THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
General Sessions Court
Kristi L. Harrington, Circuit Court Judge

Case No. 2015-GS-08-01333
Appellate Case No. 2015-002688

The State,

Respondent,

v.

Sha'Quille Washington,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, counsel for Petitioner certifies that a petition for rehearing was made by Petitioner and finally ruled on by the Court of Appeals.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's exclusion of testimony of a defense witness that Larry Kinloch told him he committed the shooting?

2. Did the Court of Appeals err in affirming the trial court's exclusion of a toxicology report and testimony of the forensic pathologist concerning the report's findings as to the deceased's blood alcohol level?

3. Did the Court of Appeals err in affirming the trial court's exclusion of the testimony of a defense witness who had been present in the courtroom briefly, in violation of the court's sequestration order?

4. Did the Court of Appeals err in affirming the trial court's refusal to charge the jury on self-defense?

5. Did the Court of Appeals err in affirming the trial court's giving a jury charge on accomplice liability?

6. Did the Court of Appeals err in affirming the trial court's giving an *Allen* charge at the close of a day's deliberations, then excusing the jury for the night?

STATEMENT OF THE CASE

Petitioner, Sha'Quille Washington, was indicted by the grand jury of Berkeley County on a charge of murder, in connection with the shooting death of Herman Manigault. App. pp. 7-8. He was tried before a jury on October 12-16, 2015, with Judge Kristi L. Harrington presiding. The jury returned a verdict of guilty of the lesser-included offense of voluntary manslaughter. App. p. 632. Judge Harrington sentenced Petitioner to imprisonment for 30 years. App. pp. 9, 643. Judge Harrington subsequently denied Petitioner's motion to reconsider the sentence. App. p. 10.

ARGUMENT AND AUTHORITIES

This case arose from an altercation that occurred in the early morning hours of August 26, 2013, outside a Berkeley County club called A Place in the Woods. Many people had gathered at the club for a party on the night of August 25. Alcohol was being served, and most everyone there had been drinking. Petitioner, who was then 17 years of age, and his uncle, Larry Kinloch, were both at the club that night. App. pp. 88, 163-65. The deceased, Herman ("Trey") Manigault, also went to the club that night with his girlfriend, Arianna Coakley; his cousin, Larry Jenkins; and another acquaintance, Christina ("Taj") Lockwood. App. pp. 45, 86. After they had been there for some time, a fight broke out in the parking lot of the club. Ultimately, gunshots were fired, and Manigault was killed.

There were many conflicts and inconsistencies in the accounts of the various witnesses that testified. Who provoked the fight and who possessed or fired a weapon were matters in dispute. Coakley, Manigault's girlfriend, and Jenkins, Manigault's cousin, gave testimony that attempted to establish Petitioner provoked the altercation and shot Manigault.[1] App. pp. 50-51, 90-91. But Coakley did not see Petitioner shoot anyone. App. pp. 111, 116. Moreover, Jenkins did not observe the first shots, instead claiming he saw Petitioner shooting after Manigault was already on the ground. App. pp. 50-51. Other witnesses contradicted the testimony of Coakley and Jenkins and affirmatively stated they were observing Petitioner when the first shots were fired. App.

[1] Another witness, Christina Lockwood, had identified Petitioner as the shooter in a statement, but she testified she did not see the actual fight and did not see the shooting. App. pp. 227, 257. Lockwood denied seeing Petitioner point a gun. App. p. 236. She testified she put information in her statement based on what others had said. App. pp. 236, 257.

pp. 482, 488, 495-96. One of those witnesses testified Petitioner did not have a gun. App. p. 482. She and another witness, watching Petitioner when the shooting occurred, both testified he was not in proximity to where the shots were fired, and they both observed him running away after the shooting started. App. pp. 488, 495-96.

Although some witnesses attempted to establish that Petitioner or Larry Kinloch provoked or started the altercation, many witnesses gave testimony tending to show Manigault was the instigator. Earlier, Manigault had told the cook something was bothering him. App. pp. 129-30. While inside the club, Manigault had repeatedly told his girlfriend Petitioner was "looking at" him, and Manigault had said he was "going to snap," was "about to snap." App. pp. 89, 106-07, 115-16. When he and others went outside immediately before the altercation occurred, Jenkins testified Manigault took off his shirt, which Jenkins acknowledged indicated there was going to be a fight. App. p. 62. A disinterested witness, not there for the party but only to pick up a food order, confirmed Manigault[2] took off his shirt like he was about to engage in a fight. App. pp. 471-72. Others confirmed Manigault's shirt was off. App. pp. 249, 400. Coakley testified that a week earlier Kinloch had approached her, tried to talk with her, and asked for her number, but she denied Kinloch's attempt to "hit on" her had caused the stare-down that night with Manigault, her boyfriend of four years. App. pp. 88, 104-05, 115.

Other specific aspects of the evidence are discussed in greater detail in connection with the issues addressed below.

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[2] The witness, Renard Deveaux, did not identify Manigault by name, but by his clothing. He specified it was the person in the brown shorts that took off his shirt. App. p. 472. Manigault was wearing shorts that were described as khaki, tan, or brown. App. pp. 124, 285, 471-72. Petitioner was wearing blue and multi-colored swim-trunk-like shorts. App. pp. 123-24, 353. Kinloch was wearing jeans. App. p. 124.

