THE STATE OF SOUTH CAROLINA
In the Supreme Court

69516

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Deadra Jefferson, General Sessions Court Judge
09-GS-10-6730

Case Tracking Number: 2012208426

The State of South Carolina, ... Respondents,

v.

Jerome Campbell
a/k/a Jerome Coaxum ..... Petitioner.

PETITION FOR REHEARING OR REHEARING *EN BANC*

Appellant, by and through undersigned counsel and pursuant to Rules 219 and 221, SCACR, respectfully submits this Petition for Rehearing or Rehearing *En Banc* and requests this Honorable Court rehear this matter and reconsider its opinion based upon the following arguments:

STATEMENT OF THE CASE

This is an appeal from a murder conviction where Appellant was sentenced to 30 years imprisonment with no possibility of parole. At trial, on January 23, 2012, Appellant and Respondent selected a jury consisting of twelve primary and two alternate jurors. [R. p. 14, line 11 – p. 22, line 4] During the initial *voir dire*, the court asked the venire, "Does any member of

the panel have a close personal or social relationship with [the accused, the victims, or anyone related to the deceased]?" [R. p. 7, lines 14 – 18] No one responded. During the initial *voir dire*, the court neither identified Appellant's family members nor asked the venire whether any of the jurors were acquainted with Appellant's family members.

Prior to the selection of Juror # 70 Robin Givens (hereinafter "Juror Givens"), the State exhausted all five of its peremptory challenges. [R. p. 19, line 21; p. 14, lines 11 – 18; p. 15, lines 2 – 8; p. 16, lines 8 – 14; p. 18, lines 13 – 19; p. 19, lines 14 – 20; p. 20, lines 5 – 12] After the jury was sworn in, the court recessed for lunch. [R. p. 25, line 4 – p. 26, line 20] Before recessing, the court instructed the jury panel as follows:

> During the break, please do not discuss the case among yourselves or with anyone else. . . . Also, please do not have any contact with anyone in or about the courthouse. There are a lot of witnesses in this case and again, we would not want an innocent conversation to be observed and misinterpreted.

[R. p. 26, lines 3 – 15]

When the trial reconvened, the State asserted that during lunch two jurors conversed with a "family member or friend of the Campbell group" in the courthouse snack bar. [R. p. 27, line 4 – p. 28, line 6] The trial judge performed a *voir dire* of the jury panel and inquired whether any of the jurors had any conversations during lunch with anyone who was not a juror. [R. p. 30, lines 16 – 18; p. 33, lines 15 – 24] Juror Givens and Juror # 63 Erica Gadsden (hereinafter "Juror Gadsden") did not respond to the court's questions. The court proceeded with trial.

The next day, on January 24, 2012, the State moved to exclude Juror Givens and Juror Gadsden. [R. p. 1 – 2; p. 48, line 2 – p. 60, line 3] In support of its motion, the State submitted a surveillance video. [Surveillance Video, attached to inside back cover of Record on Appeal] As shown on the video, Juror Givens and Juror Gadsden sat together in the snack bar when a person

who may have been related to Appellant approached these jurors and appeared to speak with them for approximately forty-four (44) seconds. [R. p. 50 lines 22 – 23; Surveillance Video, Time 1:19:54 – 1:20:38]

The trial judge performed *voir dire* regarding the jurors in issue. Juror Givens testified that: (1) a woman approached her in the snack bar, but Juror Givens could not recall her name; (2) she knew this person through a mutual friend and had "hung out" with her a few times at birthday parties; (3) she had not seen this person since June or July of the previous year; (4) she did not know whether this person was involved with the case; (5) the person was not a close friend; (6) she did not discuss the case with this person; (7) she forgot about the court's instructions not to speak with a non-juror; and (8) she could be fair and impartial. [R. p. 60, line 7 – p. 65, line 7]

Juror Gadsden testified that: (1) a woman approached Juror Givens and her during the break; (2) Juror Gadsden asked the person if they knew each other, but the person responded "no;" (3) there was no reason why she did not respond the previous day when the trial court asked if any jurors had interaction with anyone at lunch; (4) she did not know any members of the victim's family or Appellant's family; and (5) she could be fair and impartial. [R. p. 67, line 17 – p. 70, line 24] The State withdrew its motion regarding Juror Gadsden. [R. p. 71, lines 8 – 12] Regarding Juror Givens, the State argued that Juror Givens was not "entitled to any presumption of impartiality" because she did not disclose her conversation to the court during *voir dire* the day before. [R. p. 66, lines 12 – 18]

