THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2019—001570

State of South Carolina……Respondent,

vs.

Devin Zachary Elijah Ruttle……Appellant.

Final Amended Brief of Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

ARGUMENT 12

Standard of Review 12

I. The circuit court abused its discretion in concluding that Nysha Jefferies, Juror 92, was not the same Nysha who attended New Life Deliverance Worship Center and whose grandfather was the victim of violent crimes. 13

A. The circuit court's ruling was controlled by an error of law because the court improperly imposed upon Appellant the burden of producing Nysha Jefferies to prove her unity of identity with the Nysha who attended New Life and whose grandfather was the victim of violent crimes. 13

B. The circuit court's ruling that it could not determine with any degree of conviction whether there was a unity of identity between Nysha Jefferies and the Nysha who attended New Life, and the Nysha Jefferies whose grandfather was the victim of violent crimes both lacked evidentiary support and was controlled by an error of law. 21

II. The circuit court abused its discretion by denying Appellant's Motion for New Trial due to juror concealment where the juror in question, Nysha Jefferies, intentionally concealed clearly responsive information during voir dire that would have been material to Appellant's intelligent use of peremptory challenges or could have supported a for cause challenge. 29

III. The circuit court's denial of immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 et. seq. (the "Act" or "PPPA"), constituted an abuse of discretion because the court imposed an improperly elevated burden of proof upon Appellant to establish immunity. 42

IV. The circuit court's denial of immunity under the PPPA was controlled by an error of law because the court misinterpreted the "without fault" element of self-defense by concluding that an individual is debarred from exercising his fundamental right of self-defense simply by doing an action that affords an opportunity for conflict. 44

V. The circuit court's denial of immunity under the PPPA constituted an abuse of discretion because it was grounded in factual conclusions, including that Appellant "confronted" decedent with a gun and that decedent knew anything about the presence of individuals other than Appellant, that are without evidentiary support. 46

VI. In light of the new rule enunciated by the Supreme Court in State v. Burdette, 427 S.C. 490, 501–03, 832 S.E.2d 575, 582–83 (2019) and State v. Smith, 430 S.C. 226, 233-34, 845 S.E.2d 495, 498-99 (2020), the trial court committed reversible error by giving an implied malice charge where evidence had been presented that the Appellant acted in self-defense. 48

CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Brown v. S. H. Kress & Co, 170 S.C. 178, 170 S.E. 142 (1933)…30

California v. Luckett, 1 Cal.App.3d 248, 253 (Cal. App. 1969)…26

Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236 (4th Cir. 1989)…9

Corbin v. Hearst-Argyle Television, Inc., 561 F. Supp. 2d 546 (D.S.C. 2008)…9

Dist. of Columbia v. Heller, 554 U.S. 570, 628 (2008)…44-45, 49

Dooly v. Sears, C/A 8:22-cv-01734-DCC-JDA (D.S.C. Jul. 20, 2022)…9

Ethier v. Fairfield Mem'l Hosp., 429 S.C. 649, 653, 842 S.E.2d 355, 358 (2020)…16

Gray v. Bryant, 298 S.C. 285, 379 S.E.2d 894 (1988)…13-14, 16, 30, 36, 40

Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)…49

Hefferman v. United States, 50 F.2d 554, 557 (3rd Cir. 1931)…26

Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 682 S.E.2d 489 (2009)…17

Idaho v. Lawyer, 244 P.3d 1256, 1260 (Idaho App. 2010)…26

Lewis v. State, 234 Ga.App. 873, 508 S.E.2d 218, 222 (1998)…25

Long v. Norris & Assocs., LTD., 342 S.C. 561, 578, 538 S.E.2d 5 (Ct. App. 2000)…12, 15, 19, 28, 29, 34

Long v. Warden, Lieber Corr. Inst., No. 6:20-197-TMC-KFM (D.S.C. Feb. 14, 2020)…24

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __ at 25 (2022)…44-45, 48

Magnoni v. Smith & Laquericia, LLP, 701 F. Supp. 2d 497 (S.D.N.Y. 2010), aff'd, 483 F. App'x 613 (2d Cir. 2012)…23

McDonald v. City of Chicago, 561 U.S. 742 (2010)…45

Philips v. Pitt Cnty. Mem. Hosp., 572 F.3d 176 (4th Cir. 2009)…9

Pinckney v. Warren, 344 S.C. 382, 389, 544 S.E.2d 382 (2001)…22

Masters v. Rodgers Development Group, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984)…24

Murphy v. State, 399 So.2d 340, 346 (Ala.Crim.App.1981)…25

Richland Memorial Hosp. v. English, 295 S.C. 511, 512, 369 S.E.2d 395 (Ct. App. 1988)…22

Sanders v. S.C. Dep't of Motor Vehicles, 431 S.C. 374, 387, 848 S.E.2d 768, 775 (2020)…22, 23

State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999)…14, 15, 16

State v. Andrews, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019)…43

State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)…12

State v. Belcher, 385 S.C. 597, 685 S.E.2d 802(2009)…48

State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006)…18

State v. Bodie, 33 S.C. 117, 11 S.E. 624, 630 (1890)…46-47

State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011)…42

State v. Burdette, 427 S.C. 490, 501–03, 832 S.E.2d 575, 582–83 (2019)…47, 48

State v. Cain, 419 S.C. 24, 30, 795 S.E.2d 846, 849 (2017)…46

State v. Cervantes-Pavon, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019)…41, 43, 45

State v. Coaxum, 410 S.C. 320, 327, 764 S.E. 2d 242 (2014)…10, 13, 14, 15, 16, 19, 28, 29, 38, 39, 40

State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013)…41, 43

State v. Douglas, 411 S.C. 307, 321 n.8, 768 S.E.2d 232, 240 n.8 (Ct. App. 2014)…44

State v. Glenn, 429 S.C. 108, 120, 838 S.E.2d 491, 497 (2019)…44

State v. Goodson, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1993)…44

State v. Green, 432 S.C. 97, 99, 851 S.E.2d 440, 440 (2020)…13, 14

State v. Gulledge, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982)…28, 29

State v. Jacobs, 78 S.C. 29, 4 S.E. 799, 800 n.1 (1888)…44

State v. Johnson, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990)…18

State v. Johnson, 350 S.C. 543, 567 S.E.2d 486 (Ct. App. 2002)…23, 25

State v. Kelly, 331 S.C. 132, 142-43, 502 S.E.2d 99 (1998)…18

State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016)…12

State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)…12

State v. Miller, 398 S.C. 47, 56 n.3, 727 S.E.2d 32, 37 n.3 (Ct. App. 2012) (Few, J.), vacated as moot, 409 S.C. 312, 762 S.E.2d 394 (2014)…14

State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)…42

State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100, 104 (2005)…17

State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)…12

State v. Palmer, 413 S.C. 410, 422–23, 776 S.E.2d 558, 564 (2015)…46

State v. Prater, 26 S.C. 198, 2 S.E. 108, 109 (1887)…30

State v. Rowell, 436 S.C. 54, 68, 870 S.E.2d 175, 182 (Ct. App. 2021)…15, 16, 19, 30

State v. Sims, 426 S.C. 115, 144, 825 S.E.2d 731, 746 (Ct. App. 2019)…46

State v. Smith, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020)…47

State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, __ (2004)…17, 19, 30, 36

State v. Stone, 290 S.C. 380, 383, 350 S.E.2d 517, 518 (1986)…18

State v. Tucker, 423 S.C. 403, 815 S.E.2d 467, 471 (Ct. App. 2018)…12, 15, 16

State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)…10, 13, 14, 16, 19, 23, 29, 30-31, 34, 35, 36, 37, 38, 39, 40

State v. Wooten, 92 S.C. 61, 64, 75 S.E. 212 (1912)…26

Steinke v. S.C. Dep't of Labor, Licensing & Reg., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999)…42

Tanner v. United States, 483 U.S. 107, 127 (1987)…13

Terwilliger v. Marion, 222 S.C. 185, 188, 72 S.E.2d 165, 155 (1952)…41, 42

Warger v. Shauers, __ U.S. __, 135 S.Ct. 521, 528-29 (2014)…12

Williams By & Through Wilford v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. 1987)…36

Wilson v. Gordon & Wong Law Group, P.C., No. 2:13-cv-00609-MCE-KJN, 2013 WL 6858975, 2013 U.S. Dist. LEXIS 180366 (E.D. Cal. Dec. 24, 2013)…23

Constitutions

U.S. Const. Amend. II…43, 48

U.S. Const. Amend. VI…12

U.S. Const. Amend. XIV…12

S.C. Const. Art. I § 14…12

Statutes

S.C. Code Ann. § 16-11-410 et seq….2, 41

S.C. Code Ann. § 16-11-440(C)…1, 45

S.C. Code Ann. § 16-11-450(A)…1

Other Authorities

47 Am. Jur. 2d Jury § 191 (1995)…28

50A C.J.S. Juries § 503 (1997)…18

66 C.J.S. New Trial § 25 (1998)…16

Form 235 Juror Information

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Rule 201(d), SCRE…9

Rule 201(f), SCRE…25

Rule 803 (13), SCRE…22

Rule 803 (19), SCRE…22

Social Security Administration, Baby Names from Social Security Card Applications - National Data 1880-2021. Accessed at https://www.ssa.gov/OACT/babynames/limits.html on Sep 1, 2022 8:20:32 PM…24, 25

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court abused its discretion in concluding that Nysha Jefferies, Juror 92, was not the same Nysha who attended New Life Deliverance Worship Center and whose grandfather was the victim of a violent crime.

II. The circuit court abused its discretion by denying Appellant's Motion for New Trial due to juror concealment where the juror in question, Nysha Jefferies, intentionally concealed clearly responsive information during voir dire that would have been material to Appellant's intelligent use of peremptory challenges or could have supported a for cause challenge.

III. The circuit court's denial of immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 et. seq. (the "Act" or "PPPA"), constituted an abuse of discretion because the court imposed an improperly elevated burden of proof upon Appellant to establish immunity.

IV. The circuit court's denial of immunity under the PPPA was controlled by an error of law because the court misinterpreted the "without fault" element of self-defense by concluding that an individual is debarred from exercising his fundamental right of self-defense simply by doing an action that affords an opportunity for conflict.

V. The circuit court's denial of immunity under the PPPA constituted an abuse of discretion because it was grounded in factual conclusions, including that Appellant "confronted" decedent with a gun and that decedent knew anything about the presence of individuals other than Appellant, that are without evidentiary support.