I. The Court of Appeals erred in affirming the trial court's exclusion of testimony of a defense witness that Larry Kinloch told him he committed the shooting.

Larry Kinloch was called as a prosecution witness. He testified he was at the club that night and drunk. App. pp. 191, 194. He denied involvement in the fight and claimed he was outside smoking when he heard a gunshot. App. p. 170. He denied having a weapon. App. pp. 193-94. He denied that he had seen Quentin Kenneth Grant and Darlene Washington after the shooting that night, and he denied telling them he did the shooting. App. pp. 181-82. The defense called Grant[3] as a witness and sought to elicit his testimony that Kinloch told him he did the shooting. The state objected on hearsay grounds, and the trial court sustained the objection and struck the witness's testimony. App. pp. 448-50, 460. On appeal, Petitioner contended this ruling was error, on multiple grounds. The Court of Appeals erred in affirming the exclusion of this testimony.

Evidentiary rulings are governed by an abuse of discretion standard. *See State v. Stahlnecker*, 386 S.C. 609, 617, 690 S.E.2d 565, 569 (2010); *State v. LaCoste*, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct.App. 2001). An abuse of discretion occurs when the trial court's ruling is controlled by an error of law or a factual conclusion that is without evidentiary support. *State v. Pittman*, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007); *State v. Garner*, 389 S.C. 61, 65, 697 S.E.2d 615, 617 (Ct.App. 2010). The trial court's ruling on the state's hearsay objection was governed by multiple errors of law.

[3] Grant was referred to in the testimony as Quentin Kenneth Grant, but he stated his name to be Kenneth Gordon Grant. App. p. 446. Petitioner and the state referred to him as Quentin Kenneth Grant in their briefs and acknowledged this to be the same person referred to in Kinloch's testimony, as the Court of Appeals noted. *See* App. p. 760 n. 4.

First, Grant's testimony as to what Kinloch told him was admissible as a prior inconsistent statement.[4] A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement and the statement is inconsistent with the declarant's testimony. *See* Rule 801(d)(1)(A), SCRE. Evidence of a prior inconsistent statement is admissible not merely as impeachment evidence but as substantive evidence. *See State v. Copeland*, 278 S.C. 572, 581-82, 300 S.E.2d 63, 68-69 (1982); *In re Richard D.*, 388 S.C. 95, 99-100, 693 S.E.2d 447, 449-50 (Ct.App. 2010). In this case, Kinloch testified in the state's case-in-chief, was cross-examined by the defense, and specifically denied having told Grant he did the shooting. The testimony of Grant that Kinloch told him he did the shooting is a prior inconsistent statement that is squarely within the definition of non-hearsay contained in Rule 801(d)(1)(A). *Cf. State v. Fossick*, 333 S.C. 66, 68-70, 508 S.E.2d 32, 33 (1998).

In *Fossick*, this Court found the trial court erred in excluding testimony similar to that which the defense sought to introduce in this case. There, the witness had been questioned and denied having made the prior statement, "I killed that bitch. . . ," to a particular individual. The state objected to proferred testimony by that individual to the

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[4] The Court of Appeals questioned whether the prior inconsistent statement argument was preserved. *See* App. p. 764. Its discussion of the preservation issue overlooked the principle that, to be preserved for appellate review, the specific evidentiary argument need only be "made known to the court" or be "apparent from the context." *See* Rule 103(a)(2), SCRE; *cf. State v. Foster*, 354 S.C. 614, 620 n.4, 582 S.E.2d 426, 429 n.4 (2003) (specific ground for objection to evidence of prior consistent statement was apparent from context); *State v. Hamilton*, 344 S.C. 344, 360-61, 543 S.E.2d 586, 595 (Ct.App. 2001) (ground for objection made in off-the-record bench conference was apparent from context of later argument of jury charges and mistrial motion contained in the record), *overruled on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Here, counsel's articulation that the testimony was not hearsay because Kinloch had already testified, in the context of Kinloch's having denied the statement, advised the court that the grounds for introducing this testimony was that it was non-hearsay as a prior inconsistent statement. *See* Rule 803(d)(1)(A), SCRE.

effect that he heard the earlier witness say, "I killed that bitch . . . ." This Court found error in the trial court's exclusion of the statement under Rule 613(b), SCRE, which addresses extrinsic evidence of prior inconsistent statements of witnesses. *See Fossick*, 333 S.C. at 68-70, 508 S.E.2d at 33.

Like the testimony in *Fossick*, the testimony of Grant that Kinloch said he did the shooting was admissible as a prior inconsistent statement. In rejecting this argument, the Court of Appeals found the foundation requirement of Rule 613(b) – that the witness be advised of the time and place the statement was allegedly made – had not been met. *See* App. pp. 765-66. In its analysis, however, the Court of Appeals required far greater specificity as to time and place than previously required by this Court under Rule 613(b). In *Fossick*, the only foundation as to time was "a time back in 1989." There was no reference whatsoever as to the place of the statement. Notwithstanding this minimal foundation, this Court held the trial court erred in not admitting the prior inconsistent statement under Rule 613(b). *See Fossick*, 333 S.C. at 68-70, 508 S.E.2d at 33.

