

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

JOSHUA GRIFFITH,

PETITIONER

RECEIVED

APPELLATE CASE NO. 2014-000066

MAR 30 2017

SC Court of Appeals

Appeal from Horry County

Honorable Edward B. Cottingham, Circuit Court Judge

Opinion No. 2017-UP-119

PETITION FOR REHEARING

Petitioner requests rehearing pursuant to Rule 221 (a), SCACR because this Court apparently overlooked the fact that the state failed to present any direct or substantial circumstantial evidence Petitioner was guilty of murder or two counts of A.B.I.K. or criminal conspiracy.

In addition, this Court should grant rehearing because it overlooked the fact that State v. Drayton, 411 S.C. 533, 543-46, 769 S.E.2d 254, 259-61(Ct.App. 2015) and State v. Jenkins, 408 S.C. 560, 572-73, 759 S.E.2d 759, 766 (Ct.App. 2014), which are the foundations of its affirmance on the jury charge issue in this case, were both tried before State v. Logan, 405 S.C. 83, 747 S.E.2d

444 (2013), was decided, and therefore the Logan circumstantial evidence instruction could not have been requested in those cases. In State v. Logan the Supreme Court held, *when requested, as in this case*, the trial court *should provide* the Logan circumstantial evidence instruction.

The Logan Court also held that trial courts *may not rely on the former circumstantial evidence charge over objection*. Trial counsel here requested the Logan instruction, and he objected to the trial court's reliance on the former circumstantial evidence charge. This was an overwhelmingly circumstantial evidence case where the judge had the duty under Logan to charge the Logan instruction, where it was applicable, as here. Rehearing should also be granted because if ever there was a case where the judge abused his discretion in allowing a reply witness to testify, in violation of a sequestration order, to complete the state's case-in-chief, as the final witness before the jury, it was this case.

A. Directed verdict should have been granted where there was no substantial circumstantial evidence of Petitioner's guilt.

There was no direct or substantial circumstantial evidence that Petitioner killed the victim with malice aforethought, where the evidence against the co-defendant having been the killer was overwhelming, and the stand-alone improper reply testimony of Petitioner's former girlfriend that Petitioner allegedly said he saw the victim die was not substantial circumstantial evidence of his guilt. In this Court's summary opinion, State v. Joshua Griffith, 2017-UP-119 (March 15, 2017), it did not apply the facts to the law cited so Petitioner in this rehearing petition will reiterate evidence which, in the light most favorable to the state, could lead to the conclusion that the state met its burden of presenting substantial circumstantial evidence of Petitioner's guilt. It should respectfully be apparent that the **state did not present substantial circumstantial evidence of Petitioner's**

guilt, and that the trial judge sent this case to the jury based on mere suspicion that Petitioner was acting somehow in concert with bad actor Brown.

Marianna Mays went to Myrtle Beach in September 2009 with Petitioner Blake Griffith, her friend, Kayla Houck, and co-defendant Blake Brown. R. 25, l. 11 - 26. l. 23. After Blake Brown caused some controversy with the girls this forced them to part ways. They got back together on their last night at the beach about 9:00 p.m. Any fair reading of this record shows Blake Brown was the troublemaker. This Court respectfully -- at least until this rehearing petition -- has been unable to tell Petitioner Joshua Griffith and Blake Brown apart. R. 35, ll. 4 -9.

When they passed the Afterdeck Bar next to The Doll House strip club later that night, they saw that the bar was packed. According to Mays, Blake Brown was the only person with ties to Myrtle Beach who knew people there. None of the other three knew anyone at the Afterdeck that night. R. 38, ll. 10-24. Petitioner went with Blake Brown into the bar that evening and "Kayla and [Mays] are dancing. We see [Brown and Petitioner] a couple of times. We danced a couple of times with them. I mean, everybody was having a fun time. Like, I didn't see Blake Brown or Blake Griffith get mad; I didn't see them frustrated with each other. I didn't see any altercations whatsoever, like all four of us really were just having a good time." R. 39, ll. 5-17.

The four of them stayed at the Afterdeck for an hour and a half to two hours. Both Petitioner Griffith and Blake Brown were wearing wife-beaters and shorts that evening. Mays and Kayla left the bar and went to the car first. Mays telephoned Petitioner on his cell phone, and he told her "we'll be out there in a minute." R. 40, l. 13 - 44, l. 21. As they were waiting in the car, after she talked to Petitioner on the phone, they saw "people were busting out the doors, one guy was actually being carried out." Mays said she was confused about what was going on "then all of a sudden I see Blake Brown just run out the door and take off, doesn't hesitate to look around, just

runs off.” Mays saw two injured people coming out of the club. R. 47, ll. 6-24. One victim would die (murder count), and two were injured (ABIK counts).