VI. In light of the new rule enunciated by the Supreme Court in State v. Burdette, 427 S.C. 490, 501–03, 832 S.E.2d 575, 582–83 (2019) and State v. Smith, 430 S.C. 226, 233-34, 845 S.E.2d 495, 498-99 (2020), the trial court committed reversible error by giving an implied malice charge where evidence had been presented that the Appellant acted in self-defense.

STATEMENT OF THE CASE

This is an appeal from criminal proceedings in the matter of State v. Devin Zachary Elijah Ruttle. See generally R. pp. 627-30. This appeal concerns matters of law in trial court criminal proceedings and specifically the immunity hearing that was held pursuant to S.C. Code Ann. §§ 16-11-450(A) and 16-11-440(C), and the subsequent jury trial of this case.

The trial Court criminal proceedings before the Spartanburg County Court of General Sessions concerned charges for Murder and Unlawful Carrying of Handgun. The charges arise

out of an incident wherein Appellant Devin Ruttle ("Mr. Ruttle"), while on the grounds of the Timken Activity Center in Cowpens, South Carolina, claimed to have utilized a concealed handgun carried about his person in self-defense, resulting in the death of decedent, Dalton Moore ("Decedent").

Mr. Ruttle filed a pretrial Motion for Statutory Immunity based on S.C. Code Ann. § 16-11-410 et seq., on the grounds that Mr. Ruttle was immune from prosecution because he had a legal right to use a firearm in self-defense when he was attacked by Decedent with a knife. R. pp. 32:17-33:21; 40:18-41:6. The pretrial hearing to consider Mr. Ruttle's Motion for Statutory Immunity was held on August 29, 2018. The pretrial hearing was conducted outside of the presence of the jury and was considered and ruled upon by Judge J. Derham Cole.

On September 5, 2018, Judge Cole issued a written Order denying Mr. Ruttle's Motion for Statutory Immunity because Judge Cole, applying State v. Curry, found that "[g]iven the actual testimony presented as well as reasonable interpretations or inferences to be drawn therefrom, it appears that the defendant's 'claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution.'" R. p.4 (citing State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013)).

Following the trial court's denial of Mr. Ruttle's pretrial Motion for Immunity, Mr. Ruttle was tried by jury in a trial that began on September 10, 2018 and concluded on September 13, 2018. On September 13, 2018, the jury returned a guilty verdict against Mr. Ruttle as to both the charges of Murder and Unlawful Carrying of Handgun. At the conclusion of trial, Judge Cole imposed a sentence of life imprisonment on Mr. Ruttle who was 19 at the time of the altercation and 21 at the time of trial. Following sentencing, Mr. Ruttle timely filed a Motion to Reconsider

Sentence on September 19, 2018. A decision on Appellant's Motion to Reconsider Sentence was not issued by the trial court until a year later on September 10, 2019 when Judge Cole issued a single page Order denying Mr. Ruttle's Motion to Reconsider.

Mr. Ruttle's Notice of Appeal was properly and timely served upon all parties of interest in this matter on September 12, 2019 seeking review of the trial court's Order denying Mr. Ruttle's Motion for Statutory Immunity, Mr. Ruttle's conviction, and the imposition of the life sentence. See R. p. 877. Mr. Ruttle was initially represented on appeal by the Appellate Division of the South Carolina Commission on Indigent Defense until undersigned counsel was retained by Mr. Ruttle and substituted as counsel of record by way of Order of this Court on March 10, 2020. Realizing that an issue of juror concealment existed that should properly be decided upon by way of a motion for new trial to the trial court, undersigned counsel immediately drafted and filed a Motion to Suspend Appeal and for Leave to File Motion Regarding Disqualification of Juror ("Motion to Suspend") with this Court on April 17, 2020. After briefing by Mr. Ruttle and the State, the Court granted Mr. Ruttle's Motion to Suspend on June 10, 2020 and Mr. Ruttle proceeded to file his Motion for New Trial with the trial court on June 25, 2020.

On July 21, 2020 counsel for the State emailed Judge Cole "request[ing] a formal, in-person, hearing to allow for proper examination and cross-examination of the witnesses" and stating that the State "anticipate[d] issuing some subpoenas for the hearing." See R. p. 849. On September 3, 2020 the Court informed counsel for the parties that Judge Cole "would like to schedule a hearing on Devin Ruttle's motion for a new trial", however due to difficulties arising from the pandemic, including the South Carolina Department of Corrections moratorium on prisoner transport, a hearing was not able to be held on Mr. Ruttle's Motion for New Trial until

May 12, 2021. In the interim, Judge Cole asked whether the State was contesting the timeliness of the Motion for New Trial, to which counsel for the State responded indicating that the "[b]ecause of the Appellate order, the State will not contest the timeliness of the motion at this time." See Email correspondence between Judge Cole's Office and Counsel between January 5, 2021 and January 8, 2021. At the hearing, Mr. Ruttle, his trial counsel, Rick Vieth, Mr. Ruttle's father and the founder and Pastor of New Life Deliverance Worship Center ("New Life"), and the Youth Pastor for New Life between 2012 and 2015, Travis Mimms, testified in support of Mr. Ruttle's Motion for New Trial. The State called no witnesses and presented no evidence in opposition to Mr. Ruttle's Motion for New Trial. Neither the court nor the parties subpoenaed the juror in question, Nysha Jefferies, Juror 92, to attend the hearing. Almost a year after the May 12, 2021 hearing, Judge Cole issued an Order denying Mr. Ruttle's Motion for New Trial on April 7, 2022.

For the reasons stated in this Brief, it is the Mr. Ruttle's position that the trial court committed an abuse of discretion requiring either the reversal of the trial court's denial of immunity and the affirmative grant of immunity based on the Act ,or the vacation of the denial of statutory immunity and Mr. Ruttle's convictions on the above-referenced charges and the remand of this case for a new immunity hearing and, if necessary, trial.

STATEMENT OF FACTS
Events of May 5, 2017

This case arises out of an incident occurring May 5, 2017 in the parking lot of the Timken Community Center, located at 180 Foster Street, Cowpens, SC 29330 ("Timken Center"). See R. pp. 18-20; 32:17-33:21; R. pp. 174-75; 377:24-380:14.

The individuals involved in the events in question are Devin Ruttle, Lorenzo Calderon, a friend of Mr. Ruttle's ("Lorenzo"), Hunter Sizemore, who was a friend of Lorenzo's ("Hunter"), and Dalton Moore ("Decedent"). See R. pp. 25:24-26:10; 27:10–28:11; 30:21–33:21; 64:17-65:7; 66:7-67:16. Mr. Ruttle met Lorenzo at New Life Deliverance Worship Center ("New Life") where Mr. Ruttle's father is the Pastor and where Mr. Ruttle attended and assisted with worship services and youth group meetings. R. pp. 25:24-26:10; R. pp. 685:16-25; 732:22-734:12; 740:23-742:24. Mr. Ruttle knew of Decedent, but had no relationship with Decedent. R. pp. 25:15–26:16-17. While driving his car on the afternoon of May 5, 2017, Mr. Ruttle ran out of gas and reached out to Lorenzo to ask for a ride to a gas station. R. pp. 27:13-28:1; 61:19-62:11 Lorenzo showed up riding in Hunter's truck to give Mr. Ruttle a ride to the gas station. R. pp. 27:23–28:18.

After obtaining some gas, Mr. Ruttle retrieved his car and began driving to his girlfriend's house to go on a date, at which time he drove past Decedent who appeared to be waving him down while walking along the side of the road near the Timken Center. See R. pp. 28:14–29:13; 31:1-8. Mr. Ruttle did not initially intend to stop, but due to an altercation that Mr. Ruttle witnessed between Lorenzo and Decedent a few weeks prior to the events of May 5, Mr. Ruttle decided that he would turn his car around and go speak with Decedent in hopes that he could speak peaceably to Decedent to let him know that he had no problems with or ill will towards him despite Decedent's issues with Lorenzo. See R. pp. 28:19–29:3; 31:1-15. Unbeknownst to Mr. Ruttle, after he had parted ways with Hunter and Lorenzo, Hunter, with Lorenzo riding in his truck, had driven in the same direction as Mr. Ruttle towards downtown Cowpens. R. p. 29:6-17. As Mr. Ruttle turned around in the school parking lot just beyond the Timken Center to go back

and speak with Decedent, he saw Lorenzo jump out of the truck that Hunter was driving and approach his car with a gun in his hand.[1] R. p. 31:10-20. Mr. Ruttle allowed Lorenzo to enter his car, but due to Lorenzo now being in the car with him, Mr. Ruttle did not want to try to speak to Decedent with Lorenzo present out of fear that Lorenzo might do "something violent towards [Decedent]."[2] R. pp. 31:10–32:5.

To keep separation between Lorenzo and Decedent while still attempting to peaceably speak with Decedent, Mr. Ruttle parked his car on Marion Court, approximately 100 yards away and down a bit of a hill from where he believed Decedent was walking in the Timken Center parking lot, and demanded that Lorenzo stay in the car so that he [Mr. Ruttle] could speak with Decedent. R. pp. 32:6-33; 54:18-25. Before letting Mr. Ruttle leave the car to go speak to Decedent, Lorenzo pulled out a second gun and demanded that Mr. Ruttle take the gun "just in case." R. pp. 32:6-20. In hopes of convincing Lorenzo to stay in the car and away from Decedent, Mr. Ruttle took the gun offered by Lorenzo and concealed it in his waistband under his hooded sweatshirt. R. pp. 32:17-20; 36:3-9; 40:18–41:6.

Walking to the Timken Center parking lot, Mr. Ruttle found Decedent, who he approached in a non-aggressive manner with his empty hands out in the open, and told him that he didn't want anything to do with whatever problem existed between Decedent and Lorenzo. R.

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[1] In direct contravention to the finding of the trial court, Hunter, who only knew Mr. Ruttle as "Dev", was driving his truck in which Lorenzo was a passenger—at no time did Lorenzo drive Hunter's truck, use it to follow Mr. Ruttle, or stop the truck in the roadway for him [Lorenzo] and Hunter to jump out of the truck. See R. p.2. Rather, Hunter slowed his truck down because Lorenzo began to, and did, jump out of the moving truck, after which time Hunter departed the area in his truck without ever having exited his truck. R. pp. 46:9-17; 64:17-65:7; 66:7-67:16; R. p. 243:9-18.