In this case, the foundation testimony was far more precise than in *Fossick*. In the context of questioning Kinloch about having made the statement, the defense questioned him about what occurred "the night when the shooting took place" when he ran and Grant assisted him "away from the shooting," and about his having seen Grant "after the shooting that night." App. pp. 181-82. These questions supplied both the time and place of the statement, with far more precision than the foundation testimony in *Fossick*. The foundation for the statement Kinloch denied making was that it occurred the very night the shooting took place, not some vague time in another year, as in *Fossick*. It occurred at the location to which he had run and where Grant was assisting him, "away from" the

shooting. The foundation as to time, the night of the shooting, was clearly established. The foundation as to place, while less precise than that as to time, was far greater than the non-existent foundation as to place in *Fossick.* Despite Petitioner's reliance on *Fossick* in his brief and reply brief filed in the Court of Appeals, the Court of Appeals did not address *Fossick* in its analysis of this issue.

The Court of Appeals found the question to Kinloch concerning the place of the statement – away from the shooting – was contrary to Grant's testimony it was made when they were at Kinloch's home. *See* App. pp. 765-66. On the contrary, the foundation question and Grant's testimony are consistent – Kinloch's statement at his house was made at the place to which he had fled upon getting away from the shooting. App. pp 181-82, 456. Like the statement in *Fossick*, Grant's testimony concerning Kinloch's statement should have been admitted as a prior inconsistent statement. The Court of Appeals erred in its analysis of the foundation issue. This Court should find, as it did in *Fossick*, that the failure to allow this testimony was erroneous.

If the statement is not admissible as a prior inconsistent statement, it was nonetheless admissible under two exceptions to the rule against hearsay. *See* Rule 803, SCRE. Like prior inconsistent statements, a statement that is admissible under a Rule 803 exception may be used substantively, to prove the truth of the matter asserted. *See Stahlnecker*, 386 S.C. at 622-23, 690 S.E.2d at 572-73. Grant testified he was with Kinloch, his best friend, 20 to 25 minutes after the shooting, and Kinloch said he did it. App. pp. 450, 458. The statement of Kinloch to Grant was admissible as both a present sense impression and as an excited utterance. *See* Rule 803(1), (2), SCRE.

Kinloch's statement met the standard for admission as a present sense impression – a statement describing or explaining an event made immediately after the event. *See* Rule 803(1), SCRE. It met the three requirements for admissibility under this exception: (1) it described or explained an event, the shooting; (2) it was contemporaneous with the shooting, occurring immediately thereafter; and (3) Kinloch personally perceived the event, the shooting. *See State v. Parvin*, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct.App. 2015); *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct.App. 2014).

The Court of Appeals correctly noted these requirements for a present sense impression, but it misconstrued the immediacy requirement for admission under Rule 803(1). *See* App. pp. 766-68. While acknowledging that the declaration does not need to be made "instantly" after the perceived event to which it pertains, the Court of Appeals held a declaration occurring 20 to 25 minutes after the event was not sufficiently immediate to qualify for admission under this exception. The Court's conclusion overlooked the unique circumstances of this case and the close temporal proximity of the statement to the event that had occurred. Grant had assisted Kinloch away from the scene of the shooting, and Kinloch made the declaration after he had gotten away, within 20 to 25 minutes. Under these circumstances, this brief lapse of time was within the Rule 803(1) requirement that the statement occur "immediately thereafter."

The Court of Appeals correctly noted the rationale behind the present sense impression but misapprehended its significance under the circumstances of this case. A present sense impression is admissible because its close temporal proximity to the event negates the likelihood of deliberate or conscious misrepresentation. The Court's analysis overlooked the content of Kinloch's declaration, which negated any possibility that it was

the product of reflection or a deliberate misrepresentation. Had it been the product of reflection, it would not have been inculpatory and against Kinloch's personal interest.

Kinloch's statement also qualified as an excited utterance – a statement relating to a startling event made while the declarant was under the stress or excitement caused by the event. *See* Rule 803(2), SCRE. It satisfied the three requirements for admissibility under this exception: (1) it related to a startling event, the shooting; (2) Kinloch made it to a friend minutes after the shooting, while Kinloch was under the stress of excitement; and (3) the stress of excitement was caused by the startling event, the shooting. *See Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573; *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007); *Hendricks*, 408 S.C. at 532, 759 S.E.2d at 437-38. The startling event of shooting someone would suspend a person's reflective thinking such that fabrication was unlikely, in accordance with the rationale underpinning the excited utterance exception. *See Ladner* 373 S.C. at 116, 644 S.E.2d at 691; *LaCoste*, 347 S.C. at 160, 553 S.E.2d at 468; *State v. Dennis*, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999). Indeed, where Kinloch's statement was inculpatory, any likelihood he fabricated the statement is non-existent.

The Court of Appeals correctly noted the requirements for an excited utterance, but misapplied those requirements to the circumstances presented here.[5] *See* App. pp.

