, lines 5-19). In addition to Lopez and Colorado, one of Lopez's friends was also in the parking lot at the time. (R. p. 212, lines 17-25).

Colorado told law enforcement that they "were all hanging out in the parking lot." (R. p. 245, lines 20-21).

The Petitioners did not follow Lopez, Colorado, and Lopez's friend out of the Club. Rather, they stayed inside, and left sometime later when Acosta (the Club owner who was friends with Lopez, Solis, and Solis's wife) told them that they had to leave. (R. p. 306, lines 24-25). The Petitioners did not want to leave the Club by themselves and urged Acosta to make everyone leave at the same time. (R. p. 307, lines 19-21). Acosta refused this request and told the Petitioners that they (alone) had to leave. (R. p. 308, lines 18-20). The Petitioners left the Club, only to find Lopez, Colorado, and one of Lopez's friends lying in wait. The Petitioners could not turn around and go back inside, as Acosta had locked the Club's door. (R. p. 206, lines 17-22; p. 267, lines 14-16; p. 268, lines 2-5; p. 303, lines 13-15; p. 309, lines 4-5). Although Solis's wife could not see anything that was happening outside, she knew that the men planned on attacking the Petitioners, as she told Solis not to leave the Club. (*See* R. p. 293, lines 14-17; p. 319, lines 1-6). By this time, Lopez and Colorado were standing next to each other, and Lopez was arguing with the Petitioners. (R. p. 263, lines 8-11). Solis went outside despite his wife's pleas.

The Petitioners then faced four men: Lopez, Lopez's friend, Colorado, and Solis. At some point, Colorado armed himself with what was described as a club, a tube or stick, and a metal tube or pole. (R. p. 237, lines 13-14; p. 342, lines 13-14). The Petitioners tried to escape, running to their work van. (R. p. 237, lines 21-23) (Colorado testimony, "Q: And when [the Petitioners] ran away, did you follow them? A: Yes. I went after them, and they tried to get into a van used for work"). Law enforcement testified there was a trail of blood going to the driver's side door of the Petitioners' work van. (R. p. 393, lines 21-24). A reasonable jury could conclude that this was a four man on two man ambush, facilitated by Acosta.

With respect to the charges as a whole, the trial court instructed the jury on negligence, recklessness, and indifference to duty, as applicable "in this case":

> In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State **in this case** for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence.
>
> … Criminal - - **criminal intent can arise from action or a failure to act**. **It may arise from negligence, recklessness, or indifference to duty** or to consequence that is considered by the law to be the equivalent of criminal intent.

(R. p. 572, lines 7-12; p. 573, lines 9-13) (bold added).

With respect to the accomplice liability charge itself, the trial court instructed the jury that it could find the Petitioners guilty as a principal "who is present aiding, abetting, or assisting in the crime" or as an accomplice upon proof that attempted murder was a "natural and probable consequence" of acts done in carrying out a common plan or scheme. (R. p. 575, line 10-p. 577, line 6). While the court instructed the jury that attempted murder requires specific intent, it did not instruct the jury that it had to find that the Petitioners, as accomplices, specifically intended that the victim be killed when they aided the crime of attempted murder. (*See* R. p. 575, line 10-p. 577, line 6). Despite the Petitioners' request, the court refused to charge self-defense. (R. p. 484, line 23-p. 506, line 20).

The Petitioners did not testify at trial. The court was planning to give the "no inference charge" regarding the Petitioners' right to remain silent, but it failed to do so. (*See* R. p. 561, line 20-p. 580, line 14). Sometime after the jury was dismissed to deliberate, the court's failure became apparent to the court and/or trial counsel. (*See* R. p. 582, lines 4-13). Before the court and parties were able to discuss the matter on the record, the jury had reached its verdict, completed the written verdict forms, the foreperson certified that "this decision was the unanimous decision of the jury," the jury provided notice to the bailiff that it had reached a verdict, and the bailiff provided notice

to the court that the jury had reached a verdict. (R. p. 579, lines 12-16; p. 582, lines 6-13; *see also* R. pp. 12-15). Although the jury reached its verdict, which was certified by the foreperson, the court instructed the jury on the "no inference charge" and told it to "continue" its deliberations – even though its deliberations had concluded. (R. p. 583, line 24-p. 585, line 11). There is no record evidence that the jury was given a new verdict form to replace the completed one signed by the foreperson. (*See* R. p. 582, line 8-p. 585, line 14). Six minutes later, the jury again provided notice that they had reached a verdict. (R. p. 586, lines 4-6). That verdict found both Petitioners guilty on all charges. (R. p. 587, line 5-p. 588, line 16).