[2] Mr. Ruttle admitted in his testimony that when Lorenzo jumped out of Hunter's truck, and approached and entered his car, Lorenzo was "really mad at [Decedent]." R. pp. 31:25-32:1.

pp. 32:21-33:2; 36:13-37:2; 39:15-41:6. In response to Mr. Ruttle's attempt to peaceably approach and speak with Decedent, Decedent reached behind his back and pulled a knife and began advancing aggressively on Mr. Ruttle.[3] R. pp. 32:21-33:17; 34:17-35:2; 36:13-37:10; 39:15-41:6. In response to Decedent pulling a knife and aggressively advancing on him, Mr. Ruttle armed himself in self-defense with the handgun that until that moment had been concealed and known only to Mr. Ruttle, entreated Decedent to "stop", and then, when Decedent continued his armed attack, fired in self-defense, striking Decedent once under the arm and killing him. R. pp. 32:21-33:21; 41:3-6. After the shock of the attack by Decedent and having to defend himself therefrom, Mr. Ruttle retreated to his car to find that Lorenzo had gotten in the driver's seat after hearing the shots. R. pp. 33:22-34:12; 55:11-19. After Mr. Ruttle entered the passenger seat of his car, Lorenzo drove Mr. Ruttle's car away from the scene before Mr. Ruttle and Lorenzo switched places and Mr. Ruttle drove to his girlfriend's house where he gave her his money in anticipation of turning himself in to the authorities. R. p. 34:3-12.

Facts Pertinent to Voir Dire

Prior to his arrest in 2017, Mr. Ruttle attended New Life since it was founded in 2010 by his father Bunty Desor, who was and still is the Pastor at New Life. As the Pastor's son, Mr. Ruttle not only attended worship services and youth group meetings, but also assisted with the running thereof. As identified by New Life's Youth Pastor, Travis Mimms, the girl he knew as Nysha, a black female who was a "young teenager" in 2012, and whom Mr. Mimms identified as the same individual by way of Facebook photographs as Nysha Jefferies, regularly and

[3] During the immunity hearing the State admitted that there was in fact an open knife and that it was Decedent's knife. R. p. 85:3-4.

consistently attended New Life during 2012 and 2013 before her attendance became less consistent in 2014 and ultimately stopped thereafter. R. pp. 715:2-721:22; 732:16-738:13; p. 782-833.

As confirmed by the family records presented to the court, including inscriptions on family photos, and court records of which Appellant's counsel expressly requested the trial court take judicial notice, Nysha Jefferies' mother is Janie Jefferies, and her grandfather is Charles Rosemond, Sr. See Email to Judge Cole May 25, 2021 with attached Facebook posts by Nysha Jefferies, R. 870; R. p. 732:16-738:13; 757:19. Sadly in 2015 Nysha Jefferies' grandfather was the victim of three (3) violent crimes, armed robbery, burglary, and kidnapping, that ultimately resulted him being shot to death. R. p. 757:20-758:4; 758:18-759:8; 760:3-9; 760:3-18. The assailant, Aundra Hunter, Jr., responsible for the violent crimes against Nysha Jefferies grandfather was tried in the Greenville County General Sessions Court between September 10 and 13, 2018, the exact same dates during which Mr. Ruttle's trial occurred. Id.; see also State v. Aundra Hunter Jr., 2015A2330210945, 2015A2330210946, 2015A2330210948,

2015A2330210950, 2015A2330210952, Greenville County Public Index (Disposition Date 9/13/2018).[4]

Prior to trial and in preparation therefor, Mr. Ruttle's trial counsel received the Juror Information Packet from the Spartanburg County Clerk of Court's Office. R. pp. 662:5-667:7. Trial counsel provided his client and his family copies of the juror information to review whether they knew any of the names of the potential jurors indicated in the Juror Information Packet. R. pp. 662:5-667:7; 670:11-23; 694:15-696:5. However, Juror 92's, Nysha Jefferies, Form 235 Juror Information Form was not included in the Juror Information Packet provided to counsel prior to commencement of the September 10, 2018 term of court because Nysha Jefferies, in contravention of the language requiring the return of the Form 235 Juror Information Form within three (3) days of receipt, did not return her Form 235 to the Clerk of Court's Office and instead was required to fill a Form 235 out upon arrival to the Spartanburg County Courthouse

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[4] Pursuant to Rule 201(d), SCRE, "A court shall take judicial notice if requested by a party and supplied with the necessary information." (Emphasis added). Appellant's counsel expressly requested three (3) times, twice in open court and once via email on May 25, 2021, that the court take judicial notice of the content of the court records concerning Nysha Jefferies, Janie Jefferies, Charles Rosemond, Sr., Aundra Hunter, Jr., and Thomas Lamont Rosemond, and even provided the court with printouts of the associated Greenville and Spartanburg County Public Index Reports, Spartanburg County Magistrate Court records, and information concerning arrest records that were publicly available on the Spartanburg County Sheriff's Office website and preserved by internet archive capture. Philips v. Pitt Cnty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (Courts "may properly take judicial notice of matters of public record."); Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that the most frequent use of judicial notice of ascertainable facts is in noticing the content of court records.") (internal quotation marks omitted; emphasis added); see also Corbin v. Hearst-Argyle Television, Inc., 561 F. Supp. 2d 546, 550-51 (D.S.C. 2008) (holding that a court may take "judicial notice of matters of public record," and, "[a]ccordingly, the defendants are right to argue that the Court may consider [a] police report as a matter of public record") (internal quotation marks omitted). Dooly v. Sears, C/A 8:22-cv-01734-DCC-JDA, at *1 n.2 (D.S.C. Jul. 20, 2022) (accessing the Spartanburg County Public Index and taking judicial notice of and reviewing the records from the docket in plaintiff's state court action).

on Monday morning, September 10, 2018. See R. pp. 694:15-696:5; R.785-818; R. p. 784; Email correspondence from Spartanburg County Clerk of Court's Office regarding Nysha Jefferies Form 235.

At the commencement of voir dire, just prior to introducing and presenting Mr. Ruttle, his co-defendant, defense counsel, the solicitors, and the potential witnesses, the court explained the purpose of voir dire to the potential jurors and unequivocally sought for potential jurors to disclose "any connection whatsoever" with anyone involved in the trial, stating:

> [T]he purpose of the introductions is to find out if you have any connection whatsoever with anybody that's involved in the trial of this case or any members or their respective offices or any members of their respective families. I need to know if you have any connection by blood or by marriage, do you have any connection through work, school or church, have you met them, do you socialize with them, or do you know them in any fashion whatsoever, whether personally or through a family member…I'll, of course have the—each of the defendants introduced. I'll have the lawyers who will be introduced. Each of the witnesses to testify in the case will be introduced in order to find out if you have any connection with any of them so that we can make that determination and determine whether or not any connection that you may have would have any bearing upon your decision or whether or not, despite the fact that you have a connection, you could still be fair and impartial if selected as a juror.
>
> After those introductions take place I will then have some additional questions to ask you in order to determine your ability to be fair and impartial if selected as a juror in this particular case.

R. p. 119:22-120:20 (emphasis added). At the conclusion of voir dire, the court, after again asking all witnesses and related family members in the gallery, which included Devin's father the founder and pastor of New Life, to stand and face the jury panel, sought for the potential jurors to disclose if any potential juror believed they had "seen somewhere," recognized, knew, or had "any connection" to the witnesses or related family members. R. pp. 144:21-145:16. Despite several jurors responding affirmatively to the court's initial request to disclose "any connection"

to any of the parties, attorneys, witnesses, or their families, which resulted in potential jurors disclosing even attenuated connections, including one potential juror disclosing that she knew the mother of Mr. Ruttle's attorney "years ago," Nysha remained silent throughout voir dire.

In addition to generally requesting potential jurors disclose "any connection," including any through school or church, to anyone involved in the trial, the court also asked the potential jurors a number of other more specific questions to "determin[e] whether the jurors [were] aware of any bias or prejudice against a party, as well as to 'elicit such facts as [would] enable the [the parties] intelligently to exercise their right of peremptory challenge.'" State v. Coaxum, 410 S.C. 320, 327, 764 S.E. 2d 242 (2014) (quoting State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)). Included in the specific questions were the following two unambiguous questions that are relevant to this case:

- Do you or any members of your immediate family attend or have you ever attended the New Life Deliverance Worship Center…. R. p. 131:7-10.

- Has any member of the jury panel or any members of your immediate family ever been the victim of, or have you or that family member ever been accused of having committed[,] any type of criminal offense that might be characterized or described as a violent offense? You or a family member has been the victim of such or you or a family member has been accused of such.

  And violent offenses might include the crimes of murder, manslaughter, armed robbery, burglary, criminal sexual conduct, domestic violence of a high and aggravated nature, common law robbery, aggravated assault and battery or any other similar type of offense.

  Have you or that family member ever been the victim of such or ever been accused of having committed such? If so, please stand. R. pp. 131:17-132:6.

Despite the fact that, unbeknownst to Mr. Ruttle, she had regularly attended New Life and its weekly youth group meetings between 2010 and 2014, Nysha Jefferies did not reveal this

information when asked on voir dire. R. p. 127:9-16; R. pp. 715:2-721:22; 732:16-738:13; 757:19-762:16; R. 781-83; R. p. 870. In response to the inquiry regarding whether any juror or their immediate family members had been the victim of a violent crime, six (6) jurors did respond, three (3) of whom were excused from service including one who was excused on the basis that the juror's nephew was murdered in a shooting. R. pp. 132:7-136:20. Despite presumably listening to the judge's question and the various responses of other jurors, Nysha Jefferies did not disclose that her grandfather had been the victim of a 2015 burglary, kidnapping, and armed robbery that resulted in his death.[5]

Mr. Ruttle had seven (7) peremptory challenges remaining when Nysha's name was drawn for service on the jury.[6] R. pp. 143:11-148:19. Nysha was seated on the jury. R. p. 148:19.

ARGUMENT

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate "[c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." Id. "An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the

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[5] As noted, coincidentally, the assailant who perpetrated the violent crimes against Nysha's grandfather was actually standing trial in Greenville County at the same time as this trial. See 13th Circuit Public Index Records.

[6] One of Mr. Ruttle's peremptory strikes was utilized to strike Juror 125, who was one of the jurors who responded to the question regarding violent crimes and indicated that her family member was the victim of a crime. R. pp. 135:25-136:18; pp. 152:24-153:4.

trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

I. The circuit court abused its discretion in concluding that Nysha Jefferies, Juror 92, was not the same Nysha who attended New Life Deliverance Worship Center and whose grandfather was the victim of violent crimes.

A. The circuit court's ruling was controlled by an error of law because the court improperly imposed upon Appellant the burden of producing Nysha Jefferies to prove her unity of identity with the Nysha who attended New Life and whose grandfather was the victim of violent crimes.