[5] The Court of Appeals questioned whether the excited utterance exception argued by Petitioner was preserved. *See* App. p. 768. As the Court acknowledged, the argument of the hearsay objection occurred in multiple off-the-record bench conferences. And as the Court also acknowledged, a statement later made by trial counsel during discussion of the proposed jury charges revealed that one of the grounds he had argued earlier was the excited utterance exception, which counsel referenced or the court reporter transcribed as "utter excited exception to the hearsay rule." *See* App. p. 545. Counsel thereby placed on the record this basis for the earlier objection, and it is properly preserved. *Cf. Hamilton*, 344 S.C. at 360-61, 543 S.E.2d at 595.

769-70. The Court correctly acknowledged that the time between the startling event and the declaration is not dispositive, but then it unduly focused on the lapse of 20 to 25 minutes in finding the statement was not made while under the stress of excitement due to the shooting. And, as with its analysis of the present sense impression exception, it incorrectly found the circumstances surrounding the making of this statement were not in accord with the rationale behind the excited utterance exception – that the startling event suspends reflective thought and thereby reduces the likelihood of fabrication. In this case, Kinloch's declaration against his own interest, in which he confessed to a shooting and exposed himself to possible criminal liability, could not be the product of reflection and could only be attributable to the stress of the excitement of having just shot someone, thereby negating any possibility of fabrication.

Whether Kinloch's statement that he did the shooting was admissible as a prior inconsistent statement, a present sense impression, or an excited utterance, the error in refusing to allow this testimony was extremely prejudicial. This prosecution was premised on very weak evidence. No witness testified as to who fired the initial shots. One witness claimed he saw Petitioner shooting, but that was only after the initial shots had been fired and Manigault was on the ground. App. pp. 50-51. His claim was disputed by two witnesses who were observing Petitioner at the time the first shots were fired and testified he did not have a gun, was not where the shots were fired, and ran after the shooting started. App. pp. 482, 488, 495-96. One witness testified Manigault had told her Kinloch was going to shoot him. App. pp. 435, 442. In light of this evidence and the many conflicts and contradictions in the various accounts of the night's events, had the jury been allowed to consider the statement of Kinloch that he did the shooting,

the outcome of the deliberations likely would have been different. The trial court's error in excluding this evidence and the Court of Appeals' error in affirming that ruling were prejudicial. This Court should grant a writ of certiorari, reverse, and order a new trial.

II. The Court of Appeals erred in affirming the trial court's exclusion of a toxicology report and testimony of the forensic pathologist concerning the report's findings as to the deceased's blood alcohol level.

Dr. Erin Presnell, a forensic pathologist, conducted Manigault's autopsy. App. pp. 389, 393. The defense sought to introduce her testimony and a toxicology report that revealed Manigault's blood alcohol content. The state objected, and the court sustained the objection. App. pp. 464-65. The defense proferred her testimony concerning the report and the report itself, which stated Manigault had a blood alcohol level of .235. App. pp. 466-68, 647, 650. This evidence was relevant and admissible, and the Court of Appeals erred in affirming the trial court's exclusion of the report and testimony about Manigault's blood alcohol level.

Relevant evidence is generally admissible. *See* Rule 402, SCRE. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Rule 401, SCRE. In this case, the blood alcohol content of Manigault was probative of the issue whether he was the person who provoked the altercation that occurred outside the club. As previously noted, Manigault had complained during the night that something was bothering him and that he was "about to snap." App. pp. 89, 106-07, 115-16, 129-30. Witnesses testified that, upon going outside, Manigault removed his shirt, in preparation for an altercation. App. pp. 62, 471-72. Although there was testimony that Manigault had been drinking, that testimony did

not establish how much alcohol he had consumed. The level of his intoxication was relevant to whether his judgment was impaired and whether, due to his condition, he provoked and instigated the fight. His condition at the time of the events was a component of the complete picture of what occurred. Independent evidence, based on scientific testing, revealed with certainty his blood alcohol content. This evidence was relevant and its probative value outweighed any prejudicial effect that its admission would have had. *See* Rule 403, SCRE; *cf. Watson ex rel. Watson v. Chapman*, 343 S.C. 471, 477, 540 S.E.2d 484, 487 (Ct.App. 2000) (physician's alcohol dependency was relevant to his decision-making process, and its probative value outweighed any prejudicial effect).

Although the Court of Appeals correctly stated the Rule 403 standard, its analysis focused only on the probative value aspect, not on the remainder of the standard. *See* App. pp. 772-73. The evidence was in dispute as to Manigault's drinking that night, and no eyewitness established the level of his drinking – whether a single drink or a continuous course of drinking that would result in an extremely high blood alcohol level. On the other hand, the proffered scientific evidence established the exact level of his intoxication – a blood alcohol content of .235. Contrary to the Court of Appeals' conclusion, this evidence was highly probative of his actual level of intoxication, as compared to the vague and imprecise witness testimony concerning his drinking or not drinking that night.

In finding the evidence was not relevant, the Court of Appeals placed undue emphasis on the absence of evidence as to the effects such a high level of intoxication would have had on Manigault. *See* App. p. 772. Such evidence was not required,

because the jurors could draw on their common knowledge and experience as to the loss of judgment, loss of inhibitions, and tendency toward aggression that result from such extreme intoxication. No expert testimony was necessary to assist the jurors in this area, *see* Rule 702, SCRE, and the absence of such evidence does not render the blood alcohol evidence irrelevant. This evidence was relevant and necessary to provide a complete understanding of the circumstances and events of that night.