ARGUMENT

I. Did the Court of Appeals incorrectly hold that there was "no evidence" to support a self-defense jury instruction?

"[I]f there is some evidence to support each element of self-defense—whether found in the State's presentation of evidence or produced by the defendant—it becomes the State's burden to persuade the jury beyond a reasonable doubt that at least one element of the defense does not exist." *State v. Williams*, 427 S.C. 246, 250, 830 S.E.2d 904, 906 (2019) (citations omitted). In other words, "[i]f there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." *Day*, 341 S.C. at 416–17, 535 S.E.2d at 434 (2000).

The Court of Appeals incorrectly held that there was "no evidence to support a self-defense jury instruction." *Alvarez*, 2025-UP-204, p. 3. In so doing, it focused on testimony that the victims were unarmed and the Petitioners "stabbed them without provocation." *Id*. However, this was a jury issue, as the witnesses contradicted themselves and each other about what happened in the parking lot that night (*See*, *e.g.*, R. p. 187, line 8-p. 188, line 6; p. 188, lines 15-25, wherein Lopez

testified that he announced that he was leaving the Club, but he did not have time to make it to his car before the Petitioners attacked him), *contra* (R. p. 208, line 9-p. 209, line 21, wherein Lopez admitted that he was outside with Colorado, but still asserted that the Petitioners did not let him get to his car before attacking him), *contra* (R. p. 232, lines 3-13 wherein Colorado testified that Lopez was inside his car at the time); *contra* (R. p. 220, lines 16-24, wherein Lopez testified that he was outside for five (5) minutes before the Petitioners came out), *contra* (R. p. 230, lines 10-15, wherein Colorado testified that he left just after Lopez); *see also Sauers v. Poulin Bros. Homes*, 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct. App. 1997) ("As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness"); *State v. Jackson*, 384 S.C. 29, 37, 681 S.E.2d 17, 21 (Ct. App. 2009) (self-defense instruction proper where there was "testimony that [the victim] himself had the knife at one point during the fight").

There was more than "any evidence" from which it could reasonably be inferred that the Petitioners acted in self-defense. *See Day*, 341 S.C. at 416-17, 535 S.E.2d at 434. The Petitioners were actively trying to avoid any difficulty outside the Club. A reasonable inference is that the Petitioners were the victims of a deliberate ambush facilitated by Acosta, the Club's owner. Lopez, Colorado, and Lopez's friend were all outside the Club, waiting in the parking lot for five minutes, when Acosta forced the Petitioners outside and locked the door behind them. (R. p. 212, lines 17-25; p. 220, lines 16-24; p. 230, lines 10-15; p. 245, lines 20-21). Again, Acosta was friends with Lopez, Solis, and Solis's wife. Although Lopez and Colorado had past difficulty with the Petitioners inside the Club, they chose to wait in the parking lot rather than leave the premises. The Petitioner did not follow Lopez outside the Club. Rather, the Petitioners only left the Club when Acosta told them that they had to leave. (R. p. 306, lines 24-25). The Petitioners did not want to leave the Club, especially by themselves. The Petitioners urged Acosta to make everyone leave

at the same time. (R. p. 307, lines 19-21). Acosta refused this request and told the Petitioners that they (alone) had to leave. (R. p. 308, lines 18-20). Acosta forced the Petitioners out of the Club by themselves, and then he locked the door behind them. (R. p. 206, lines 17-22; p. 267, lines 14-16; p. 268, lines 2-5; p. 303, lines 13-15; p. 309, 4-5). Although Solis's wife could not see anything that was happening outside, it reasonably can be inferred that she knew the men planned on attacking the Petitioners, as she told Solis not to leave the Club. (*See* R. p. 293, lines 14-17; p. 319, lines 1-6). Solis went outside despite his wife's pleas. (*See id.*; *see also* R. p. 263, lines 2-4, 8-11). When Solis stepped outside, Lopez was arguing with the Petitioners. (R. p. 263, lines 2-4, 8-11). The Petitioners then faced four men: Lopez, Colorado, Lopez's friend, and Solis.

The Petitioners had the right to act on appearances, and they were not required to wait to be actually attacked before acting. *See State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). A reasonable fear of bodily injury from a group of people does not need to be explained by testimony. *See Day*, 341 S.C. at 416–17, 535 S.E.2d at 434 ("[i]f there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error.").