Because a criminal defendant's liberty is at stake, both the United States and the South Carolina Constitutions provide rigorous protections to the inviolate right to a fair trial by a competent and impartial jury. U.S. Const. Amends. VI and XIV; S.C. Const. Art. I § 14; see also Long v. Norris & Assocs., LTD., 342 S.C. 561, 578, 538 S.E.2d 5 (Ct. App. 2000) ("A raison d'etre for the jury system in this country is to provide litigants the assurance of a fair and impartial trial."). "[V]oir dire can be an essential means of protecting this right," State v. Tucker, 423 S.C. 403, 815 S.E.2d 467, 471 (Ct. App. 2018) (quoting Warger v. Shauers, __ U.S. __, 135 S.Ct. 521, 528-29 (2014)), as it is the parties' only opportunity to "examine[]" "[t]he suitability of an individual for the responsibility of jury service." Tanner v. United States, 483 U.S. 107, 127 (1987). Accordingly, to protect the rights of both parties to an impartial jury the "trial court must conduct voir dire of the prospective jurors to determin[e] whether the jurors are aware of any bias or prejudice against a party, as well as to 'elicit such facts as will enable the [the parties] intelligently to exercise their right of peremptory challenge.'" Coaxum, 410 S.C. at 327, 764 S.E. 2d at 245 (quoting State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)) (emphasis added; second change in original). "Should jurors give false or misleading answers

during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge." Id. at 327, 764 S.E.2d at 245.[7] "In the event of such juror misconduct, the trial court must inquire into whether the withheld information affects the jury's impartiality." Id.

Despite the fact that "[i]t is the duty of the trial judge to ascertain the qualifications of the jurors, and when the discharge of this responsibility is thwarted by mischance, or otherwise, it is within the court's inherent power to remedy the situation when brought to his attention," the trial court imposed the burden on Mr. Ruttle to produce Nysha Jefferies and to prove through live testimony of Nysha Jefferies that she, Juror 92, was the same Nysha who attended New Life and the same Nysha Jefferies whose grandfather was the victim of violent crimes resulting in his death. Gray v. Bryant, 298 S.C. 285, ___, 379 S.E.2d 894, 895-96 (1988); Coaxum, 410 S.C. at 327, 764 S.E.2d at 245 ("In the event of [false or misleading answers during voir dire], the trial court must inquire into whether the withheld information affects the jury's impartiality."); Green, 432 S.C. at 100, 851 S.E.2d at 441 ("In this regard, we join the court of appeals in commending the trial court for its 'deft handling of this [juror misconduct] issue.' The trial court questioned each juror and the bailiff, which proved 'there was no reasonable possibility the [bailiff's] comments influenced the verdict.'") (emphasis added; internal citation omitted); see also Woods,

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[7] The vital necessity of full and truthful voir dire disclosure is of such fundamental importance to the Sixth Amendment right to a competent and impartial jury that jurors are placed under oath prior to the commencement of voir dire. S.C. Clerk of Court Manual Chapter 4 Juror Oath - Voir Dire ("Place your hand on the Bible (if no objection). You shall truthfully answer all questions asked of you concerning this matter now before the court, by the court, or order thereof. You shall speak the truth, the whole truth and nothing but the truth. So help you God (if no objection)."); State v. Green, 432 S.C. 97, 99, 851 S.E.2d 440, 440 (2020) ("The chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath.") (citation omitted).

345 S.C. at 587, 550 S.E.2d at ___ ("When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information…") (emphasis added); id. ("[W]here a juror's response to voir dire amounts to an intentional concealment, the movant need only show that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.") (emphasis added); State v. Miller, 398 S.C. 47, 56 n.3, 727 S.E.2d 32, 37 n.3 (Ct. App. 2012) (Few, J.) ("In Woods, the supreme court did not expressly impose the burden of proof on the defendant as to th[e] issue [of juror concealment]…the supreme court affirmed this court's decision to reverse the trial court and grant a new trial. Significantly, this court also did not place the burden of proof on the defendant. State v. Woods, 338 S.C. 561, 564, 527 S.E.2d 128, 129–30 (Ct.App.2000) (stating 'the juror did not justify her failure to disclose particular information that was specifically sought by a voir dire question'"), vacated as moot, 409 S.C. 312, 762 S.E.2d 394 (2014).

Although the procedure set out by the the Supreme Court in State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) is "limited solely to circumstances where the jury engages in premature deliberations," due to some recent decisions of the Court of Appeals[8] that have cited Aldret in connection with the affirmance of trial court decisions not to hold evidentiary hearings on motions raising juror concealment, it appears that the trial court mistakenly applied the Aldret procedure to this issue of juror concealment and the conduct of the hearing the court deemed appropriate to hold. Long, 342 S.C. at 574, 538 S.E.2d at __ (emphasis added). The inappropriate

[8]State v. Rowell, 436 S.C. 54, 68, 870 S.E.2d 175, 182 (Ct. App. 2021) and State v. Tucker, 815 S.E.2d 467, 472 (Ct. App. 2018).

application of Aldret to Mr. Ruttle's Motion for New Trial imposed upon Mr. Ruttle the duty to request the reassembly of the juror(s) and the attendant "clear and convincing" burden imposed by Aldret in cases of early deliberation jury misconduct. Aldret, 333 S.C. at 315, 509 S.E.2d at __ (holding that the "party claiming [premature deliberation] juror misconduct has burden to prove prejudice by clear and convincing evidence"); id. ("At such an evidentiary hearing, the trial court may, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature deliberations") (emphasis added); see also R. p. 8 ("The subject juror was not summoned to appear at the hearing, nor was the Court requested to have her appear to provide testimony at the hearing, nor did any affidavit by the juror accompany the motion.").[9] Not only did this result in the trial court imposing upon Mr. Ruttle a burden of proof that the Supreme Court has still not assigned, but also the application of the Aldret procedure appears to have mislead the trial court to conclude that it was incumbent upon Mr. Ruttle to "request" the court to "reassemble the juror[] and conduct voir dire to ascertain the nature and extent of the [juror misconduct]." Aldret, 333 S.C. at 315, 509 S.E.2d at ___; see Coaxum, 410 S.C. at 327, 764 S.E.2d at 245 ("In the event of [false or misleading answers during voir dire], the trial court must inquire into whether the withheld information affects the jury's impartiality."); Woods, 345 S.C. at 587, 550 S.E.2d at ___ ("[W]here a juror's response to

[9] The clear and convincing standard required by Aldret to prove prejudice is clearly inapplicable and inappropriate in the context of intentional concealment juror misconduct since "in the case of a juror's intentional nondisclosure in response to voir dire, bias and prejudice are inferred, and a new trial is required." Long, 342 S.C. at 574, 538 S.E.2d at __ (citing Annotation, 66 C.J.S. New Trial § 25 (1998)); Coaxum, 410 S.C. at 328, 764 S.E.2d at 246 (holding that in the face of a juror's intentional concealment the moving party "need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent").

voir dire amounts to an intentional concealment, the movant need only show that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.") (emphasis added). Counterintuitively, there does appear to have been one benefit of the trial court's misapplication of Aldret, which is the fact that the decision by the trial court to hold a hearing on Mr. Ruttle's Motion for New Trial appears to confirm that the trial court found the affidavits of Travis Mimms and Rick Vieth credible and indicative of misconduct. Rowell, 436 S.C. at 68, 870 S.E.2d at 182 (citing Aldret for the holding that "if the trial court finds the affidavits credible and indicative of misconduct it should hold an evidentiary hearing to assess whether such deliberations occurred"); Tucker, 815 S.E.2d at 472 ("Unless the trial judge finds the moving party's affidavits credible, our rules wisely forbid exposing jurors to open-ended inquiries into how they performed their duty.").

In contrast to the language in Aldret requiring the moving party to request the reassembly of jurors, once "the situation [concerning Nysha Jefferies' intentional concealment] [was] brought to his attention," it was the "duty of the trial judge," Gray, 298 S.C. at 287, 379 S.E.2d at 896, "to inquire into whether the withheld information affects the jury's impartiality." Coaxum, 410 S.C. at 327, 764 S.E.2d at 245. Furthermore, more recent applications of Aldret even appear to acknowledge the authority of the court to sua sponte summon jurors when it concludes that a hearing is required by credible affidavits of juror misconduct. Ethier v. Fairfield Mem'l Hosp., 429 S.C. 649, 653, 842 S.E.2d 355, 358 (2020) (noting that after counsel filed an affidavit regarding juror misconduct with the trial court the "court first called [the offending juror]…[and] [t]hereafter, the court called the remaining members of the jury"); see also Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 682 S.E.2d 489, 491, 494 (2009) (reinstating trial court's

decision concerning juror misconduct where the judge notified the parties that he was informed by an alternate juror of possible juror misconduct, "[t]he judge summoned the jurors to appear at the courthouse on September 7, 2005, for sworn examinations," and "[t]he judge's thorough fact-finding inquiry led him to the conclusion" that the jury was not improperly influenced by the juror misconduct) (emphasis added). Recognizing the propriety and the duty of the trial judge to summon a juror for purposes of protecting the fundamental fairness of the right to a jury trial is also consistent with the Supreme Court's well-established views on the "duties and limitations" of trial judges.[10] Accordingly, it was within the "inherent power" of the court to sua sponte summon to the hearing and, if it felt necessary, to question Nysha Jefferies if the court had any lingering question as to the unity of identity between Nysha Jefferies and the individual

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[10] The Supreme Court has reiterated on numerous occasions that trial judges "must observe" the following "duties and limitations" in the conduct of their work:

> A grave responsibility rests upon a trial judge. It is his duty to see to it that justice be done in every case, if it can be done according to law; and, if he thinks that the attorney for either party, either from inadvertence or any other cause, has failed to ask the witnesses the questions necessary and proper to bring out all the testimony which tends to ascertain the truth of the matter under investigation, we can see no legal objection to his propounding such questions; but, of course, he should do so in a fair and impartial manner, and should not by the form or manner of his questions express or indicate to the jury his opinion as to the facts of the case, or as to the weight or sufficiency of the evidence.