The Court of Appeals summarily concluded there was danger of unfair prejudice, without articulating what that prejudice was. *See* App. p. 772. Its conclusion misapprehended the applicable test – that the probative value be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." *See* Rule 403, SCRE. There was no such danger from admission of this evidence. In fact, this evidence would have provided clarity on the issue of Manigault's drinking, which was relevant to the issue of provocation. The evidence was not prejudicial, confusing, misleading, or cumulative, therefore its probative value outweighed any factor that would warrant its exclusion under Rule 403. This Court should grant a writ of certiorari, reverse on this issue, and remand for a new trial.

III. The Court of Appeals erred in affirming the trial court's exclusion of the testimony of a defense witness who had been present in the courtroom briefly, in violation of the court's sequestration order.

Kevin Watson, a defense witness, was called to testify on the third day of trial. App. p. 417. The state objected on the basis that the witness had been present in the courtroom during a previous witness's testimony, in violation of the sequestration order issued earlier in the trial. App. p. 419. Watson stated he had come to court for the first

time that day, and he entered the courtroom when he was told his name was called. App. p. 419. He acknowledged he had been in the courtroom that day, when Detective Shuler was on the stand, and had "seen a thing on the screen" but, besides that, did not hear any testimony. App. pp. 421-22. The court prohibited the witness from testifying. App. p. 423. The Court of Appeals erred in affirming that ruling.

A party is not entitled to sequestration of witnesses as a matter of right. *State v. Simmons*, 384 S.C. 145, 173, 682 S.E.2d 19, 33 (Ct.App. 2009); *State v. Caldwell*, 378 S.C. 268, 278, 662 S.E.2d 474, 480 (Ct.App. 2008); *State v. Fulton*, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct.App. 1998); *see* Rule 615, SCRE (court ***may*** order witnesses excluded so they cannot hear testimony of other witnesses). The mere opportunity for witnesses to compare testimony is insufficient to compel sequestration. *State v. Sullivan*, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981); *State v. Carmack*, 388 S.C. 190, 197, 694 S.E.2d 224, 227 (Ct.App. 2010); *Caldwell*, 378 S.C. at 279, 662 S.E.2d at 480. Where a sequestration order has been issued, violation does not automatically result in disqualification of the witness to testify. In fact, our appellate courts have frequently approved allowing testimony from witnesses who had been sequestered but were in the courtroom during the testimony of one or more other witnesses. *See, e.g.*, *State v. Saltz*, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001); *State v. Huckabee*, 388 S.C. 232, 241-43, 694 S.E.2d 781, 785-86 (Ct.App. 2010); *Simmons*, 384 S.C. at 173-74, 682 S.E.2d at 33-34; *Fulton*, 333 S.C. at 375, 509 S.E.2d at 827.

Where there has been a violation of a sequestration order, the court may discipline the witness; however, the question of excluding the witness's testimony depends upon the particular circumstances and is within the court's discretion. *Huckabee*, 388 S.C. at 241,

694 S.E.2d at 785. Based on the circumstances surrounding this particular sequestration violation, the trial court abused its discretion in prohibiting the witness from testifying.

Here, the violation was minor. The witness entered the courtroom during the playing of a video, when Detective Shuler was on the stand, but had heard no testimony. The infraction occurred on the third day of trial. The witness was not present during the first two days of trial, having come forward as a witness the same day he was called to testify. Because he was not present for the earlier days of trial, he had not been made aware of the sequestration order, and he had entered the courtroom when he was informed his name had been called. The minor violation of the sequestration order was unknowing and unintentional, and certainly not flagrant. Under these circumstances, the court abused its discretion in excluding the witness. *Cf. Simmons*, 384 S.C. at 173-74, 682 S.E.2d at 33-34 (trial court did not abuse discretion in allowing testimony of officer who had heard testimony of other witnesses *in camera* and who violated sequestration order by entering courtroom during defendant's testimony because he was "'sent for' to testify"; evidence did not establish he entered courtroom knowingly and intentionally in effort to violate order); *State v. Tisdale*, 338 S.C. 607, 615-18, 527 S.E.2d 389, 394-95 (Ct.App. 2000) (trial court did not abuse its discretion in denying mistrial based on violation of sequestration order, where the violation was not flagrant or intentional).

The Court of Appeals found no reversible error in the trial court's exclusion of Watson's testimony. *See* App. p. 775. In its analysis of the issue, the Court misapprehended the potential for Watson to conform his testimony to what he heard while in the courtroom. That clearly did not happen here. Watson entered the courtroom when a detective was on the stand, while a recorded statement of Petitioner was playing,

but otherwise Watson heard no testimony. As shown by the proffer of his testimony, he did not model his testimony after Petitioner's recorded statement, instead testifying to his own observations – that he was outside the club when tussling was going on, saw fighting, and did not see either Kinloch or Petitioner with a weapon. App. p. 426. He did not provide in his testimony the details Petitioner described in the recording. His brief presence in the courtroom before taking the stand did not shape his testimony in any way, and the Court of Appeals overlooked this fact in analyzing the issue.