The trial judge found that Juror Givens had no intention to mislead anyone or to conceal information:

> I'm really not troubled by the fact that [Juror Givens] didn't disclose when asked the question because she's a typical juror. They just don't -- The things we think are important they don't think are important and I really don't think she had any intention to mislead the Court and there would have been no reason for her to have disclosed the individuals in *voir dire* because they weren't in the courtroom and their names specifically were not mentioned and in addition to that, she indicated really don't even know this person's name. . . . I do think that the interaction was innocent. I really don't think it amounts to anything . . . . I don't even think she really knows the woman. I think it's one of those things because you can tell on the video the lady is very shocked that she sees her. She's like -- It's almost like, "oh, that's you, I haven't seen you in a long time." There is no indication that they discussed anything about this case.

[R. p. 72, line 6 – p. 73, line 2] Nevertheless, the trial judge removed Juror Givens over Appellant's objection. [R. p. 71, line 15 – p. 74, line 3; p. 20, line 6] The trial judge addressed Juror Givens as follows:

> Miss Givens, out of an abundance of caution, I do not believe you have misled the Court in any way. I believe you have been candid and I believe the person you interacted with in the snack bar was an innocent interaction with somebody you hadn't seen in a while. But out of an abundance of caution, I'm going to excuse you as a juror in this case so that there can never be any question regarding the impartiality of the verdict. We appreciate your candor and your time.

[R. p. 73, line 20 – p. 74, line 3] The trial judge stated her reason for dismissing Juror Givens as follows: "[O]ut of an abundance of caution I'm going to excuse her just because I don't want there to be any perception that whatever verdict is rendered that it was not fair and impartial. But I really think that anything she did was innocent." [R. p. 72, lines 18 – 22] At the State's request, the court replaced Juror Givens with an alternate juror. [R. p. 74, line 22 – p. 78, line 4; p. 21, line 17]

On January 27, 2012, the jury convicted Appellant of murder and three counts of assault and battery with intent to kill. [R. p. 81, line 9 – p. 82, line 23] The court sentenced Appellant, consecutively, to thirty (30) years for murder and ten (10) years each on the three counts of assault and battery with intent to kill. [R. p. 86, lines 1 – 13] This appeal followed.

ARGUMENTS

I. This Court should rehear this matter because this Court overlooked the Supreme Court's decision in State v. Stone wherein the Supreme Court remanded the case for a new trial finding that the trial court abused its discretion in removing a juror whose nondisclosure was innocent and overlooked several other authorities to support the same.

In State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002), the state called the defendant's aunt, Ms. Perry, as a witness during sentencing. At that time, a juror indicated that she knew Ms. Perry, that Ms. Perry had lived down the street from the juror five or six years earlier, that they were casual acquaintances, and that the juror's acquaintance with Ms. Perry would not affect the juror's ability to be fair and impartial. Although Ms. Perry had been identified as a witness at the start of *voir dire*, the juror did not recognize Ms. Perry's name. The solicitor objected to the juror's participation and claimed the juror was biased. The lower court removed the juror and replaced her with an alternate juror. Our Supreme Court reversed and remanded the case for a new trial because, in part, the trial court abused its discretion in removing a juror whose nondisclosure was innocent.

Here, the lower court made an extensive factual determination that Juror Givens did not intentionally conceal information. The trial judge personally examined Juror Givens under oath and reviewed Juror Givens' demeanor, conduct in the courtroom, and conduct on the surveillance video. The trial judge noted that Juror Givens seemed surprised on the video when the person approached her in the snack bar. [R. p. 162, lines 6 – 8; p. 71, line 15 – p. 72, line 2; Surveillance Video] The trial judge made an unequivocal finding that Juror Givens' nondisclosure was innocent. The trial judge expressly stated that: (1) the court had no concerns about Juror Givens' impartiality; (2) Juror Givens' interactions were innocent; and (3) Juror Givens did not attempt to mislead the court in any way. [R. p. 71, line 15 – p. 73, line 13; p. 73,