State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100, 104 (2005) (emphasis in original); see also State v. Ivey, 331 S.C. 118, 122 n. 3, 502 S.E.2d 92, __ n. 3 (1998) (holding that when the trial court was made aware of a potential issue of juror bias that defense counsel was not entitled to question the juror and that "[t]he trial judge properly inquired into the effect [the juror's] [potential source of bias] would have on her ability to be fair and impartial" and citing 50A C.J.S. Juries § 503 (1997) for the proposition that "[w]here the court is informed of a matter which may justify the discharge of a juror, the court generally must take some action and must inquire into the matter, at least where the juror's competency is in question. The court has the discretion to question a juror whose qualifications have been called into doubt. Where and in what form to conduct an inquiry may depend upon the circumstances.") (emphasis added).

identified by the substantial documentary and testamentary evidence submitted to the court and the court and police records of which Appellant requested that the trial court take judicial notice in support of Mr. Ruttle's Motion for New Trial. State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, __ (2004) (noting that at a hearing on juror concealment "[t]he trial judge questioned [the juror accused of concealment] about the past indecent, asking [the juror] why he did not stand up during voir dire and inform the parties that he was a victim of a serious crime…The trial judge then asked every jury member whether [they were influenced by comments of the juror accused of concealment]"); see also State v. Bennett, 369 S.C. 219, __, 632 S.E.2d 281, 285-86 (2006) ("In our justice system, the trial judge has the discretion and the duty to monitor the voir dire so as to ensure that the jury selected measures up to the constitutional standard."); cf. State v. Kelly, 331 S.C. 132, 142-43, 502 S.E.2d 99 (1998) ("The trial judge conducted extensive voir dire of the jurors both prior to empaneling the jury and during questioning concerning this incident [of juror misconduct]. The trial judge questioned jurors extensively about potential biases and prejudices and, thus, placed himself in the best position to assess the truthfulness of the jurors.") (emphasis added); State v. Johnson, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990) (holding that to protect a criminal defendant's right to an impartial jury in the face of a question being raised about improper juror contact with a third party that "[t]he general rule is that the trial court is to determine whether any conversation between a jury member and a third party was prejudicial."); State v. Stone, 290 S.C. 380, 383, 350 S.E.2d 517, 518 (1986) (praising the trial court in connection with a potential issue of juror bias that arose during a trial because "[t]he trial judge's voir dire of the jurors clearly established that no member of the jury had been prejudiced by the article") (emphasis added).

Moreover, it was and is Mr. Ruttle's position that the Nysha Jefferies' testimony is unnecessary under the particular circumstances of this case, such that once the trial court informed counsel for the parties that it desired to hold a hearing on Mr. Ruttle's Motion based on the Affidavits submitted therewith being both credible and indicative of juror misconduct, it was incumbent not upon Mr. Ruttle to request or summon Nysha Jefferies' presence, but rather the State, who, based on the objective clarity of the circumstances in this case, would have the burden of providing something "to the contrary" to overcome the inference of Nysha Jefferies' impartiality.[11] Coaxum, 410 S.C. at 328, 764 S.E2d at 245 ("In the face of a juror's intentional nondisclosure of pertinent information during voir dire, 'it may be inferred, nothing to the contrary appearing, that the juror is not impartial.'") (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284); Rowell, 436 S.C. at 67, 870 S.E.2d at 182 ("Nothing required the trial court or a party to hail a juror into court to testify on the issue of juror misconduct under the circumstances presented here."); Long, 342 S.C. at 574, 538 S.E.2d at __ (rejecting argument that "Circuit Court should not have set aside the judgment [and ordered a new trial on juror concealment grounds] without conducting a hearing"); see also Woods, 345 S.C. at 589-90, 550 S.E.2d at 285 (rejecting juror's testimony and implicitly finding juror's testimony provided "nothing to the contrary" to overcome the inference of impartiality created by the juror's "fail[ure] to respond to questions on voir dire which clearly applied to her"). Consequently, having abdicated its duty to

[11] Interestingly, after indicating in a July 21, 2020 email to the court that the State intended to investigate Mr. Ruttle's Motion for New Trial and "anticipated issuing some subpoenas for the hearing," counsel for the State subsequently revealed just prior to the hearing that the State "d[id] not have any witnesses." See July 21, 2020 and May 4, 2021 emails from Derrick Bulsa to Judge Cole. A cynic would presume that the State did investigate the facts supporting Mr. Ruttle's Motion and choose not to issue "some subpoenas" because the presence of Nysha Jefferies at the hearing would have further supported Mr. Ruttle's Motion for New Trial.

ensure that the jurors that sat on Mr. Ruttle's jury measured up to the constitutional standard and having instead wrongly imposed the burden upon Mr. Ruttle to produce Nysha Jefferies, the trial court's Order denying Mr. Ruttle's Motion for New Trial was controlled by errors of law that dictate its reversal and the granting of a new trial to Mr. Ruttle.

B. The circuit court's ruling that it could not determine with any degree of conviction whether there was a unity of identity between Nysha Jefferies and the Nysha who attended New Life, and the Nysha Jefferies whose grandfather was the victim of violent crimes both lacked evidentiary support and was controlled by an error of law.

Put simply, the only evidence entered into the record supports the conclusion that Nysha Jefferies, Juror 92, was the same person that attended New Life and whose grandfather tragically died as a result of being the victim of a burglary, kidnapping, and armed robbery in 2015. The evidence presented to confirm for the court the identity of Nysha Jefferies included sworn affidavits, live testimony of Travis Mimms, the Youth Pastor for New Life from 2012 to 2014, video and photographic evidence confirmed by testifying witnesses, court and police records, and family records. With specific regard to the court and family records, the records corroborate and confirm Nysha Jefferies' date of birth, her addresses, her familial ties, and a conviction for Public Disorderly in March 2017, which Nysha Jefferies also did not disclose. Not only is the information in the court and family records consistent with the video evidence and testimony of Travis Mimms, it is also consistent with juror records, including the Jury Venire for the September 10, 2018 term of court and the Form 235 Juror Information Section ("Form 235") that counsel was recently able to obtain from the Spartanburg County Clerk of Court's Office after realizing that, despite discussion during the hearing specifically concerning Nysha Jefferies Form

235, or rather the absence thereof, the trial judge did not review the case file for or take into consideration the corroborating information contained thereon.[12] R. pp. 662:5-677:7.

Even assuming that the testamentary and documentary evidence did not establish that the Nysha that attended New Life was Nysha Jefferies, the fact is that the evidence by way of court and family records indisputably establishes that Charles Rosemond, Sr. was Nysha Jefferies' grandfather, that he was the victim of multiple violent crimes that resulted in his death, and that Mr. Rosemond's assailant was standing trial just a short distance away in Greenville General Sessions Court while Nysha Jefferies was sitting on the jury in this case in Spartanburg. See May

[12]With specific regard to the Form 235 Juror Information Section, the Clerk of Court's records further indicated that Nysha Jefferies did not return the Form 235 "WITHIN THREE DAYS OF RECEIPT", as indicated thereon, but instead filled out the Form 235 that is in the Clerk of Court's records when she showed up to the courthouse on the Monday of the September 10, 2018 term of court during which Mr. Ruttle was tried. Due to Nysha Jefferies failure to return the Form 235 as directed, Mr. Ruttle and his trial counsel where denied the ability and reasonable opportunity to even review the basic information provided by Form 235 ahead of the morning of trial and the attendant stresses associated therewith for purposes of considering whether Nysha Jefferies might have some connection to or cause for bias against Mr. Ruttle. It also bears note that despite the fact Form 235's contain the admonition that "THE FURNISHING OF FALSE OR MISLEADING INFORMATION OR THE FAILURE TO FURNISH INFORMATION TO THE COURT MAY SUBJECT YOU TO PENALTIES AS PRESCRIBED BY LAW," Nysha Jefferies indicated that she had never been convicted of a crime despite the fact that she had been found guilty of "Disorderly/Public disorderly conduct" by the Spartanburg Municipal Court on March 2, 2017. See Form 235; State v. Nysha Maria Jefferies, 5102P0354081, Spartanburg County Public Index (Disposition Date 3/2/2017).

25 Email to Judge Cole.[13] The Greenville and Spartanburg County court records, Spartanburg Sheriff's Office arrest records, and family records, including family photos with inscriptions and the obituary for Charles Rosemond Sr., were properly admissible and/or were appropriate for the court to take judicial notice of for purposes of establishing the personal and family history of Nysha Jefferies and her grandfather. See Rule 803(13), (19), SCRE; see also Pinckney v. Warren, 344 S.C. 382, 389, 544 S.E.2d 382, ___ (2001) (holding obituary listing surviving family members was evidence establishing illegitimacy of plaintiff); Richland Memorial Hosp. v. English, 295 S.C. 511, 512, 369 S.E.2d 395 (Ct. App. 1988) (affirming finding of common law marriage based in part of obituary describing defendant as widow); see also https://www.wgwmortuary.com/memorials/Rosemond-Charles/2311914/obituary.php; Wilson v. Gordon & Wong Law Group, P.C., No. 2:13-cv-00609-MCE-KJN, 2013 WL 6858975, 2013 U.S. Dist. LEXIS 180366, at *11-12 (E.D. Cal. Dec. 24, 2013) (taking judicial notice of an obituary appearing in a newspaper); Magnoni v. Smith & Laquericia, LLP, 701 F. Supp. 2d 497, 501

[13]The afternoon before the May 12, 2021 hearing the court informed undersigned counsel that the hearing was cancelled because no court reporter was available, at which time Mr. Ruttle's witnesses were informed of the cancellation. At approximately 9:30 a.m. on May 12, 2021, Judge Cole's office contacted undersigned counsel and directed me to contact my witnesses and come to Spartanburg as quickly as possible to move forward with the hearing. See May 11 and 12, 2021 Emails between trial court and counsel. Due to the cancellation of the hearing, hearing preparation, including the printing of documents to be submitted to the court was put on hold for the remainder of May 11, 2021, such that, when unexpectedly directed to rush to the Spartanburg County Courthouse to proceed with the hearing, undersigned counsel did not have hardcopies of all documents intended to be submitted in support of Mr. Ruttle's Motion for New Trial. Accordingly, undersigned counsel requested and the court granted leave for additional documentation to be submitted to the court via email following the hearing. See R.pp. 667:3-7; 757:19-760:5; 762:10-23; 775:10-776:19. Consequently, following the hearing undersigned counsel submitted to the court additional information and documentation regarding Nysha Jefferies' familial connections, her grandfather having been the victim of multiple violent crimes, and the absence of Nysha Jefferies' Form 235 in the Juror Information Packet provided to Mr. Ruttle's trial counsel. See R. 870-72.