The Petitioners were in actual imminent danger, or they had a reasonable belief of imminent danger. There was such evidence, including evidence that the Petitioners were the victims of a deliberate ambush facilitated by the Acosta (*see supra*); evidence of the victims' intoxication (*see State v. Douglas*, 411 S.C. 307, 327, 768 S.E.2d 232, 243 (Ct. App. 2014); (R. p. 185, lines 6-13; p. 231, lines 12-14; p. 217, lines 14-24; p. 281, line 22-p. 282, line 1)); and evidence of the past difficulties between the parties (*see infra*).

The past difficulties, individually and combined with each other and with the other evidence set forth herein, is "any evidence": Evidence that Lopez was arguing with the Petitioners inside the bar (R. p. 231, lines 4-6); evidence that Solis was upset at the Petitioners for speaking to Patina, and although Solis did not hear the conversation, he confronted the Petitioners inside the Club (R. p. 287, line 25-p. 288, line 4; p. 288, line 25-p. 289, line 6); evidence that Solis was angry at the Petitioners because the Petitioners passed him when they used the bathroom (R. p. 289, line 20-p. 290, line 3; p. 290, line 23-p. 292, line 9); evidence that Lopez was arguing with the Petitioners in the parking lot when Solis left the Club despite the pleas of his wife (R. p. 263, lines 2-4, 8-11); evidence Lopez and Solis sued the Club and its owners because the fight "started there" (R. p. 213, lines 11-22; *see also* R. p. 321, lines 14-18); evidence that Acosta forced the Petitioners to leave the Club on their own, despite the Petitioners not wanting to leave and urging Acosta to make everyone leave together (R. p. 306, lines 24-25; p. 307, lines 19-21; p. 308, lines 18-20); evidence that Acosta locked the Club door, actively preventing the Petitioners from going back inside (R. p. 206, lines 17-22; 267, lines 14-16; p. 268, lines 2-5; p. 303, lines 13-15; p. 309, lines 4-5); evidence that when Lopez, Colorado, and Lopez's friend left the Club, they waited for the Petitioners' in the parking lot until Acosta forced the Petitioners to leave the Club by themselves (R. p. 206, lines 17-22; p. 267, lines 14-16; p. 268, lines 2-5; p. 303, lines 13-15; p. 309, lines 4-5); evidence that it was known that Lopez, Colorado, and Lopez planned on attacking the Petitioners in the parking lot, as Solis's wife (who could not see anything that was happening outside) told Solis not to go outside (R. p. 293, lines 11-13; p. 319, lines 1-6); evidence that Colorado armed himself with what was described as a club, a tube or stick, and a metal tube or pole (R. p. 237, lines 13-14; p. 342, lines 13-14); and evidence that the Petitioners were bleeding,

and they tried to escape the attack in their work van, however the van door would not open (R. p. 238, lines 8-10; p. 393, lines 20-24).

The Petitioners had no other probable means of avoiding the danger, *e.g.*, evidence that the Petitioners could not stay inside the Club and were forced to leave the Club alone (R. p. 306, lines 24-25; p. 307, lines 19-21; p. 308, lines 18-20); evidence that the Petitioners could not get back inside the Club, as the door was locked (R. p. 206, lines 17-22; p. 267, lines 14-16; 268, lines 2-5; p. 303, lines 13-15; p. 309, lines 4-5); and evidence that the Petitioners tried to leave in their van, but were unable to do so (R. p. 238, lines 8-10; p. 393, lines 20-24).

The jury, having been told in opening statements that the Petitioners acted in defense of their own lives, had an expectation that was never met – namely, that the Petitioners would present evidence as why they stabbed the victims. (R. p. 176, lines 1-13) (opening statements, stating "[The Petitioners] leave as the bar is closed. And when they get outside, Orlando Lopez, Jhefrey Colorado, and Javier Solis are lying in wait, waiting to attack [the Petitioners]. That's what they were waiting on. Unfortunately, they picked the wrong individuals to wait and attack. Unfortunately [sic], for [the Petitioners], one of them had something that they could defend themselves with and they did. That's what really - - that's what really happened. Now, ladies and gentlemen, you cannot be the instigator and the victim, but that's what they're attempting to do"); *see also North Carolina v. Ross*, 367 S.E.2d 889, 893 (N.C. Sup. Ct. 1988) ("The jury, having been told at the outset of this case essentially that this defendant committed the killings, but did so only in defense of his own life, had an expectation that was never met-namely, that defendant would present evidence as to why he killed the victims").