The Court of Appeals also erred in concluding that, at best, the testimony was cumulative to that of another witness. In fact, exclusion of the witness's testimony was prejudicial. In the proffer, Watson testified he observed the fighting and did not see either Kinloch or Petitioner with a weapon. App. p. 426. The various witnesses' accounts were extremely contradictory. Coakley and Jenkins claimed Petitioner had a gun, but others who observed him when the shots were fired disputed he had a weapon. Where there was such a sharp conflict in the testimony, Watson's testimony was not merely cumulative, and it was prejudicial to exclude this testimony that would have been corroborative of the witnesses who testified Petitioner did not have a weapon. This Court should grant a writ of certiorari and find prejudicial error requiring reversal.

IV. The Court of Appeals erred in affirming the trial court's refusal to charge the jury on self-defense.

The court denied a defense request for a jury charge on self-defense. App. pp. 546-47. The evidence supported a charge on self-defense, and the trial court's refusal to give such a charge and Court of Appeals' affirmance were reversible error.

The law to be charged is determined by the evidence presented at trial. *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016); *State v. Smith*, 391 S.C. 408, 412,

706 S.E.2d 12, 14 (2011); *State v. Bryant*, 391 S.C. 225, 469, 705 S.E.2d 465, 233 (Ct.App. 2010). If there is any evidence in the record to support a requested charge, the court must give it. *Smith*, 391 S.C. at 412, 706 S.E.2d at 14. The court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented at trial. *Smith*, 391 S.C. at 412, 706 S.E.2d at 14.

As noted above, testimony was presented that tended to establish Manigault was the one who provoked the altercation. He had indicated to others that he was bothered by something and "about to snap." App. pp. 89, 106-07, 115-16, 129-30. His girlfriend of four years acknowledged that Kinloch had "hit on" her a week earlier. App. pp. 88, 104, 114. When Manigault went outside, immediately before the altercation began, he took off his shirt, in preparation for a fight. App. pp. 62, 471-72. Moreover, Coakley testified Petitioner drew a gun to defend himself after ***she*** raised a beer bottle to strike ***him***. App. p. 110. All of this testimony provided an evidentiary basis for a charge on self-defense.

In finding there was no evidence to support giving a self-defense charge, the Court of Appeals wove together factual conclusions with respect to each of the four elements of self-defense, based on parts of certain witnesses' testimony and other parts of other witnesses' testimony. *See* App. pp. 777-80. But those factual conclusions excluded the aspects of the evidence favoring Petitioner's contention that a self-defense instruction was warranted, cited above. The ultimate factual determination was for the jury, and the trial court should have allowed the jury to consider self-defense because it was a factual issue in dispute based on the evidence presented.

Much of the Court of Appeals' discussion of the requested charge on self-defense and the elements of self-defense turned on a factual finding made by the Court that the

evidence indicated mutual combat, which defeats a claim of self-defense. *See* App. pp. 776-79. That finding overlooked the testimony of multiple witnesses that it was Manigault who was about to snap and who took what he apparently perceived as an affront to a new level, going outside and removing his shirt in preparation to fight. Once Petitioner was outside and saw Manigault's act of aggression, he could act on appearances. *See State v. Starnes*, 340 S.C. 312, 320-22, 531 S.E.2d 907, 912-13 (2000); *State v. Fuller*, 297 S.C. 440, 443-44, 377 S.E.2d 328, 331 (1989); *State v. Jackson*, 227 S.C. 271, 278, 87 S.E.2d 681, 684-85 (1955). He did not have to wait for Manigault to get the drop on him, and he had the right to act under the law of self-preservation. *See Starnes*, 340 S.C. at 322, 531 S.E.2d at 913; *State v. Rash*, 182 S.C. 42, 188 S.E. 435, 438 (1936). The fact that Petitioner may have thrown the first punch does not negate his claim of self-defense, where Manigault had displayed his readiness and made the first move toward a physical altercation.

Thereafter, Coakley supplied further evidence in support of the requested charge on self-defense, testifying that she raised a beer bottle to strike Petitioner and he defended himself with a weapon in response to her threatening action. Her testimony established he was in actual imminent danger, and his response of drawing a weapon provided evidence of his belief he was in danger. No one testified he displayed a weapon before Coakley threatened him with the bottle.

The testimony concerning Manigault's and Coakley's actions was also sufficient to give rise to a jury issue on the question whether Petitioner's belief he was in danger was reasonable and whether, under the circumstances presented, he had any other probable means of avoiding the danger presented. Manigault was clearly agitated to the

point of being about to snap, and he demonstrated an intention and readiness to fight. Coakley armed herself and physically threatened Petitioner with a beer bottle. Upon the evidence presented, it was the province of the jury to resolve the factual issues of the reasonableness of Petitioner's belief, his ability to avoid the danger presented, and the existence or non-existence of an opportunity to retreat without increasing the danger.