(S.D.N.Y. 2010) (court generally has discretion to take judicial notice of internet materials), aff'd, 483 F. App'x 613 (2d Cir. 2012). As to the Greenville and Spartanburg County court records, including information obtained from the Greenville and Spartanburg County Public Indices, and the Spartanburg Sheriff's Office arrest/booking records, the trial court was required to take judicial notice of the information contained therein regarding Nysha Jefferies, Janie Jefferies, and the perpetrator of the violent crimes against Nysha's grandfather. Sanders v. S.C. Dep't of Motor Vehicles, 431 S.C. 374, 387, 848 S.E.2d 768, 775 (2020) (holding that judicial notice of information regarding the status of an individual's professional license from a "government website" was proper and that such "information is obviously compelling") (emphasis added). Specifically, the family, court, and police records establish the relationship by blood between Nysha Maria Jefferies, Janie Marie Jefferies (Nysha's mother), and Charles Rosemond, Sr. (Nysha's maternal grandfather). In addition to the familial connection, the court records regarding Mr. Rosemond's death that were submitted to the court establish that Mr. Rosemond was the victim of multiple violent crimes resulting in his death by shooting in 2015, and that the assailant who perpetrated the crimes against Mr. Rosemond stood trial and was convicted in Greenville County during the exact same days, September 10-13, 2018, during which Nysha Jefferies was sitting on Mr. Ruttle's jury. See State v. Aundra Hunter Jr., 2015A2330210945, 2015A2330210946, 2015A2330210948, 2015A2330210950, 2015A2330210952, Greenville County Public Index (Disposition Date 9/13/2018); Long v. Warden, Lieber Corr. Inst., No. 6:20-197-TMC-KFM, at *1 n.1 (D.S.C. Feb. 14, 2020) ("The court takes judicial notice of the records in the petitioner's criminal case in the Orangeburg County General Sessions Court…"). The trial court's failure to recognize this indisputable connection is either completely contrary to

the "obviously compelling" facts or it is the result of an error of law on the part of the court for refusing to admit the family records and/or take judicial notice of various court records and police records. Sanders, 431 S.C. at 387, 848 S.E.2d at 775.[14]

Moreover, instead of summoning Nysha Jefferies to offer evidence to establish that she was not the same Nysha that attended New Life and whose grandfather was the victim of multiple violent crimes that resulted in his death, counsel for the State instead rolled his eyes and complained about the fact the Supreme Court's opinion in Woods makes clear that "[w]here [a] juror's failure to disclose information is 'without justification,' i.e., intentional, the juror's bias will be inferred." 345 S.C. at 589, 550 S.E.2d at __ (holding that the juror's "failure to respond in the affirmative [to a reasonably comprehensible voir dire question because she did not hear the question or she failed to comprehend its application] amounted to an intentional concealment"); State v. Johnson, 350 S.C. 543, 548, 567 S.E.2d 486, __ (Ct. App. 2002) (holding concordance of name alone was sufficient to show unity of identity particularly in light of the fact that "[r]ather than offer evidence that he was not the Demarco Johnson in question, Johnson, through counsel, complained about the State's failure to honor his request to furnish him with fingerprints or a mug shot from 1997 showing that he was in fact the same individual who had pled guilty to the two offenses that the State relied upon to trigger the Two-Strikes law. Complaints of counsel do not constitute evidence."); see also R. p. 773:17-775:6.

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[14] To the extent the lower court abused its discretion by refusing to take judicial notice of information contained in court and police arrest/booking records concerning Nysha Jefferies, Janie Jefferies, and the crimes committed against Charles Rosemond, Sr. by Aundra Hunter, Jr., Appellant requests, pursuant to Rule 201(f), SCRE, for this Court to take judicial notice thereof.

In addition to the wealth of evidence provided to the trial court confirming Nysha Jefferies' identity, given the trial court's conclusion that it could not determine with "any degree of conviction" whether Nysha Jefferies who served on the jury in this case and the Nysha reflected in the evidence presented to the court were the "same person," undersigned counsel referred to the United States Social Security Administration's ("SSA") Baby Names from Social Security Card Applications National and State-Specific data that "provide[s] almost all names for researchers interested in naming trends."[15] [16] Based on review of national naming data for 1998, the year Nysha Jefferies was born, there were only fifteen (15) babies nationwide that were named "Nysha." In light of this data, the astronomical odds of there being two Nysha's of the same age in Spartanburg, let alone there being two Nysha Jefferies in Spartanburg lays bare the error of law and fact upon which the trial court's refusal to accept the obvious is based.[17]

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[15] To safeguard privacy, the SSA exclude from the naming data files certain names that would indicate, or would allow the ability to determine, names with fewer than 5 occurrences in any geographic area.

[16]Social Security Administration, Baby Names from Social Security Card Applications - National and State-Specific Data. Accessed at https://www.ssa.gov/OACT/babynames/limits.html on Sep 1, 2022 8:20:32 PM; see also Masters v. Rodgers Development Group, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984) (original appellate judicial notice is proper where "the fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability").

[17] According to SSA data, there were 80 females named Nysha in the United States that were at least 18 years old in 2018, the year during which Mr. Ruttle was tried. Based on the United States Census Bureau data, the 2018 United States population was 327,167,434. Those numbers equate to a per 100,000 incident rate of .02445231 for individuals of at least 18 years of age named "Nysha" in 2018. Applying the foregoing incident rate to South Carolina and Spartanburg County's 2018 populations of 5,084,127 and 302,195, the expected number of individuals named Nysha in all of South Carolina would be 1.2431 and in Spartanburg County would be .073893. In fact, in 2018 the names "John" (27), "Carlos" (16), "Kevin" (16), and "Legend" (16) all were more popular female names than "Nysha". See SSA Nat'l Data, supra, yob2018.txt.

Though the trial court wishes to ignore reality, given the extremely unique nature of Nysha Jefferies' first name, the identity of name between the Nysha known to and identified by Travis Mimms and reflected in the court and family records and the Nysha Jefferies who served as Juror 92 is, as a matter of law, "sufficient to show [the two] were the same person." Johnson, 350 S.C. at 548, 567 S.E.2d at __ ("The State proffered certified copies of court records showing that a Demarco Johnson pled guilty in 1997 to two [charges]. Johnson offered no evidence to suggest he was not that Demarco Johnson. Under these circumstances, the evidence was sufficient to show that Johnson and the individual previously convicted were one and the same."); id. at 548 n.17, 567 S.E.2d at __ n.17 (citing Lewis v. State, 234 Ga.App. 873, 508 S.E.2d 218, 222 (1998) for the holding that "where the defendant presented no evidence contradicting that he was the person named in the certified court documents, '[c]oncordance of name alone is some evidence of identity' and was sufficient to show the defendant and the individual previously convicted were the same person" and Murphy v. State, 399 So.2d 340, 346 (Ala.Crim.App.1981) for the holding that a "certified copy of prior conviction of individual with the same name as the defendant was sufficient as it 'raised a prima facie presumption of the sameness of the person' and '[t]here was no attempt to rebut that presumption'); see also State v. Wooten, 92 S.C. 61, 64, 75 S.E. 212 (1912) (affirming conviction and increased repeat offender sentence based on identification of defendant "Ed Wooten" through the admission of court records that disclosed the prior conviction of one "W.E. Wooten"); California v. Luckett, 1 Cal.App.3d 248, 253 (Cal. App. 1969) (holding "the name Samuel Luckett is sufficiently uncommon that, quite apart from the testimony of the witnesses, the finding of identity of person is supported by an inference based on identity of name" and that "the strength of the inference will depend in particular cases

on whether the name is common or unusual."). As previously noted, despite the State's claims that it would investigate Mr. Ruttle's Motion for New Trial and that it expected to issue a number of subpoenas, the State offered no evidence to rebut the presumption of the unity of identity as to Nysha Jefferies created by the concordance of names.

Moreover, the evidence presented to the trial court to confirm Nysha Jefferies identity consisted not only of Nysha Jefferies "very unusual name" but also of additional corroborating information including her date of birth and addresses in Spartanburg. Hefferman v. United States, 50 F.2d 554, 557 (3rd Cir. 1931) (holding that evidence of the "same very unusual name" with the "same address" in the "same city" was sufficient to establish identity).[18] Interestingly, during voir dire the trial court, while asking the potential jurors to reveal any possible connection or knowledge of the parties, their families and counsels, or the witnesses, told the potential jurors:

> Now, some of those people are not in the courtroom. But if any juror knows someone that has a name that I called out, if you will let me know of that fact, then we'll try to narrow down the identification of that person so that you can determine whether or not the person that's name was called is the same person that you happen to know with that same name.

R. p. 122:19-25. Given this language, it appears that even the trial judge himself acknowledges the principle that in the absence of an individual's physical presence, the court and the jurors can use the combination of a "same name" and additional information to "narrow down the

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[18] Even where the burden rests with the State to prove unity of identity beyond a reasonable doubt to secure a conviction, courts throughout the county have consistently held that the combination of name and additional identifying information is sufficient to establish identity beyond a reasonable doubt. See, e.g., Idaho v. Lawyer, 244 P.3d 1256, 1260 (Idaho App. 2010) (compiling cases and holding that "a combination of personal and nonpersonally identifying evidence, when considered together, may at some point be sufficient to establish identity beyond a reasonable doubt. To hold otherwise is to require absolute certainty which the reasonable doubt standard does not require.").

identification" to "determine whether or not the person that's name was called is the same person…with that same name." Id. In fact, in the ensuing discussion with Juror No. 1 regarding knowledge of a "Jacob Quinn," the court used city of residence, approximate age, and lack of criminal background to apparently conclude that there was a sufficient unity of identity between the Jacob Quinn witness and the Jacob Quinn known to Juror No. 1 to excuse Juror No. 1 from service in Mr. Ruttle's trial. R. pp. 123:6-125:8. The refusal to allow the same types of evidence to establish the unity of identity as to Nysha Jefferies is nothing short of a results oriented analysis that is controlled by an error of law.

In light of the uncontested documentary and testamentary evidence proffered to the trial court establishing that Nysha Jefferies was the same Nysha that attended New Life and whose grandfather was tragically died as a result of being a victim of a burglary, kidnapping, and armed robbery, the court's refusal to acknowledge that Nysha and Nysha Jefferies, and Nysha Jefferies are the same person is neither supported by the facts or the law, and as such constitutes an abuse of discretion.

II. The circuit court abused its discretion by denying Appellant's Motion for New Trial due to juror concealment where the juror in question, Nysha Jefferies, intentionally concealed clearly responsive information during voir dire that would have been material to Appellant's intelligent use of peremptory challenges or could have supported a for cause challenge.