The State exacerbated the court's failure to charge self-defense by commenting on it in its closing. (R. p. 509, line 20-p. 510, line 4) ("That's what I'm asking today that you do, is use simply

your common sense in this case. You will not hear any type of charge to you on the law of self-defense. … You will not hear anything about that from the judge who charges you on the law"); (R. p. 510, lines 10-24) ("Somehow or another, I anticipate that they're going to bring to you and say that these two individuals, Javier and Mr. Colorado, Orlando, had some kind of fault in this. … There is nothing in the record to that effect. And the reason why is because it's not a valid claim …"); (R. p. 532, lines 6-9) ("They want to come in here and argue to you self-defense. Let me tell you, self-defense, there's no evidence of that mind you …").

There was extensive evidence in the record from which it could be reasonably inferred that the Petitioners acted in self-defense, and the trial court's failure to charge self-defense is reversible error.

II. Did the Court of Appeals incorrectly hold that even if the trial court's accomplice liability charge was improper, it was harmless?

While the court instructed the jury that attempted murder requires specific intent, it did not instruct the jury that it had to find the Petitioner, as an accomplice, specifically intended that the victim be killed when he aided the crime of attempted murder. The Court of Appeals relied on its incorrect finding that the record "overwhelmingly suggest[ed]" the Petitioners stabbed Solis and/or Lopez without provocation, and it therefore concluded that any error was harmless. *Alvarez*, 2025-UP-204, at 3-4.

"Attempted murder requires the State to prove three essential elements: (1) malice, (2) the specific intent to kill a person, and (3) an attempt to kill that person." *State v. Geter*, 445 S.C. 139, 146, 912 S.E.2d 255, 258 (2025). "[T]he doctrine of transferred intent is inapplicable to the crime of attempted murder." *Id*. If the defendant's intent cannot be transferred from one victim to another victim, it follows that the defendant cannot be guilty of being an accomplice to attempted murder unless he specifically intended to kill the victim. The jury here could have improperly found that

Petitioner Juan Alverez (and/or Petitioner Luis Alverez) guilty as an accomplice upon proof that attempted murder was a "natural and probable consequence" of acts done in carrying out a common plan or scheme. *See Specht v. Indiana*, 838 N.E.2d 1081, 1090 (Ind. Ct. App. 2005) ("While we agree with the State that the *attempted murder* instruction in this case does properly instruct on the basic elements of attempted murder, … the jury was never specifically instructed that it had to find that [the defendant], as a non-shooting accomplice, specifically intended that the victim be killed when he *aided* in the crime of attempted murder"); *Wilson-Bey v. United States*, 903 A.2d 818, 843-44 (D.C. 2006) (instructing the jury on the "natural and probable consequences" doctrine impermissibly allowed conviction on the theory of aiding and abetting without proof of specific intent mens rea required for the offense was an error of "constitutional magnitude," even when the evidence against the defendant was strong; a juror may have had reasonable doubt as to whether the defendant formed the intent to kill the victim, and under the trial court's instruction, a juror who believed that defendant's intent was merely to join in an assault on victim could nevertheless reasonably find defendant guilty of aiding and abetting the specific intent crime of premeditated murder); *Sharma v. Nevada*, 118 Nev. 648, 656-57, 56 P.3d 868, 873 (Nev. Sup. Ct. 2002) (reversing the conviction of an alleged aider and abettor for attempted murder (which required a showing of specific intent to kill) because the jury received a "natural and probable consequences" instruction but was not told that the accomplice "must have aided and abetted the attempt *with the specific intent to kill*").

The errors here were not harmless beyond a reasonable doubt. *See State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty

verdict."). The trial court charged the jury that "criminal intent can arise from action or criminal intent can arise from action or a failure to act. It may arise from negligence, recklessness, or indifference to duty or to consequence that is considered by the law to be the equivalent of criminal intent." (R. p. 572, lines 7-12; p. 573, lines 9-13) (bold added). The jury could have convicted Luis Alvarez of knowingly or recklessly (rather than intentionally) aiding Juan Alvarez in knowingly or recklessly (rather than intentionally) attempting to kill Solis and Lopez, or vice versa. As stated by the Indiana Supreme Court, "[i]t is difficult if not impossible to see how [the defendant] received a fair trial when the jury could have convicted him of knowingly (rather than intentionally) aiding the principal in knowingly (rather than intentionally) attempting to kill [the victim]. As such, we now hold that the trial court committed fundamental error in not instructing the jury that it had to find that [the defendant] possessed the specific intent to kill when he knowingly or intentionally aided, induced, or caused his backseat accomplice to commit the crime of attempted murder." *Williams v. Indiana*, 737 N.E.2d 734, 740 (Ind. 2000). The error here was not harmless.