Mays remembered that Petitioner Griffith came walking to the car very calmly. She was very worried about Petitioner. She asked him if he “had anything to do with this and he said ‘yes’ and that’s when he took off running.” Petitioner did not appear to be injured at all, he did not have any blood on him, but he appeared angry just before he ran away. This was a vague statement on Petitioner’s part, there was no substantial circumstantial evidence Petitioner was acting in concert with Blake Brown, or aiding and abetting him within the legal meaning of accomplice liability. R. 48, l. 23 -50, l. 25.

While Mays was worried about Petitioner, she did not care about Blake Brown. She asserted Brown, “was blowing my phone up, too” during this chaos. R. 52, ll. 3-25. When Brown reached Mays on the telephone, and Brown said that he was back at the beach house. Mays agreed to let the police ride with her to the beach house. Blake Brown was arrested by the police after they arrived at the beach house. Brown approached the car Mays was driving, and the police pulled their weapons on Brown. R. 52, l. 7 - 53, l. 6.

On cross-examination, Mays repeated that she thought Blake Brown stole their money that Sunday night. She also said that Brown “had a cocky attitude,” and that Brown had gotten in a fight at the Waffle House that weekend. Petitioner had nothing to do with Blake Brown’s hostile actions. R. 64, l. 4 - 66, l. 23. Petitioner was having a good time that evening, and she did not think Petitioner was looking for “any trouble” at the Afterdeck or anywhere else that evening. Mays had the opposite opinion of Blake Brown. R. 67, l. 1 - 69, l.1. Mays did not see Petitioner do anything improper that weekend but she knew that Blake Brown had cocaine with him. R. 73, l. 10 - 76, l. 17.

The testimony of the witnesses was discussed at length in the briefs before this Court, and at oral argument, and it does not need to be repeated again here in full. However, *the observations, lack of them, and the assumptions of some people at the Afterdeck that night are worth noting again.*

Ryan Palmer, who was twenty years old, went to the Afterdeck on September 8, 2009 with about ten friends. R. 160, ll. 4-23. He saw the two men, Brown and Petitioner, together that evening. Palmer claimed both men stared at him as if there were a problem, and Palmer claimed both men “bumped him.” A short time later he heard someone behind him say “you are about to get fucked up.” R. 168, l. 9 - 170, l. 16. Palmer identified Petitioner in the courtroom as being “the shorter guy.” R. 170, ll.10-16.

On cross-examination, Palmer admitted he gave a statement **that Brown**, the taller man, was the person he bumped into. It was **Brown** who “told him you are about to get fucked up.” R. 187, l. 12 - 191, l. 1. Palmer thought **Brown was the person who “cut him on the head** because DJ and Griffith were next to him and he had just thrown a punch at Griffith.” R. 190, l. 16 - 191, l. 7. **Petitioner never touched him** and he never saw Petitioner with a knife that evening. R. 198, l. 7 - 199, l. 12.

Robert Penna was one of the men stabbed (ABIK) that evening. He had first claimed that Petitioner, the shorter one, stabbed him that evening at the Afterdeck. R. 248, l. 17 -250, l. 9. However, Penna then **repeatedly admitted that he did not know who actually stabbed him**, and he was just making assumptions because “it happened so fast.” R. 253, ll. 8-22.

Penna maintained: “It took me a long time to kinda of come to terms with myself to remember what happened that night.” He said the more he thought about it, the more he **assumed** it must have been Petitioner who stabbed him. He remembered he was “throwing what [punches] I could at Brown at the time.” R. 263, ll. 7-22.

At another point on cross-examination, Penna was asked how he could assert that Petitioner stabbed him and DJ that evening when he admitted he did not see who did the stabbing. Penna answered, *“I guess you are just going to have to take my word for it.”* R. 268, ll. 12-25. (emphasis added). On redirect examination by the solicitor, Penna even admitted: **“I didn’t see a knife at all.”** R. 270, ll. 3-5.

Penna acknowledged that **he never saw Petitioner with a knife** during the struggle. He also admitted **he did not know who stabbed and killed DJ that night**. He told the police that he remembered very little of what occurred that evening, R. 263, l.7-268, l. 25. Penna finally admitted that he did not even know he had been stabbed until “someone told me I was stabbed.” R. 274, ll. 3-11. This is not **substantial circumstantial evidence** that petitioner stabbed him.

Kenneth Lee Muth was the assistant manager at the Afterdeck and the Dollhouse on the night of the incident. Muth noticed Brown that evening, he remembered Brown, and he thought **Brown was “trouble.”** He remembered co-defendant Brown because he leaned out the window, stuck his forearm out the window, and he said, “yeah, I’m local, right here it says 843” and “he had 843 tattooed on him.” R. 284, l. 15 – 285, l. 4. After the incident, Petitioner ran from the scene towards the inter-coastal waterway. R. 286, l. 6 - 290, l. 3.