The Court of Appeals misapprehended the significance of the existence of evidence of mutual combat at the stage of determining the law to be charged, overlooking the holding of *State v. Graham*, 260 S.C. 449, 196 S.E.2d 495 (1973), that the question whether a person acted in self-defense or engaged in mutual combat is for the jury to determine. The presence of some evidence of mutual combat does not deprive the defense of the right to a charge on self-defense, where there is also evidence to dispute mutual combat and to support the claim of self-defense. The Court's summary of the evidence on all the elements of self-defense overlooked the existence of some evidence contradicting the state's claims as to Petitioner's involvement in provoking, precipitating, or participating in the altercation that led to the shooting, and that evidence necessitated that a self-defense charge be given.

The failure to charge self-defense was prejudicial. As previously noted, the evidence of what occurred that night was not at all clear. The accounts of the various witnesses were rife with contradictions and conflicts. The jurors clearly had difficulty reaching a verdict, as shown by their communication with the court that they were "hopelessly at an impasse." *See* App. p. 656. The question of Petitioner's guilt or innocence was not certain, and a genuine likelihood exists that a jury charge on self-

defense would have altered the outcome. This Court should grant a writ of certiorari, reverse, and remand for a new trial.

V. The Court of Appeals erred in affirming the trial court's giving a jury charge on accomplice liability.

The state requested a charge on accomplice liability, to which the defense objected because the record was devoid of any evidence to support such a charge. App. pp. 540-41, 544-46. The Court of Appeals erred in affirming the giving of this charge.

Under the theory of accomplice liability stated as "the hand of one is the hand of all," one who joins with another to accomplish an illegal purpose is liable criminally for the actions of his confederate incidental to the execution of the common design and purpose. *See Barber v. State*, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011); *State v. Ward*, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct.App. 2007); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App. 2002).

To determine if an accomplice liability charge should have been given in this case, the question is whether there was any evidence that a co-conspirator was the shooter and that Petitioner was acting with him when the crime took place. *See Barber*, 393 S.C. at 237, 712 S.E.2d at 439. In this case, there was no evidence that a co-conspirator was the shooter. The defense had attempted to introduce such evidence, but the court had refused to admit Grant's testimony concerning Kinloch's statement that he did the shooting, and the court had instructed the jury to disregard that testimony. App. pp. 448-49, 460. With that testimony excluded, there was no evidence in the record to support an accomplice liability charge, and the court's charging the jury on that theory of criminal liability was reversible error.

In *Wilds v. State*, 407 S.C. 432, 756 S.E.2d 387 (Ct.App. 2014), the Court of Appeals addressed the precise issue presented here.[6] The trial court gave an accomplice liability charge, over defense counsel's objection. *Wilds*, 407 S.C. at 437, 756 S.E.2d at 389. The trial record established there was no evidence that anyone other than the defendant was the shooter. *See Wilds*, 407 S.C. at 439, 756 S.E.2d at 390. The Court of Appeals found the trial court erred in giving the charge and the error was prejudicial. *See Wilds*, 407 S.C. at 439, 756 S.E.2d at 390-91. This Court upheld that determination, initially granting a writ of certiorari, but ultimately dismissing the writ as improvidently granted. *See Wilds v. State*, 414 S.C. 341, 778 S.E.2d 112 (2015).

In upholding the giving of the accomplice liability charge, the Court of Appeals misapplied the relevant authorities and incorrectly found this case to be analogous to *Barber*, where in fact *Wilds* is controlling. Under *Barber*, the alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented some evidence upon which it could rely to find the existence or non-existence of that fact. *See Barber*, 393 S.C. at 236, 712 S.E.2d at 439. Here, there was no evidence, not even equivocal evidence, that a co-conspirator was the shooter. The defense attempted to introduce such evidence, but it was excluded and the jury was instructed to disregard it. The outcomes of *Barber* and *Wilds* depended on the existence or non-existence of evidence that an alleged accomplice of the defendant was the shooter. There was such evidence in *Barber*, and the accomplice liability charge was appropriate.

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[6] Procedurally, the issue was decided in the context of a post-conviction relief claim of ineffective assistance of appellate counsel for failing to challenge in Wilds's direct appeal the giving of a charge on accomplice liability. *See Wilds*, 407 S.C. at 437, 756 S.E.2d at 389.

There was no such evidence in *Wilds*, and an accomplice liability charge was improper. The facts of this case are in keeping with the facts of *Wilds*.

The Court misconstrued the witness testimony on which it relied in reaching its conclusion as to the existence of evidence to support the accomplice liability charge. While some witnesses refuted that Washington was the shooter, they did not implicate Kinloch in that role. Any inference from a witness's testimony that someone other than Kinloch or Petitioner was the shooter does not support a charge on accomplice liability, because there was no allegation and no evidence that Petitioner was acting in concert with anyone other than Kinloch. In the absence of any evidence that Kinloch was the shooter, it was improper to charge the jury on accomplice liability.

Here, as in *Wilds*, the error was prejudicial. Giving such a charge upon the evidence in this record was confusing to the jury. In fact, the jury requested that the court clarify the law of "hand of one is hand of all." *See* App. pp. 616, 655. Moreover, the jury's confusion is clearly reflected in a later note to the court, in which it confused the "hand of one is the hand of all" doctrine to pertain to "acting in concert with the victim." *See* App. pp. 616, 657. The court did not correct this confusion, instead simply informing the jury, "You have been given all instructions on the law in my charge to you. Please continue your deliberations." *See* App. pp. 616, 657. The jury's confusion about this doctrine, which should not have been charged, likely contributed to the guilty verdict. This Court should grant a writ of certiorari and reverse.