III. Did the Court of Appeals incorrectly hold that the trial court's failure to instruct the jury on the Petitioners' right to remain silent until after the jury reached its verdict was not preserved for appellate review?

"A state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S. Ct. 1112, 1121–22, 67 L. Ed. 2d 241 (1981). "The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth." *Id*. at 450 U.S. at 305, 101 S. Ct. at 1121 (quoting *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 1493, 12 L. Ed. 2d 653 (1964)). "And the

Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege." *Id*. (citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)).

The Petitioners did not testify at trial. The trial court charged the jury, but it failed to give the "no inference charge." (*See* R. p. 561, line 20-p. 580, line 14). The State exasperated this error by commenting on the Petitioners' failure to testify during its closing. (R. p. 510, lines 5-6) (telling the jury that "I have first argument because they put up no evidence, which is their right"); *see also State v. Arther*, 290 S.C. 291, 297–98, 350 S.E.2d 187, 191 (1986) ("This Court has repeatedly admonished that the prosecution must not comment directly *or indirectly* on a defendant's failure to take the stand.") (emphasis added) (citations omitted). The jury left the courtroom for deliberations. (R. p. 580, line 15). By the time it became apparent that the "no inference charge" was not given, the jury had reached its verdict, completed the written verdict forms, the foreperson certified that "this decision was the unanimous decision of the jury," and the jury provided notice to the bailiff that it had reached a verdict. (R. p. 579, lines 12-16; p. 582, lines 6-13 *see also* R. pp. 12-15). The court received notice that the jury reached a verdict, but the clerk had not yet published that verdict in the courtroom. (R. p. 583, lines 13-14). By this point, the trial court had only three options: it could do nothing, it could charge the jury on the Petitioners' right to remain silent, or it could order a new trial. The trial court had a bench conference with trial counsel. (R. p. 582, lines 8-13). Immediately after the bench conference, the trial court announced on the record of what it was going to do:

> THE COURT: All right. At the bench conference, we had a discussion that the right to - - or failure of the defendants to testify should not be held against them, and so let me make a couple of comments.
>
> … what we're going to do - - *what I'm going to do*, I'm going to bring [the jury] back in. And I'm going to explain to them that [] part of the charge was not included, and I am going to charge them and have them go back to the jury room to deliberate if that makes any difference.

Anything from the State on that?

MR. RICHARDSON: That's the way we think it should be done.

THE COURT: All right. And same from the defense? Anything from the defense?

MS. GORSKI:No, thank you, Your Honor.

MR. WATSON: That's fine.

(R. p. 582, lines 9-12, 16-25; p. 583, lines 1-3).

The trial court had made its decision in the bench conference of "what I'm going to do," and that ruling was clearly final. "[R]equiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of 'gotcha,' where form is elevated over substance." *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021) (citing Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 183 (3rd ed. 2016); *Atl. Coast Builders v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting); *Singh v. Singh*, 434 S.C. 223, 226 n.7, 863 S.E.2d 330, 334 n.7 (2021)).

"Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal." *Jones*, 435 S.C. at 145, 866 S.E.2d at 561 (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). It was clear to all concerned that Petitioners' trial counsel argued that a new trial was appropriate. The Petitioners' trial counsel filed post-trial motions on this very issue. (*See* R. p. 5; R. p. 9). If Petitioners' trial counsel had not made an argument for a new trial, they would not have been able to make the same argument in post-trial motions. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007); *see also Jones*, 435 S.C. at 145, 866 S.E.2d at 561 (The "purpose [of preservation rules] is not to sabotage attorneys' efforts to bring issues before the appellate courts, particularly where, as here, it was clear to all concerned

that Jones's counsel continued to object to the denial of his motion not suppress"). This issue is preserved for appellate review.

CONCLUSION

The Petitioners respectfully request that this Court grant certiorari, review this case, and remand this case back to the Circuit Court for trial.

Respectfully submitted,

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