Detective Jim Chatfield with the Horry County Police Department responded to the Afterdeck on the morning of September 8, 2009. There were approximately 400 people there, and it was “basically out of control.” R. 301, l.18 - 302, l. 19. Chatfield was told that two people were involved in the altercation. In the chaos at the Afterdeck, people were trampling over the crime scene and witnesses were leaving. He never saw Blake Brown or Petitioner Griffith at the scene. R. 303, l. 7 - 306, l. 20.

Crime Scene Investigator Robert Deal testified that the police had located a green mossy oak folding knife and swabbed it to take a DNA sample. R. 404, l. 12 - 405, l. 22. SLED DNA/Serology Fitts testified that the swab from the knife handle **had the major contributor DNA of Blake Brown. R. 425, ll. 1-25. Fitts did not find anything on the knife linking it to Petitioner. R. 428, ll. 6-8.**

Seth Rogers was drinking at the bar that evening. **He saw Blake Brown, the taller white male, standing over the victim's body.** He did not see Petitioner until Petitioner ran and said in an excited fashion: "We gotta go, we gotta go." Both men ran out of the parking lot, and then "I turned my attention back to my friends." R. 457, l. 23 - 464, l. 8.

Detective David "Rusty" Crocker, learned from the emergency room staff that the victim was dead. Crocker arrested Blake Brown, and he saw a Mossy Oak-style knife on the passenger floorboard of the car he was in at the time. R. 474, l. 21 - 479, l. 2. This knife **contained Brown's and the victim's DNA.** Crocker had no contact with Petitioner Griffith. R. 483, ll. 16-21.

Defense counsel Hewitt moved for a directed verdict noting there was no evidence that Petitioner Griffith was brandishing a knife that evening. **This was a purely circumstantial evidence case. Counsel noted that the one witness that came the closest said "you will have to take my word for it."** This did not meet state's burden of proof at the directed verdict stage. R. 495, l. 5 - 497, l. 11. (emphasis added).

Defense counsel focused strongly on the fact that the state had utterly failed to prove that Petitioner did anything with malice aforethought as to both the murder and A.B.I.K. counts. Counsel argued that "eyeballing somebody" or even "talking trash" did not satisfy the state's duty to produce sufficient evidence of malice aforethought at the directed verdict stage, even with everything being accepted, as it must, in the light most favorable to the state. R. 487, l. 10 - 492, l. 2. Defense

counsel noted that Blake Brown, whom the evidence pointed to as the guilty stabbing party, had pled guilty. R. 490, ll. 16-25.

The judge appeared to focus strongly on the fact that Petitioner purchased a knife that evening; that a jury could believe that Petitioner was acting with Brown, and that they wanted to start a fight. R. 493, l. 14 - 494, l. 11. Defense counsel Hewitt continued to focus on the fact that the state's burden in this circumstantial evidence case had not been met, and that there was no evidence of a conspiracy. The judge continued to point out there was evidence of "trash talking" that evening. Defense counsel argued that the mere fact Petitioner purchased a knife, and that a person later died at the bar did not satisfy the state's burden of proof at the directed verdict stage. R. 417, l. 7 - 420, l. 11. The trial judge respectfully sent this case to the jury based on speculation, and assumptions, and that was reversible error.

Other evidence

Kacie Henry testified she dated Blake Brown right after the incident in this case. She was aware of his arrest and the charges against him. R. 540, l. 15 - 541, l. 14. Kacie said *Brown repeatedly admitted he stabbed and killed the victim, and he stabbed the other two men also. Petitioner was not responsible according to Brown.* R. 544, l. 2 - 545, l. 16. (emphasis added). Despite Brown's confessions, and the lack of substantial circumstantial evidence of Petitioner's guilt, a directed verdict would not be issued.

Reply testimony

Over objection, the state was allowed to offer the reply testimony of Kayla Houck. This was sandbagging, and using a witness to complete the state's case-in-chief in an impermissible highly prejudicial manner, if it ever occurred. Houck testified that she talked to Petitioner two days after he made bond. Houck said that Petitioner told her that he was sorry **for what had happened,**

and that he said he had **seen someone die** that evening. Houck said Petitioner did a “falling back” motion to apparently describe how the victim fell. She alleged that Petitioner said of the other knife: “That shit it [is] long gone.” Houck claimed that she did not tell anybody about this discussion because she was good friends with Petitioner’s family. R. 608, l. 22 - 610, l. 9.

Houck testified that she interpreted Petitioner’s expressions above as an apparent admission to murder. She offered to the jury, as the last witness they would hear given her improper reply testimony: “I don’t want to be friends with a murderer.” R. 610, ll. 7-24.