VI. The Court of Appeals erred in affirming the trial court's giving an *Allen* charge at the close of a day's deliberations, then excusing the jury for the night.

Late in the afternoon of the fourth day of trial, the jury reported to the court that it was deadlocked. The trial judge informed the attorneys she intended to bring the jury in,

give an *Allen*[7] charge, and release the jurors for the evening. App. p. 617. The defense objected to this procedure, arguing that the jury should be sent home and the *Allen* charge not given until the jury returned the next morning, but if the charge was to be given that afternoon, the jury should then resume deliberations. App. p. 617. Despite this objection, the court gave the *Allen* charge and sent the jury home for the night. App. pp. 618-21. After the jury left, the defense renewed its objection, not to the charge given, but to the procedure of giving the charge and not having the jurors stay together and continue their deliberations. App. p. 622. The judge explained her ruling, stating that under the law she had to give the *Allen* charge before breaking for the evening. App. p. 624.

Contrary to the court's ruling, the law does not require that, before the jury could be sent home for the evening, the court had to give an *Allen* charge. Rather, if the court is going to break for the day after the jury is deadlocked, the practice in that situation is to send the jury home with instructions to return the next day, and to give the *Allen* charge the next day immediately before the jury resumes deliberations. *Cf. Harvey v. Strickland*, 350 S.C. 303, 307-08, 566 S.E.2d 529, 532 (2002) (on medical malpractice and medical battery claims, jury reported it could not agree; jury was excused for the day but brought back the next morning for further deliberations after an *Allen* charge); *State v. Tillman*, 304 S.C. 512, 521, 405 S.E.2d 607, 612 (Ct.App. 1991) (at about 9:30 p.m., after almost four hours of deliberations, jury reported it was hung; trial judge excused jury for the night and gave *Allen* charge the next morning, after which jury resumed deliberations). The court's ruling, controlled by an error of law, was an abuse of discretion.

[7] *See Allen v. United States*, 164 U.S. 492 (1896).

Neither the state nor the Court of Appeals has pointed to any authority in this state in support of the trial judge's assertion that she was required to give the *Allen* charge before the evening recess, and there is none. The Court of Appeals acknowledged the trial court may have abused its discretion in giving the charge and dismissing the jury for the night, due to the judge's statement that she was required to do so. However, rather than deciding the legal question presented – what is the proper timing for the giving of an *Allen* charge when a jury is deadlocked but needs to be excused for the night to resume deliberations the following day – the Court declined to address the question. Instead, the Court held Petitioner was not prejudiced by the procedure the trial court employed.

Under the circumstances of this case, a lack of prejudice should not be presumed. The premise of an *Allen* charge is to require continued deliberations. The language of the charge directs the jurors to continue to deliberate and to specifically consult with each other, express their views, listen to one another, and discuss their differences with open minds. App. p. 619. The procedure adopted by the court defeated that purpose, because it interrupted those deliberations, separated the jurors, and sent them home for the night. This procedure thwarted the very premise of the *Allen* charge, which is to require continued deliberations in an effort to reach consensus, and it was therefore prejudicial.

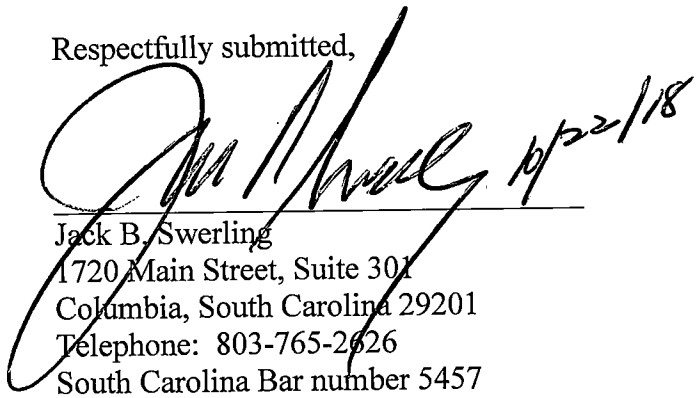
In finding Petitioner was not prejudiced, the Court placed undue emphasis on the court's additional instruction that the jurors should stop deliberations and not consider any issue until they were back together. This brief cautionary statement did not negate the impact of sending the jurors home with their own individual thoughts, rather than having them immediately resume their deliberations in light of the *Allen* charge. This Court should grant a writ of certiorari, determine that the proper procedure is the one

sought by the defense, and find prejudicial error in the procedure employed by the trial court.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari, reverse the rulings of the Court of Appeals and the circuit court, and grant Petitioner a new trial.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
General Sessions Court
Kristi L. Harrington, Circuit Court Judge

Case No. 2015-GS-08-01333
Appellate Case No. 2015-002688

The State,

Respondent,

v.

Sha'Quille Washington,

Petitioner.

PROOF OF SERVICE

I hereby certify that I have served copies of the Petition for Writ of Certiorari upon respondent, by mail to its counsel of record, Senior Assistant Attorney General David Spencer, Post Office Box 11549, Columbia, South Carolina 29211, on October 22, 2018.

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