It is axiomatic that for voir dire to function properly as an essential means of protecting the right to a fair trial by an impartial jury, "[f]ull knowledge of all relevant and material matters that might bear on the possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily." Long, 342 S.C. at 573, 538 S.E.2d at ___ (quoting 47 Am. Jur. 2d Jury § 191 (1995)) (emphasis added). "[T]rial

judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information." Coaxum, 410 S.C. at 327, 764 S.E.2d at 245 (citation omitted; change in original); see also State v. Gulledge, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982) (holding "[w]here the trial judge grants counsel's request that the judge ask a particular question on voir dire, counsel is entitled to a truthful answer to the question") (emphasis added); Coaxum, 410 S.C. at 327, 764 S.E. 2d at 245 ("Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge.").

Necessarily, the "voir dire oath mandates that a prospective juror tell the entire truth. A juror's lack of honesty and candor during voir dire is a violation of his oath, as well as a barrier to a party's efforts in identifying potential jurors who harbor a bias" Long, 342 S.C. at 578, 538 S.E.2d at __ ("Juror concealment of material facts during voir dire is anathema to justice.") (emphasis added); see also R. pp. 484:8-9 (reflecting admission by counsel for the State that "This [the oath taken by the jurors] is a serious oath, a serious matter."). Where jurors fail to respond to particular voir dire questions or provide false or incomplete responses, the parties are wrongfully denied the "intelligent[] exercise [of] their right of peremptory challenge." Woods, 345 S.C. at 587, 550 S.E.2d at __ (quoting Gulledge, 277 S.C. at 370, 287 S.E.2d at 490); Long, 342 S.C. at 573, 538 S.E.2d at __ ("It is the duty of every potential juror to make true and full disclosures during voir dire because counsel is entitled to rely on the answers in determining whether to exercise a peremptory strike…A juror's lack of honesty and candor during voir dire is a violation of his oath.") (emphasis added); State v. McCoy, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013) (citing State v. Kelly, 331 S.C. 132, 145-46, 502 S.E.2d 99, 106-07 (1998) for the

recognition "that trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information") (emphasis added). Consequently, "[j]uror concealment of material facts during voir dire is anathema to justice." Long, 342 S.C. at 578, 538 S.E.2d at __. Accordingly, in the event of juror misconduct arising from a juror's concealment of information during voir dire, a new trial is required "when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Coaxum, 410 S.C. at 328, 764 S.E.2d at 246 (holding that in the face of a juror's intentional concealment the moving party "need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent").[19]

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[19] Though the Supreme Court has noted that "[w]hether a juror's failure to respond is intentional is a fact intensive determination that must be made on a case-by-case basis," Sparkman, 358 S.C. at 496, 596 S.E.2d at 377, the "inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred." Rowell, 436 S.C. at 67, 870 S.E.2d at 181. Thus, where there exists "no reasonable inability to comprehend the information solicited by the question" and "the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable," the testimony of the juror is likely unnecessary or of no consequence. Gray, 298 S.C. at 288, 379 S.E.2d at 896 (reversing the trial court and granting a new trial on the grounds of juror concealment because the "trial court erroneously relied on [the juror accused of concealment's] announcement that she tried her best to be impartial and fair. The qualification of a juror is not to be determined alone by the fact that she declares her fairness and impartiality."); Woods, 345 S.C. at 589, 550 S.E.2d at __ (affirming grant of new trial after rejecting juror's testimony regarding reasons for nondisclosure during voir dire because "not hear[ing]" the question, "not realiz[ing] it applied to her," or "fail[ing] to comprehend its application to her" "cannot excuse her failure to respond" where "[t]he question was reasonably comprehensible [and] [i]ts application to Juror B was clear"); Brown v. S. H. Kress & Co, 170 S.C. 178, 170 S.E. 142 (1933) ("It is quite clear that the mere fact that a given juror swears that he is not sensible of any bias would not be sufficient to qualify him to sit as a juror in a particular case; for, if that were the rule, then a close friend, or even a near relative of the accused, might, by simply swearing that he was not sensible of any bias, force himself upon the jury.") (quoting State v. Prater, 26 S.C. 198, 2 S.E. 108, 109 (1887)); see also Rowell, 436 S.C. at 67, 870 S.E.2d at 181 ("noting 'a trial court is not obligated to take juror testimony when the court determines it can rule' on the misconduct issue without it") (citation omitted).

As dictated by the South Carolina Supreme Court in Woods, "the first inquiry in the juror disqualification analysis is whether the juror intentionally concealed the information during voir dire."[20] 345 S.C. at 587, 550 S.E.2d at 284. "[I]ntentional 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." Id. at 588, 589, 550 S.E.2d at 284 (holding that a juror's failure to disclose information is "intentional" where it is "without justification"). Despite the trial court's seemingly results-oriented analysis of Nysha Jefferies' concealment of responsive and material information during voir dire, the trial judge cannot escape the straightforward and unambiguous clarity of his own words. The ability for average jurors to reasonably comprehend the inquiries in question is laudably and directly attributable to the trial judge's clear and repeated point of utilizing simple and commonplace language, concepts, and sentence structure that is readily accessible and understood by the common man.

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[20] As confirmed by the Supreme Court in Woods and its progeny, "[w]hen a juror conceals information inquired into during voir dire, a new trial is required only when the court finds [1)] the juror intentionally concealed the information, and [2)] that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." 345 S.C. at 587, 550 S.E.2d at 284 (emphasis added). Given that the Woods test controls in situations of intentional juror concealment, to the extent the trial court's denial of a new trial was based a requirement that Mr. Ruttle establish the fact of juror disqualification, such was an error of law. Under Woods, in the face of intentional concealment, satisfying the general three (3) part test for juror disqualification is not an absolute requirement. See Woods, 345 S.C. at 590, 550 S.E.2d at 285 ("No motion to disqualify Juror B was made, thus there is no discretionary ruling by the trial judge for this [c]ourt to review. However, we need not decide whether [Juror B's] relationship with the solicitor's office would support a challenge for cause because we find her failure to disclose the relationship prevented the respondent's intelligent exercise of his peremptory challenges.").

In addition the court's generally inquiries for potential jurors to disclose if they had "seen somewhere," "recognized," or had "any connection," including any through church, to anyone involved in the trial, the court also asked the potential jurors two clear, unambiguous, and specific questions relevant to this appeal. First the court asked the potential jurors "[d]o you… attend or have you ever attended the New Life Deliverance Worship Center…." R. p. 131:7-10. Despite the court's mental gymnastics to engineer ambiguity where none exists, it is hard to contemplate a more simple, direct, and clear question. As defined by Merriam-Webster, "attend" means "to be present at: to go to."[21] Thus, the question asked by the court unambiguously sought a response from any juror who goes to New Life or who has "ever" gone to New Life. The question, as asked, contains no qualification or limitation concerning the regularity of attendance or the purpose of attendance. Although the trial court reads into "attend" the requirement that attendance be both regular and limited to "normal religious services," these efforts to create ambiguity where none exists are belied by inclusion of the word "ever," which means "at any time" or "in any way."[22] Thus, the question is not whether any juror "regularly attended [New Life] as a worshiper at normal religious services," but rather whether any juror, at any time, in any way went to New Life. Moreover the court's conclusion that this question would only be intended to generate a response from a juror who "regularly attended" New Life as a worshiper at "normal" religious services, this interpretation is neither consistent with the the court's direction to potential jurors to reveal "any connection" they might have through church,

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[21]Merriam-Webster.com Dictionary, "Attend," Merriam-Webster, https://www.merriam-webster.com/dictionary/attend. Accessed 29 Aug. 2022.

[22]Merriam-Webster.com Dictionary, "Ever," Merriam-Webster, https://www.merriam-webster.com/dictionary/ever. Accessed 29 Aug. 2022.

nor the fact that a potential juror who went to New Life once, for whatever reason, and decided they did not like the church and were never going back, could just as easily, if not more so, be biased against those associated with the church. Furthermore, in addition to the trial court's rewriting of the New Life question to inject ambiguity, the trial court also abuses its discretion to the extent its denial of a new trial is based on the factual conclusion that Nysha Jefferies' attendance at New Life was limited to "one or more event held at [New Life] for the entertainment of groups of community youth at various times over some period of time where the evidence shows that Hip Hop music, dancing, and food was provided for entertainment." R. p. 12. Despite the fact that the trial court's foregoing factual conclusion would nonetheless reasonably be expected to illicit a response from a juror to the actual question asked regarding whether any juror at any time, in any way went to New Life, the court's limiting of Nysha's attendance at New Life to "one or more event[s]" completely ignored the uncontroverted testimony that over the course of 2012 and 2013 Nysha's attendance was "very regular and consistent" at both Friday night youth group meetings and weekly worship services. R. p.783; R. pp.719:6-720:2; 738:23-739:24. Thus, even applying the limited question the court claims it thought it was asking with regard only to regular attendance as a "worshiper at normal religious services," the record reveals that Nysha should nonetheless have been reasonably expected to disclose this information during voir dire such that the court's conclusion to the contrary constituted an abuse of discretion. R. p. 11

Despite the clarity of the question that was actually asked during voir dire concerning New Life, and the fact that Nysha regularly and consistently attended "worship services and Friday night youth group meetings" at New Life during 2012 and 2013 before becoming a less

frequent attender in 2014 and then stopping thereafter, Nysha Jefferies remained silent and did not disclose this information during voir dire. R. 781-83; R. pp. 719:6-720:2.