line 20 – p. 74, line 3] Moreover, the trial court recognized that Juror Givens did not act intentionally because the subject matter of the court's inquiry, a forty-four (44) second encounter, was insignificant. As the trial court observed, Juror Givens was "young," "a typical juror," and "[t]he things we think are important they don't think are important and I really don't think she had any intention to mislead the Court . . . ." [R. p. 71, lines 21 – 22; p. 72, lines 8 – 11] Still, the trial judge removed Juror Givens. Accordingly, pursuant to Stone, the lower court abused its discretion in removing the juror.

Other authority also lends to the conclusion that the trial court abused its discretion removing a juror who innocently and unintentionally did not disclose her insignificant forty-four (44) second encounter at the snack bar with a non-juror. Pursuant to S.C. Code Ann. § 14-7-1020, "[i]f it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called." "[T]he first inquiry in the juror disqualification analysis is whether the juror intentionally concealed the information in *voir dire*." State v. Woods, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001) (citation omitted). If the juror's failure to disclose is innocent, no such inference of partiality may be drawn against that juror. Id.

In Woods, during *voir dire*, the trial court asked the potential jurors whether they were "friends or casual acquaintances with any of them [i.e., the attorneys involved in the trial] or business associates or social acquaintances with any of them, that would also include having been represented by any of them in the past." Id. at 586, 550 S.E.2d at 283. The court also asked whether any of the jurors were "contributors to or supporters of any organization which has as its primary function the promotion of law enforcement or protection of victims' rights such as MADD, SADD, CAVE, or the like." Id. The juror in issue did not respond to either

question. When this juror was selected, the defendant had one peremptory challenge remaining. After the jury rendered its verdict, but before sentencing, the defendant moved for a new trial based upon the discovery of the juror's volunteer work as a victims' advocate in the prosecutor's office.

The court held that the defendant was entitled to a new trial because the juror intentionally failed to disclose that she had worked as a volunteer victims' advocate in the prosecutor's office.

> We hold that intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

Id. at 588, 550 S.E.2d at 284. Further, our Supreme Court held that "whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." Id. "The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court should grant [the trial judge] broad deference on this issue." State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ; *see also* State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000) (holding the trial judge is in the best position to determine the credibility of the jurors); State v. Loftis, 232 S.C. 35, 100 S.E.2d 671 (1957) (refusing to interfere with the trial judge's discretion in matters involving the jury because the trial judge has the opportunity to consider the juror's credibility).

In State v. Guillebeaux, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004), the jurors were asked during *voir dire* whether they had "any personal, business or social relationship either with the defendant, Mr. Guillebeaux or any of the potential witnesses." After both sides exhausted all

of their peremptory strikes, the juror in issue was seated without challenge. During trial, the court learned that: (1) the juror in issue knew the State's lead witness; (2) the juror had no conversations with the witness beyond saying "hi" in passing; (3) the juror went to high school with the witness's brother; and (4) the juror knew what type of car the witness drove because the witness worked across the street from the juror's hairdresser. The lower court denied the defendant's motion for a new trial because it found that the juror had not misled the court. In affirming the lower court, this Court stated, "When allegations arise concerning a juror's failure to reveal information in response to *voir dire* questions, courts look to whether the concealment was intentional and consider the nature of the information concealed." Id. at 270, 101 (citation omitted).

When the lower court determined that Juror Givens did not intentionally conceal any information, the court's inquiry should have ended at that point. Guillebeaux, 362 S.C. at 270, 607 S.E.2d at 101 (citation omitted). However, the trial judge granted the State's motion to remove Juror Givens "in an abundance of caution" to avoid "any perception that whatever verdict is rendered that it was not fair and impartial." [R. p. 72, lines 17 – 22] By allowing the State to remove Juror Givens without cause on the second day of trial, the lower court acted partially toward the State by granting the State a *de facto* sixth peremptory challenge and thereby prejudiced Appellant as discussed *infra*.