On cross-examination, Houck finally admitted that she had spoken with prosecution Investigator Carmen Mureddu, **and that she never alleged that Petitioner admitted any involvement in the crime. Houck gave a full statement in 2010 to the investigator, and never mentioned any of her allegations she was making in court that day.** R. 612, l. 9 - 613, l. 14.

Direct verdict motion renewed

Defense counsel renewed his previous motion for a directed verdict. The judge stated there was sufficient evidence to go forward to the jury, and that he was not going to direct a verdict. R. 621, l. 4 - 623, l. 1.

This Court should grant rehearing because state failed to present any direct evidence or *substantial circumstantial evidence* that Petitioner killed the decedent in this case, stabbed the other two men, or was engaged in a conspiracy with the guilty Blake Brown. The state’s evidence placed Petitioner with Blake Brown where it was apparent Brown, “the local boy,” was the bad actor and “trouble,” as the manager of the Afterdeck immediately spotted when Brown arrived at the bar.

The state’s witnesses, as defense counsel argued, did not provide the necessary circumstantial evidence to get beyond the directed verdict stage. One witness, when challenged about his obvious memory problems or inconsistent statements arrogantly asserted: “You have to

take my word for it.” Further, defense counsel also correctly argued that “eyeballing somebody” or even “trash talking” did not satisfy the state’s burden of proof at the directed verdict stage, in the light most favorable to the state.

The trial judge focused much attention on the fact that Petitioner purchased the knife that evening. Brown already had a knife, **and the only DNA found on a knife belonged to Brown and the victim**. Further, the judge’s reasoning that the jury could believe that Petitioner was acting with Brown, and that both men wanted to start a fight that evening **was not substantial circumstantial evidence that Petitioner murdered the decedent or committed ABIK upon the two living victims, or was involved in a criminal conspiracy**.

Moreover, reply witness Houck’s testimony that Petitioner told her he was sorry that what had happened, and that he had witnessed someone die that evening also fell far short of the substantial circumstantial evidence needed to get beyond the directed verdict stage. State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002). “Mere suspicion” of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). Mere suspicion is exactly what the state presented as to Petitioner in this case.

Petitioner cited, and continues to cite State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), as authority to this Court that a directed verdict should have been granted in this case. The Supreme Court held in Bostick that the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state’s case was that Ms. Polite worked at her church and always brought the collection proceeds home on Sunday afternoon. The state presented evidence that investigators found the victim’s personal items, burned by an

accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick's next door property. Bostick's mother testified she never used accelerants in the burn pile.

The Supreme Court noted that the evidence above as well as the fact Bostick had a pattern of gasoline on his shoes and that gasoline was the accelerant used to start the fire at the Polite home. This Court held this evidence raised a suspicion that Bostick may have been guilty but it was not sufficient for the case to have gone to the jury.

Earlier, and similarly, in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) the Supreme Court held that the state's circumstantial evidence against Martin was insufficient to take the case to the jury. In Martin the defendant borrowed his girlfriend's car which was later placed near the scene of the murder.

On the morning after the murder the manager of a restaurant found several bags of garbage near the bar where defendant Martin and co-defendant Wilson picked up Martin's girlfriend late the prior night. Inside the trash were items belonging to the victim. Also found were inside were latex gloves similar to those Martin's girlfriend used to clean her dogs.

When Martin girlfriend's asked him why he and co-defendant Wilson were so late in picking her up from the bar on the night of the murder, defendant Martin replied "some shit happened" and co-defendant Wilson added "someone may have died tonight."

The Supreme Court held that this circumstantial evidence was not substantial circumstantial evidence, and it was insufficient to take the case to the jury. The Supreme Court in Martin cited State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) which was a case which provided a strong suspicion of the defendant's guilt.

In Schrock, the defendant admitted to the police that he smoked Marlboro brand cigarettes – the same brand as the cigarette butts found at the murder scene. However, a saliva test could not

match a cigarette butt to the defendant. A similar footprint to Schrock's was found at the scene and nearby the scene. Schrock apparently later disposed of the clothes and shoes he had been wearing and he did not present an alibi. The Supreme Court held this evidence only raised a suspicion of Schrock's guilt and that he was entitled to a directed verdict.

Brown was the "local boy" in this case, and proud of it as shown by him displaying his "843" tattoo to the Afterdeck assistant manager. Petitioner was the outsider, the evidence in this case strongly showed that Brown was the culpable party. Brown got an incredible deal despite his obvious guilt.

If ever there was a case where the prosecution was asking the jury to convict Petitioner of murder and two counts of ABIK based on surmise, conjecture, and speculation, it was this case. Petitioner essentially had the misfortune of being on a double date with bad actor Blake Brown on a weekend that Brown was looking for trouble in his own backyard of Horry County.