Assuming for argument's sake that Juror Givens intentionally concealed information, the trial court still abused its discretion in allowing the State to challenge Juror Givens. Specifically, if a court finds that a juror intentionally concealed information during *voir dire*, then the court must "determine if the information concealed would have supported a challenge for cause or would have been a material factor in the use of [a party]'s peremptory challenges." Stone, 345

S.C. at 590, 550 S.E.2d at 285 (citation omitted). "The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred." Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986).

In Stone, the juror was a casual acquaintance with a witness who had lived down the street from the juror. The Supreme Court held that the character of the concealed information did not warrant the removal of the juror:

> [The juror's] scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its peremptory challenges. [The juror] clearly indicated her former acquaintance with a witness whose name she did not even know, would not have affected her in any way. Accordingly, we hold the trial court abused its discretion in removing her.

Stone, 350 S.C. at 448, 567 S.E.2d at 247 - 248.

Like the juror in Stone, Juror Givens' "scant acquaintance" with the person in the snack bar would not have supported a challenge for cause. Juror Givens did not know the person's name, she only knew the person "through another friend of [hers] that lives on James Island," she had "hung out" with that person at a birthday party approximately a year before, she was not the person's friend, she was unaware that the person was involved in the case in any way, and she could be fair and impartial. [R. p. 60, line 7 – p. 65, line 7]

Additionally, Juror Givens' "scant acquaintance" with the person in the snack bar could not have been a material factor in the State's exercise of its peremptory challenges because the State had exhausted all of its peremptory challenges by the time Juror Givens was selected for trial. In Woods, when the juror's name was selected from the venire, the respondent had one peremptory challenge remaining. The respondent claimed that had he known of the juror's relationship with the prosecutor's office, he would have used a peremptory challenge to remove

the juror. Accordingly, the court held that the juror's failure to disclose her relationship with the prosecutor's office "prevented the respondent's intelligent exercise of his peremptory challenges." Woods, 345 S.C. at 590, 550 S.E.2d at 286. Here, unlike the party in Woods, the State had exhausted all of its peremptory challenges before Juror Givens' name was selected from the venire. Therefore, the State was not prevented from intelligently exercising its peremptory strikes because it had no remaining strikes to use against Juror Givens.

II. This Court should rehear this matter because it misapprehended the reasoning of the Supreme Court in State v. Simmons where Simmons involved a juror who discussed with his wife during trial the personal effect on the juror that a verdict would have had.

In State v. Simmons, 360 S.C. 33, 599 S.E.2d 448, the jury was sequestered. Juror C had a conversation with his wife regarding the fact that the defendant's sister lived across the street from a piece of property owned by Juror C and his wife where Juror C and his wife intended on building a home. Juror C advised the trial judge of his relation to the defendant's sister and that he was concerned an adverse verdict would perhaps cause "consternation, fear, concern, or whatever." Juror C did not advise the judge of his conversation with his wife until he was asked about it. When the SLED agent who was monitoring the sequestration of the jurors spoke to Juror C's wife, she revealed that she was "upset, fearful, and 'really concerned.'" Juror C was then examined in chambers where he confirmed that he and his wife discussed the personal effect of a verdict in the case. The Supreme Court held that the judge acted within his discretion in removing Juror C.

Here, unlike Simmons, the trial judge expressly stated that: (1) the court had no concerns about Juror Givens' impartiality; (2) Juror Givens' interactions were innocent; and (3) Juror Givens did not attempt to mislead the court in any way. As the trial court observed, Juror Givens

was "young," "a typical juror," and "[t]he things we think are important they don't think are important and I really don't think she had any intention to mislead the Court . . . ." The "scant acquaintance" between Juror Givens and the purported member of Appellant's family is akin to the acquaintance in Stone. Further, nothing suggests that Juror Givens would experience "consternation, fear, concern, or whatever" from an adverse verdict, nor does anything suggest that she was "upset, fearful, and really concerned." In fact, Juror Givens did not even realize that the person with whom she spoke in the snack bar may have had any relation to Appellant or to the case.

III. This Court should rehear this matter because it overlooked the arguments of counsel at trial that preserved the issues on appeal.

"Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). In Brannon, the state argued that the court of appeals violated error preservation rules by using a seizure analysis to determine whether an arrest was being made where the Appellant never used the terms "seizure" or "Fourth Amendment" in his directed verdict motion. The Supreme Court disagreed and held that "a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." Id. at 502, 596 (citation omitted).

Here, Appellant argued that no cause existed to excuse Juror Givens. Appellant argued that the jurors and the defendant's family had not seen each other prior to the break, that the video did not reflect that Juror Givens and the person in the snack bar knew each other very well, and that the interaction was innocent. [R. p. 50, line 10 – p. 53, line 17] Appellant further argued that any omission to disclose was innocent, that the juror disclosed her conversation in

the snack bar when asked the second time, that Juror Givens did not try to mislead or deceive the court, that she did not even know the name of the person in the snack bar, and that Juror Givens could be fair and impartial. [R. p. 66, line 20 – p. 67, line 16] Finally, Appellant attempted to reiterate his objection on this issue, but the court noted the objection without allowing additional argument:

MR. HARRIS:	Your Honor?
THE COURT:	Mm-hmm.
MR. HARRIS:	For the record, can I just – I mean object to the –
THE COURT:	You've noted your exception.
MR. HARRIS:	Okay.
THE COURT:	Yeah.
MR. HARRIS:	I just wanted to note my exception for the record.
THE COURT:	You've already noted your exception for the record when you made your argument.
MR. HARRIS:	Thank you.
THE COURT:	You're welcome.

[R. p. 75, lines 2 – 14] Trial counsel effectively preserved the issue with the arguments he made. Further, the trial court did not allow him to continue arguing the issue after the above-described attempt.

In I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained the rationale behind the longstanding rule of issue preservation:

> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve--

intentionally or by chance--in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

Here, trial counsel kept no ace card up his sleeve. Counsel argued extensively at trial that there was no cause for removing Juror Givens. The trial judge was given ample opportunity to consider these arguments. Appellant describes in his briefs that the effect of removing a juror without cause is to give the state a sixth peremptory strike. Such is not a new issue from what Appellant's counsel argued at trial. Instead, it is part of the analysis as to whether the trial court's error is reversible.

In addition, even if further argument by trial counsel would have been required to preserve the issue under the general rule, our courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused. See State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding "[a]s to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile."); State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001) (employing the futility doctrine). Here, the trial judge made it clear that she had ruled and did not wish to hear further argument on the matter, and it would have been futile for Appellant to continue arguing the point.

IV. This Court should rehear this matter because Appellant preserved the issues raised on appeal including whether the lower court gave the State a sixth peremptory challenge when the court removed a juror without cause.

The beginning of wisdom is to call a thing by its proper name. On appeal, Appellant has articulated the obvious effect of the trial court's decision to remove a juror without cause at the State's request. In other words, Appellant is not arguing a new ground on appeal. Rather,

Appellant is merely elucidating the end result of the trial court's removal of a juror without cause – such removal gave the State the use of a sixth peremptory challenge on the second day of trial that, in turn, skewed the jury selection process and gave the State unilateral and discretionary control over the composition of the jury during the trial. This fundamental error mandates automatic reversal and a new trial.

Appellant urges this court to rehear the matter in order to reconsider whether the issue was preserved. Clearly the issue of whether the removal of the juror was error was preserved, and this Court acknowledged the same by deciding the issue on the merits. Appellant went further in his brief to characterize the trial court's removal of the juror as a sixth peremptory strike only to explain why such error is reversible. Our courts have never required, in order to preserve an issue, the level of elucidation as set forth in the appellate brief. Here, the underlying issue for the trial judge was not whether the error was reversible. The issue was whether there was cause to remove Juror Givens. See Mizell v. Glover, 570 S.E.2d 176, 351 S.C. 392 (2002) (finding an evidentiary issue was preserved where a party raised an issue despite the absence of discussion as to why the error is reversible); State v. Kromah, 737 S.E.2d 490, 401 S.C. 340 (2013) (same); State v. Russell, 345 S.C. 128,546 S.E.2d 202 (Ct. App. 2001) (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict); S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) (finding an issue preserved where, although a party did not phrase objection in the exact terms used in the issues on appeal, the party made an objection sufficient enough to allow the trial court to rule on the issue).