This Court should respectfully grant rehearing because Petitioner was entitled to a directed verdict on the murder, the ABIK counts, and the criminal conspiracy count. Petitioner Blake Griffith respectfully should not be serving a 30 year -- day for day -- sentence based on **suspicion**, and where that the state did **not present substantial circumstantial evidence** of Petitioner's guilt. See, also, State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011).

B. This Court should also grant rehearing because it overlooked the fact that *State v. Drayton*, 411 S.C. 533, 543-46, 769 S.E.2d 254, 259-61(Ct.App. 2015) and *State v. Jenkins*, 408 S.C. 560, 572-73, 759 S.E.2d 759, 766 (Ct.App. 2014), which are the foundations of its affirmance on the jury charge issue, were both tried before *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), was decided. Consequently, the Logan circumstantial evidence instruction could not have been requested in those case, and alternative jury instructions

were involved. In *State v. Logan* the Supreme Court held, when requested, as here, the trial court should provide the *Logan* circumstantial evidence instruction. The *Logan* Court also held that trial courts may not rely on the former circumstantial evidence charge over objection. Trial counsel here requested the *Logan* instruction, and he objected to the trial court's stubborn reliance on the former circumstantial evidence charge. This was an overwhelmingly circumstantial evidence case where the judge had the duty under *Logan* to charge the *Logan* instruction, where it was applicable, as here.

At the close of the evidence, and prior to closing arguments, as was Judge Cottingham's style, the trial judge told the jury that his law clerk would instruct them on the law due to some health problems he was suffering. Both sides agreed that the law clerk could read the instructions to the jury. R. 623, l. 2 – 625, l. 5.

The charge on the law in this case told the jurors as to direct and circumstantial evidence:

There are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. **The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.** You should weigh all of the evidence in this case. After weighing all the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.

R. 629, ll. 6–23 (emphasis added).

The trial in this case occurred from January 6-10, 2014. Defense counsel Hewitt took exception to the judge's instruction on circumstantial evidence, and he requested the judge charge the State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) jury instruction. The judge refused to give the State v. Logan circumstantial evidence instruction ruling: "I have given you the circumstantial evidence that has previously been approved by the courts." R. 647, l. 10 – 23.

Law

In State v. Logan, 405 S.C. 83, 99, 747 S.E. 444, 452 (2013), the Supreme Court stated that when requested to do so by a defendant, as here, "We hold that the trial court *should provide the following language as a circumstantial evidence charge*, in addition to the proper reasonable doubt instruction:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, *however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.*

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two. (emphasis added).

This Court cited State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015), and State v. Jenkins, 408 S.C. 560, 759 S.E.2d 759 (Ct.App. 2014) in its summary opinion affirming Petitioner's convictions. See State v. Joshua Griffith, 2017-UP-119 (March 15, 2017).

State v. Drayton, 411 S.C. 533, 544, 769 S.E.2d 254, 260 (Ct.App. 2015) involved a trial which occurred on October 1, 2012, prior to Logan. "Drayton objected to the charge on circumstantial evidence, arguing the trend in the cases was to return to the "reasonable hypothesis" language used for directed verdict issues. He further argued it was "patently misleading" to instruct jurors that there was no difference between direct and circumstantial evidence. In requesting his jury charge, Drayton relied upon the 'reasonable hypothesis' language discussed in State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004) (holding that the language in State v. Grippon, 327 S.C. 79, 83-84, 489 S.E.2d 462, 462 (1997), is the sole remaining charge to be utilized by the courts of this state in instructing juries in cases relying, in whole or in part, on circumstantial evidence'). Citing Edwards, Drayton requested the following jury charge: Every circumstance relied upon by the state [must] be proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused *to the exclusion of every other reasonable hypothesis*. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilty [sic] of the accused, the proof has failed. (emphasis added). The court denied the request." Prior to Logan's mandate, this Court held the jury instruction substantially was correct, and not reversible error. State v. Drayton, 411 S.C. 533, 544, 769 S.E.2d 254, 260 (Ct.App. 2015).

State v. Jenkins, 408 S.C. 560, 759 S.E.2d 759 (Ct.App. 2014) was tried from April 9-13, 2012, also a re-Logan case. Jenkins maintained that: “The trial court's rejection of his proposed circumstantial evidence instruction, based on the instruction approved in *State v. Edwards* violated his right to require the prosecution to prove his guilt beyond a reasonable doubt. [Jenkins] argues the instruction given confused the jury regarding how to evaluate circumstantial evidence. We find no reversible error.” State v. Jenkins, 408 S.C. 560, 568, 759 S.E.2d 759, 763 (Ct.App. 2014).