"A peremptory challenge is an arbitrary rejection of a juror without cause. The exercise of the right of peremptory challenge affords an accused an opportunity to dismiss jurors who, he

believes, for whatever reason, may be unfavorable to him." State v. Bailey, 273 S.C. 467, 469, 257 S.E.2d 231, 232 (1979). Peremptory challenges are one of the most important of the rights secured to the accused, and the system of peremptory challenge has traditionally provided the assurance of impartiality in a jury trial. Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990). Peremptory challenges assure the selection of a qualified and unbiased jury by enabling each side to exclude those potential jurors believed to be most partial towards the other side thereby rejecting extremes of partiality on both sides. Id. at 484, 110 S.Ct. at 806 (citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). Peremptory challenge is a device that "occupies 'an important position in our trial procedures,' . . . and has indeed been considered 'a necessary part of trial by jury.'" Holland, 493 U.S. at 475, 110 S.Ct. at 804 (quoting Batson, 476 U.S. at 98, 106 S.Ct. at 1724 and Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), *overruled on other grounds by* Batson, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). The goal of an impartial jury is obstructed by procedures that cripple the device of peremptory challenge. Holland, 493 U.S. at 483 – 484, 110 S.Ct. at 809.

The right to peremptory challenges is denied or impaired if the accused does not receive that which state law provides. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). South Carolina law provides the accused with twice as many peremptory challenges as the State. "Any person who is arraigned for the crime of murder . . . is entitled to peremptory challenges not exceeding ten, and the State . . . is entitled to peremptory challenges not exceeding five." S.C. Code Ann. § 14-7-1110 (emphasis added). South Carolina's courts have always considered the jury selection process in criminal cases, including the use of peremptory challenges, as sacrosanct.

In State v. Briggs, 27 S.C. 80, 2 S.E. 854 (1887), the state and four defendants collectively challenged thirty-two jurors thereby exhausting the entire jury venire without selecting a single juror for the trial. Under an applicable statute regarding jury selection, the trial court was required to draw additional jurors as "the court may deem necessary to fill such deficiency." Id., 2 S.E. at 857. However, the lower court failed to order a new venire and continued the case until the following week at which time "a separate and distinct jury had been drawn and summoned." Id. Further, the lower court held that because the four defendants challenged eight jurors the week before, the defendants were only entitled to challenge twelve more to make the twenty allowed under the law at that time. Our Supreme Court remanded the case for a new trial based on the lower court's failure to follow statutory procedure even though the defendants may not have been prejudiced by the lower court's actions:

> [The applicable statute set forth] a plain, positive direction as to how to proceed in a criminal case "whenever it shall be necessary to supply any deficiency" as to jurors. After the trial was entered upon in the first week of the term, and the jury was exhausted, we think it was irregular to adjourn it over to the second, and then to present the jurors regularly drawn for that week, instead of those who would have been presented if the above provision of the law had been followed. This may seem technical. It may not be obvious that by this course any injustice was done to the defendants. Theoretically the jurors summoned under one *venire* may be as good as those called under another; but in criminal proceedings, and especially those involving life, it is proper that there should be great care and particularity.

Id. Our Supreme Court also held that the lower court erred in limiting the number of the defendants' peremptory challenges and that "[t]he right of challenge as allowed [by statute] is regarded sacred." Id.

There is only one reported decision that is analogous to the present circumstance wherein a court allowed the prosecution to use a peremptory challenge after a jury was selected and impaneled. In U.S. v. Harbin, 250 F.3d 532 (7th Cir. 2001), during the trial of a drug trafficking

case, one of the jurors indicated that he knew a witness's mother. The juror also indicated that he had participated in Narcotics Anonymous. Like South Carolina's courts, the trial court in Harbin could only remove a juror during trial for cause. The court conducted a *voir dire* examination of the juror, and the juror stated that he could be impartial. Although the court declined to dismiss the juror for cause, the court allowed the prosecution to exercise one of its peremptory challenges "left over" from jury selection based on the newly discovered information and replaced the juror with an alternate juror. The Seventh Circuit Court of Appeals held that the lower court violated the accused's right to a fair trial and to the fair and the intelligent use of peremptory challenges. The court held that "the ability to remove jurors with peremptory challenges mid-trial is a significant weapon. At that time, the parties have had the opportunity to observe the demeanor of the jurors and to employ that knowledge in their decision." Id. at 539. The court also observed that the "prosecution was unilaterally granted control over the composition of the jury during the trial stage . . . [which] skewed the jury selection process in favor of the prosecution, and adversely impacted the ability of the peremptory challenge process to fulfill its function as a means of ensuring an impartial jury and a fair trial." Id. at 541. The court further held that this error was "the type of fundamental error requiring automatic reversal." Id. at 547.

As previously indicated, the State had exhausted all five of its peremptory challenges before Juror Givens was selected from the venire. Further, the trial judge did not ask any questions during the initial *voir dire* that would have identified any connection between Juror Givens and the person in the snack bar. [R. p. 7, line 14 – p. 13, line 17] Moreover, although the trial judge gave the State the opportunity to ask additional questions of the jurors during *voir dire*, the State declined to do so. [R. p. 13, lines 21 – 23] However, the State was able to use information it

gleaned after the jury was impaneled to remove a juror without cause during the second day of trial. By removing an impartial juror at the State's request, the lower court unilaterally permitted the State to use a pre-trial jury selection tool to alter the composition of the jury during trial.

Here, the State was not concerned with any concealment by Juror Gadsden or Juror Givens. Rather, the State was solely interested in challenging Juror Givens based upon "any familiarity, however slight, between [her] and a member of the defendant's family . . . ." [R. p. 1 – 2] Notably, the State decided not to remove Juror Gadsden although: (1) Juror Gadsden spoke with the non-juror during the lunch break; (2) Juror Gadsden did not reveal this encounter during the court's *voir dire* of the matter during the first day of trial; (3) the State accused Juror Gadsden of "look[ing] in the direction of the defendant's family in the courtroom" during *voir dire*; and (4) Juror Gadsden had absolutely no explanation as to why she concealed her encounter in the snack bar. [R. p. 1 – 2; p. 69, lines 14 – 18] Yet, despite all of the State's professed concern that Juror Gadsden's "mendacity undermine[d] any faith that [she] could fulfill [her] oath fairly," the State withdrew its motion to excuse Juror Gadsden after she indicated that she and the non-juror did not know one another. [R. p. 69, lines 5 – 8; p. 71, lines 8 – 12] As for Juror Givens, the State challenged her after she testified that she had a "familiarity, however slight, between [herself] and a member of the defendant's family." [R. p. 1 – 2]

The State's challenge and removal of Juror Givens during trial was precisely the concern the court in Harbin addressed by granting a new trial. Specifically, here there was a shift in the balance of advantages in the State's favor that deprived Appellant of a fair trial. Like the prosecution in Harbin, the State in this case "was allowed exclusive, discretionary control over the composition of the jury mid-trial, and whether the mechanism for achieving that control was a peremptory challenge or another device is unimportant. . . . [T]he framework in which the trial proceeded

was fundamentally altered, with the jury selection mechanism transported to the trial stage for one party." Harbin, 250 F.3d at 547 – 548. This Court should not "tolerate a system in which control over the jury rests in the exclusive domain of one party during a particular stage of the proceedings." Id. at 549. Accordingly, like our Supreme Court in Stone and the court in Harbin, this Court should reverse and remand this case for a new trial.

CONCLUSION

Appellant requests this Court rehear the matter or rehear the matter *en banc* where (1) State v. Stone, along with the other authorities cited, show that the trial judge abused her discretion, (2) State v. Simmons is distinguishable from the case at hand and less akin to the case at hand than Stone, and (3) the issues are preserved in that trial counsel was only required to raise the issue of whether there was cause to remove the juror, regardless of whether trial counsel explained why any such error was reversible.

Respectfully submitted,

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Dated: 8/20/13

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Deadra L. Jefferson, General Sessions Court Judge
09-GS-10-6730

Case Tracking Number: 2012208426

The State of South Carolina, ...Respondent,

v.

Jerome Campbell
a/k/a Jerome Coaxum .....Appellant,

PROOF OF SERVICE OF
PETITION FOR REHEARING OR REHEARING *EN BANC*

I certify that I have served Petitioner's Petition for Rehearing or Rehearing *En Banc* by depositing a copy of it in the United States Mail, postage pre-paid, on August ____, 2013, addressed as follows:

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