Again, in the subsequent case of State v. Logan, 405 S.C. 83, 99-100 747 S.E. 444, 452-453 (2013), the Supreme Court stated that when requested to do so by a defendant, as here, “We hold that **the trial court should provide the following language as a circumstantial evidence charge**, in addition to the proper reasonable doubt instruction. The Supreme Court also held: “This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon*. . . However, trial courts **may not exclusively rely on that charge over a defendant's objection.**” (emphasis added).

The trial court committed reversible error by refusing to give the State v. Logan, 405 S.C. 83, 99-100 747 S.E. 444, 452-453 (2013) circumstantial evidence instruction where it was requested, and instead insisted on charging the older “no difference between direct and circumstantial evidence” jury instruction over objection.

Defense counsel correctly argued to the judge at the directed verdict stage that this was a circumstantial evidence case, and that the state had failed to offer sufficient circumstantial evidence against Petitioner for this case to go to the jury. Once the case did go to the jury, the manner in which circumstantial evidence was analyzed by the jury became critical. The jury was instructed that: “The law makes absolutely no distinction between the weight or value to be given to either

direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.” R. 629, ll. 6–23.

It is clear beyond cavil that if the jury had analyzed the circumstantial evidence in this case under the correct Logan standard that “to the extent the State relies on circumstantial evidence, **all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt,**” there is every reason to believe the jury would have determined that the state had failed in its burden of proving Petitioner guilty of murder and ABIK in this case beyond a reasonable doubt. State v. Logan, 405 S.C. 83, 99, 747 S.E. 444, 452 (2013).

The state largely sought to lump Petitioner and Brown together even though Brown was the instigator of trouble at the beach house, the Waffle House, and the Afterdeck. This was Brown’s weekend for trouble, and all of the circumstances of circumstantial evidence in this case was not consistent with Petitioner acting in concert with Brown, and it did not point conclusively to Petitioner’s guilt as a murderer and a batterer who also attempted to kill the two living victims.

Rehearing should respectfully be granted in this case. If a directed verdict is not granted on rehearing, Petitioner should at least be granted a new trial where the jury is properly instructed on the law as requested, and mandated by Logan.

C. Rehearing should also be granted where the trial court erred by permitting Petitioner’s former girlfriend, Kayla Houck, to testify as a reply witness where she was in violation of the sequestration order. Such sandbagging to complete the state’s case-in-chief by having the state’s most strident witness testify last before the jury should not be tolerated.

Defense made a motion to sequester all lay witnesses. R. 3, ll. 5–10. The court actually appears to have suggested a sequestration of *all* witnesses. R. 3, ll. 11–12, and ultimately

granted the motion. R. 3, ll. 15–16. The state requested that a few witnesses be permitted to remain in the courtroom during the trial. R. 3, ll. 17–25; R. 4, ll. 2–19. The judge permitted several witnesses to remain in the courtroom despite the sequestration order, but Houck was not one of them.¹ R. 3, ll. 17 - 20.

As part of the motion to sequester witnesses, the defense asked that eyewitnesses who did testify be remanded elsewhere out of the courthouse and not permitted to re-enter the same room with the other sequestered eyewitnesses who had not yet testified. R. 4, ll. 20–25; R. 5, ll. 1–22. Defense counsel made this additional request because many statements were made that did not correlate with one another. R. 4, ll. 23–25. The judge granted this request. R. 5, ll. 11–12, 14, 20–21; he also informed the defense that he would instruct the witnesses not to discuss their testimony with other witnesses. R. 5, ll. 14–16.

The state called Houck in reply. R. 604, ll. 6–9. The solicitor averred that Houck would “be saying that Blake Griffith told her that he stabbed the deceased boy.” (The evidence falls woefully short of this assertion). R. 604, l. 25, R. 605, l. 1. The Defense objected because Houck had remained in the courtroom throughout the trial violating sequestration. R. 605, ll. 7–8; R. 605, ll. 20–23. R. 603, l. 25, R. 604, l. 1; R. 605, ll. 7–8. Argument was heard outside the

¹ See, e.g., R. 136, ll. 8–17 (solicitor acknowledged the existence and binding character of the court’s sequestration order); R. 138, ll. 10–25, R. 139, ll. 1–10 (court repeated enforcement of sequestration order, and State acknowledged its compliance with order); R. 208, ll. 6–7 (court repeated enforcement of the sequestration, as well as its purpose, via instructing the State’s witness not to discuss his testimony with any of the other witnesses); R. 281A, ll. 8–11 (court granted defense counsel’s request that witnesses be instructed not to discuss their testimony with other witnesses); R. 514A, ll. 8–19 (court repeated enforcement of sequestration order, and State acknowledged its compliance with order). Because this Court did not explain its application of the law to the facts, Petitioner is going over the applicable facts in greater detail than normal to show the abuse of discretion in the unfairness of the Solicitor’s use of Houck as a reply witness.

presence of the jury; however, counsel even attempted to note this objection in the presence of the jurors before they were sent out. R. 603, l. 25, R. 604, l. 1.

The state argued that the court's sequestration order did not apply to Houck because she was not testifying as a "fact witness —" R. 605, ll. 11–18. The court ultimately allowed Houck's reply testimony, reasoning that she would not be testifying as to the events on the evening of the altercation. Her testimony would be limited to a response to the Petitioner's defense of third-party guilt. R. 605, ll. 24–25, R. 606, ll. 1–12.

Houck claimed to have had a conversation with Griffith about the incident a couple of days after he bonded out. R. 608, ll. 19–24. This conversation allegedly occurred at Griffith's home when Houck went there to pick him up and take him to a nearby shopping center. R. 609, ll. 2–3. Griffith said something like: "I can't -- I can't believe this happened. I'm sorry that I got you guys into this, but I saw the life come out of that guy's eyes." R. 609, ll. 4–7. As Griffith said this, immediately thereafter, he made a motion of falling backward. R. 609, l. 9. Houck also claimed another conversation with Griffith about the "weapon." R. 609, ll. 9–10. Griffith said, "that shit is long gone." R. 609, ll. 10–11.

Houck admitted to speaking with Carmen Mureddu, state's investigator, in October 2010—after the conversations with Griffith, but she did not mention these **alleged** conversations during the interview. R. 612, ll. 9–25, R. 613, ll. 1–14; R. 617, ll. 3–5. According to Mureddu's summary notes from this interview, Houck stated that "Griffith told her he saw **Brown** stab one guy in the head and he saw **Brown** pin another down and stab him in his side rib cage area," R. 615, ll. 14–16 and that Griffith was "hit and kicked during the fight." R. 615, ll. 17–18. In context, Houck claimed that Griffith had actually told her these other things about the weapon being gone, and the victim falling backward, and seeing the life come out of him, *which Houck*

apparently decided was an admission that Petitioner was a “murderer.” The solicitor cleverly worded his question: “But you’re also *trying to say* that he also said that he stabbed this guy.” She answered: “He did tell me that.” R. 617, l. 22 – 618, l. 7.

Houck actually waited two years to tell authorities this story. R. 609, ll. 12–14. When asked why she did not do so immediately, she answered that she had been “really good friends with his family” and was “on the fence whether [she] wanted to mess that relationship up with them or get involved in something that [she] necessarily didn’t want to be involved in and do the right thing.” R. 609, ll. 15–20. By ultimately choosing to come forward regarding these alleged conversations, she believed she had “chose[n] to do the right thing.” R. 609, ll. 20–21. She was no longer friends with Griffith and she did not “want to [be] friends with a murderer.” R. 610, l. 15.

Defense counsel made a post-trial motion for a new trial based on this adverse ruling, arguing that Houck’s reply testimony was in violation of the court’s sequestration order. R. 698, ll. 23–25. In the alternative, defense counsel argued that Houck’s testimony was “not responsive” to the evidence that Griffith’s former co-defendant, Blakely Brown, said that he had stabbed the deceased victim at the Afterdeck. R. 699, ll. 1–3. According to defense counsel, if the judge was going to admit Houck’s testimony despite the sequestration order, he should have limited this testimony to “whether anyone made statements that were inconsistent with Blakely Brown’s statement.” R. 699, ll. 3–5.

To this argument, the state responded that Houck’s testimony was “a proper rebuttal” because “the Defendant had admitted to her that he had done the killing,” and “there was evidence presented in the Defense’s case that the Codefendant had been the stabber.” R. 701, ll.

13–17. Furthermore, the state argued that the decision of whether to allow rebuttal testimony is “in the discretion of the Court.” R. 700, ll. 12 – 13.

Defense counsel then preserved this issue for appeal again in an explicit manner, and the court acknowledged and accepted this preservation. R. 702, ll. 18–21. Despite the argument, the court ruled “[t]he verdicts will stand as indicated.” R. 703, ll. 12–13.

In its summary opinion this Court held that to permit a witness to testify as a reply witness when she violated the sequestration order, and to exempt a witness from a sequestration order were both matters within the discretion of the trial court. State v. Joshua Griffith, 2017-UP-119 (March 15, 2017) at p. 2. Rehearing should be granted in this case because the state strategically used Houck as reply witness, who had violated the sequestration order, to prejudice Petitioner to the maximum degree. Houck was the last witness heard by the jury, and she completed the state’s case-in-chief giving the state an incredible unfair procedural advantage. R. 607-620.

If a witness violates a sequestration order, the court may subject the offending witness to discipline, or exclude the testimony of the offending witness. See United States v. Leggett, 326 F.2d 613, 614 (4th Cir. 1964). The discretion of the court with regard to such exemptions and exceptions from sequestration *is not arbitrary*. State v. O’Neal, 210 S.C. 305, 42 S.E.2d 523 (1947). The exclusion rule serves to prevent one witness from shaping his or her testimony to match the testimony given by other witnesses at trial. Leggett, 326 F.2d at 613–14. The trial court’s decision to admit the testimony of a reply witness who violated a sequestration order will be overturned if the appellate court finds this decision to be *an abuse of discretion* and if the testimony of the offending witness *prejudiced the defendant at trial*. See State v. Carmack, 388 S.C. 190, 197–98, 694 S.E.2d 224, 227-228 (Ct. App. 2010) (citing State v. Sullivan, 277 S.C.

35, 46, 282 S.E.2d 838, 844 (1981)²; State v. Jackson, 265 S.C. 278, 282, 217 S.E.2d 794, 796, (1975)).

- Houck had no reason or valid purpose to be in the courtroom and was thus seriously blameworthy. State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009).
- The solicitor never denied a violation of the order, but only argued she was not a fact witness. R. 605, l. 6 – 606, l. 12. State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961).³
- Houck was not sequestered. State v. Simmons, *supra*.
- The solicitor well knew she may need to call the witness. The prosecution knew that Houck, now the former girlfriend, had formed her “conclusions” from Petitioner’s alleged statements as shown above. State v. Cabbagesgtalk, 281 S.C. 35, 314 S.E.2d 10 (1984).
- While her testimony involved a purported discussion with Petitioner after the melee, it was directed to what happened then as discussed by the witnesses who were present. It came right after the defense witnesses who testified strongly for Petitioner. *Cf.* State v. Singleton, 395 S.C. 6, 716 S.E.2d 332 (Ct. App 2011). (Reply testimony not admitted to complete the story).
- The solicitor was aware of what Houck conclusions she had drawn from her discussion with Petitioner, and what she was going to say before trial. State v. Simmons, *supra*.

² Overruled on other grounds, State v. Brown, 389 S.C. 84, 697 S.E.2d 622 (Ct.App. 2010).

³ Overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

- Defense counsel had, as a practical matter, no real ability to demonstrate Houck's testimony would be different absent sequestration. State v. Miokovich, 257 S.C. 225, 227-28, 185 S.E.2d 360, 361 (1971).
- There was no violation of sequestration by defense witnesses. State v. Cabbagestalk, *supra*.
- The testimony far exceeded the scope of legitimate reply. Houck's testimony was sandbagged. Her observation that she did not like to associate with murderers was highly prejudicial and not in reply to the defense case, as were her self-serving reasons for withholding evidence. Also, her testimony was *not that "Blake Griffith told her that he stabbed the deceased boy" as the solicitor claimed*. R. 604, l. 25 – 605, l. 1. Cf. State v. Hall, 268 S.C. 524-529, 235 S.E.2d 112, 114 (1977).⁴ (Legitimate limited real reply testimony not an abuse of discretion.


The judge ruled her testimony did not violate the sequestration order because she was not a fact witness. There was no finding that she had been properly sequestered. R. 605, ll. 8-12. The judge's ruling that Houck could testify was **wholly arbitrary**. He granted sequestration on the state's motion, R. 571, ll. 8-13, as to defense witnesses Whiteside and Nalley, who were in the exact same posture as Houck – testimony as non-eyewitnesses to discussions after the fact. Arbitrary is defined in the American Heritage Dictionary, 2nd College Edition (1983) as: Determined by whim or impulse, not by reason or law. This ruling is a text book example. The last witness the jurors heard edified that "I don't want to be friends with a murderer." R. 610, l.

⁴ Abrogated by State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) on other grounds.

15. This testimony invited the jury to draw spurious and unwarranted inferences concerning Petitioner's unproven guilt.

The Houck evidence here was, *de facto*, admitted to complete the state's case-in-chief. State v. Huckabee, 388 S.C. 236, 243, 694 S.E.2d 781, 786 (Ct.App. 2010), and it was sandbagging at its worst. Rehearing should respectfully be granted on this issue also, since if there was ever an abuse of discretion in allowing a reply witness who violated the sequestration order, where it should have been apparent the state was using Houck in an impermissible strategic manner to prejudice Petitioner to the maximum, it was this case.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 30th day of March, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

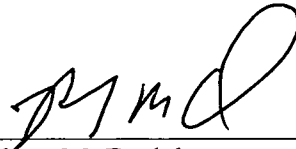
V.

JOSHUA GRIFFITH,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Donald Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Joshua Griffith, #358482, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 30th day of March, 2017.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 30th day of March, 2017.

Maia Munder (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

RECEIVED

MAR 30 2017

SC Court of Appeals