Similarly, the second question unambiguously sought a response from any juror who had a family member who had been the victim of any type of criminal offense that might be characterized or described as a violent offense, which the court described as including the crimes of armed robbery and burglary. "Indubitably, [Mr. Ruttle] [was] seeking to purge, or at least identify, those persons who" had any family member who had been the victim of a violent crime and thus might have a bias in favor of the prosecution. Long, 342 S.C. at 571, 538 S.E.2d at __. Any claim that the violent crime question could not reasonably be understood and expected to illicit a response from Nysha Jefferies is completely undercut by the fact that six (6) other potential jurors responded, three (3) of whom were excused from service, including one who was excused on the basis that the juror's nephew was murdered in a shooting. R. pp. 132:7-133:20. Despite the fact that the court specifically identified two (2) out of the three (3) violent crimes of which Nysha Jefferies' grandfather had been a victim in 2015 by name, i.e., armed robbery and burglary, Nysha Jefferies failed to disclose this clearly responsive and material information.[23]

The court's denial of a new trial is further controlled by an error of law because the court failed to recognize that "intentional" is a term of art as it applies to the analysis of juror concealment established in Woods and, accordingly, incorrectly analyzed the question of

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[23] Although the question regarding violent crime victims was discussed at length during the hearing on the Motion for New Trial and counsel, with the permission of the court, submitted substantial documentary evidence by way of family and court records establishing that Nysha Jefferies was the granddaughter of Charles Rosemond, Sr., the trial court also failed to find this question and Nysha Jefferies' failure to respond thereto during voir dire sufficient to require that Mr. Ruttle be granted a new trial. R.pp. 661:4-662:4; 668:3-15; 757:19-765:14.

concealment as whether Nysha Jefferies subjectively "knowingly" concealed information during voir dire. Woods, 345 S.C. at 590, 550 S.E.2d at ___ ("In Kelly, we stated that the first inquiry in the juror disqualification analysis is whether the juror intentionally concealed the information during voir dire. However, in Kelly we did not precisely define what constitutes an intentional concealment."); see also R. pp. 12–13. Once established that the specific questions presented to the jurors on voir dire were reasonably comprehensible to the average juror, the inquiry into whether Nysha Jefferies' non-disclosures were intentional, i.e., "without justification," turns not to whether Nysha Jefferies knowingly failed to disclose information, but rather whether "the subject of the inquiry [was] of such significance that the juror's failure to respond [was] unreasonable." Woods, 345 S.C. at 590, 550 S.E.2d at ___ (holding that a juror's excuses that "she did not hear," "did not realize it applied to her" and "failed to understand [the voir dire questions'] application to her" "cannot excuse her failure to respond" and that "[b]ecause Juror B failed to respond to questions on voir dire which clearly applied to her" the defendant was entitled to a new trial) (emphasis added). Instead of analyzing the significance of 1) Nysha Jefferies' grandfather being the victim of three (3) violent crimes that resulted in his death in 2015 and 2) regularly attending worship services and youth group meetings at a church over the course of several years shortly before being called as a juror in this case, the court incorrectly focused on whether Mr. Ruttle or his father ever met Nysha Jefferies and whether the information Nysha Jefferies failed to disclose was "central or significant to the case." R. p. 12. The significance analysis is not about the importance of the information to the case at hand, but rather about whether the subject of inquiry was memorable, i.e., significant, enough that it would be unreasonable for a juror to allegedly have forgotten the experience. Id. at 588, 550 S.E.2d at

__ (quoting Missouri Supreme Court's formulation of the intentional concealment analysis in Williams By & Through Wilford v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. 1987), which states the significance prong of the analysis as whether "the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable"); cf. Sparkman, 358 S.C. at 498, 596 S.E.2d at __ ("Unintentional concealment, on the other hand, occurs 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.") (citation omitted).

With regard to the significance of having ever attended New Life, Nysha's attendance at worship services and weekly youth group meetings was not a one time occurrence that might excuse a juror's forgetfulness. R. pp. 781-83; R. pp. 719:6-720:2. Rather, Nysha regularly and consistently attended New Life over a several year period during 2012 and 2013 before her attendance became less frequent and consistent during 2014 and ultimately stopping thereafter. Gray, 298 S.C. 286, 379 S.E.2d at 895 (granting new trial due to juror failing to disclose on voir dire examination that she "had been treated by the respondent on at least one occasion") (emphasis added); Woods, 345 S.C. at 589, 550 S.E.2d at __ (holding that where "Juror B worked as a volunteer victims' advocate for a period of three years…[t]here [was] no question she remembered the experience"). Nysha not only attended services and youth group meetings at New Life, she actively participated therein as can be seen in the video that was marked as Exhibit No. 1 in which Nysha is sitting in the front pew before going up on stage to dance. Moreover, given the important role church plays in the lives of those who choose to participate in organized religion, and particularly young people who are in need of a safe and positive environment in which to make friends, participate in religious instruction, and have fun, it would

be unreasonable to conclude that one could forget the experience of regularly attending worship services and youth group meetings over the course of a several year period. R. pp. 713:19-714:19. The objective unreasonableness of any purported forgetfulness that might have been the basis of a nondisclosure is further heightened by the fact that Nysha was still attending New Life into 2014, only, at most, four years prior to the trial of this case.

Similarly, it strains credulity to claim that one's grandfather being the victim of an armed robbery, burglary, and kidnapping that resulted in his death would ever constitute an insignificant experience so as to justify a juror's purported forgetfulness thereof. Further confirming the "significance" of Nysha Jefferies' grandfather being the victim of a violent crime, the armed robbery, burglary, and kidnapping of Nysha's grandfather occurred on December 10, 2015, less than two (2) years before the date of Mr. Ruttle's trial. Moreover, although Nysha's grandfather died on December 10, 2015, coincidentally the individual that committed the crimes against her grandfather was actually being tried in Greenville County General Sessions Court during the same three days during which Nysha Jefferies sat on Mr. Ruttle's jury. With the trial of her grandfather ongoing at the same time as Mr. Ruttle's trial, it is absurd to suggest that Nysha could possibly have forgotten that her grandfather was the victim of a violent crime.

Given both the recency of the subjects in question and the fundamental and lasting impact church and the loss of a family member to violent crime have in people's lives, it is patently and objectively unreasonable that Nysha Jefferies failed to disclose 1) that she attended New Life, and 2) that her grandfather was recently the victim of an armed robbery, burglary, and kidnapping that ultimately resulted in his death. Woods, 345 S.C. at 589-90, 550 S.E.2d at 285 (holding juror's failure to disclose a three (3) year relationship with the solicitor's office in

response to a voir dire question that "unambiguously sought a response from any juror having a business association with any of the attorneys trying the case" constituted intentional concealment of information on voir dire).

Thus, given that the questions asked by the trial judge on voir dire were reasonably comprehensible and the subjects thereof were of such significance that Nysha Jefferies' failure to respond was unreasonable, her non-disclosure constituted an intentional concealment, regardless of any subjective explanation that may or may not have existed, and dictated that the court determine "if the information concealed would have supported a challenge for cause or would have been a material factor in the use of [Devin's] peremptory challenges." Woods, 345 S.C. at 589-90, 550 S.E.2d at 285; Coaxum, 410 S.C. at 328, 764 S.E.2d at 245-46 ("In the face of a juror's intentional nondisclosure of pertinent information during voir dire…the party need only demonstrate the error of the trial court's decision [to deny a new trial] by proving the concealment was, in fact, intentional; however, the party need not show prejudice, as the bias against the party is inferred, and prejudice from the moving party's inability to strike the juror is apparent."). Unfortunately, "[b]ecause [Nysha Jefferies] did not respond to any of the questions asked during voir dire, any potential biases she might have had toward the State were not discovered until after the trial," and, accordingly, the trial court and the parties did not have an opportunity to examine Nysha Jefferies to determine if having attended New Life or her grandfather being the victim of a violent crime would have supported a for cause challenge.[24] Id.

[24] Although the court and the parties were denied the opportunity to examine any bias that could have resulted in a for cause strike, the trial court did excuse another juror for cause as a result of the juror's nephew being murdered in a shooting, which indicates that Nysha Jefferies would likely have been excused for cause had she properly disclosed the fact that her grandfather was the victim of three (3) violent crimes that resulted in his death.

at 590, 550 S.E.2d at 285; Coaxum, 410 S.C. at 328, 764 S.E2d at 245 ("In the face of a juror's intentional nondisclosure of pertinent information during voir dire, 'it may be inferred, nothing to the contrary appearing, that the juror is not impartial.'") (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284).

Regardless of the inability to determine if Nysha Jefferies was subject to a for cause challenge, Mr. Ruttle's trial counsel, Mr. Richard Vieth, stated by way of Affidavit and live testimony that had Nysha Jefferies not intentionally concealed that she previously attended New Life, but no longer did so, and that her grandfather had been the victim of violent crimes that resulted in his death, Mr. Vieth would have requested further inquiry into those matters, and that the information obtained therefrom "would have been a material factor in the use of [Mr. Ruttle's] peremptory challenges."[25] Woods, 345 S.C. at 587-88, 550 S.E.2d at 284; R. pp. 779-80; R. pp. 658:9-659:20; 661:4-662:4; 668:3-15. It is reasonable to conclude that the fact that Nysha Jefferies attended New Life for several years and then stopped attending New Life would be material, i.e., significant, to the intelligent use of Mr. Ruttle's use of peremptory challenges. Similarly, in a criminal prosecution involving a claim of self-defense to a shooting, it goes without saying that the fact that a potential juror's family member was the victim of violent crimes that resulted in the family member dying as a result of a gunshot wound would be

[25] When Juror 92's name was selected from the venire, respondent still had seven (7) peremptory challenges remaining. As further evidence of the materiality of the violent crime victim information, Mr. Vieth used one of Mr. Ruttle's peremptory challenges to strike Juror No. 125 as the first alternate. Juror 125 was one of the six (6) potential jurors who responded to the violent crime question and she disclosed that a "family member" was the victim of a "lewd act on a minor" "20 years ago." R. pp. 135:23-136:20; 152:24-153:4.

extremely material to the intelligent use of peremptory challenges.[26] Woods, ,345 S.C. at 590, 550 S.E.2d at 285 (holding it was "reasonable to conclude" that a information about which a juror was specifically asked during voir dire "would be a material factor" in a criminal defendant's use of peremptory challenges and that failure to disclose that relationship "prevented the [defendant's] intelligent exercise of his peremptory challenges"); Gray, 298 S.C. at 288, 379 S.E.2d at 896 (holding "it was error to deny…a new trial because these facts could have supported a challenge for cause or could have been a material factor in the use of the [party's] peremptory challenges"). Moreover, Nysha Jefferies' unjustified non-disclosure not only denied Mr. Ruttle the substance of her responses to the voir dire that was asked and the follow up questions that would have been asked, but also denied Mr. Ruttle and his counsel the opportunity and ability to examine Nysha Jefferies demeanor, facial expressions, and non-verbal communication, all of which are critically important information, i.e., significant, to both picking a jury and the use of preemptory challenges. Consequently, "[b]ecause [Nysha] failed to respond to questions on voir dire which clearly applied to her, and because her concealment deprived [Mr. Ruttle] of information material to his intelligent use of peremptory challenges," Mr. Ruttle is entitled to a new trial. Woods, 345 S.C. at 590-91, 550 S.E.2d at 285; Coaxum, 410 S.C. at 328, 764 S.E.2d at 246 (holding that in the face of a juror's intentional concealment the moving

[26] The materiality, i.e., significance, of Juror 92's regular attendance at New Life services and youth group to Devin's use of his peremptory challenges is further heightened by the fact that in 2014 Juror 92 began attending New Life services and youth group more infrequently and then ultimately stopped attending New Life services and youth group altogether. The reasons Juror 92 began pulling away from New Life and ultimately severed her relationship with the Church would certainly be material to Devin's use of his peremptory challenges or possibly a for cause challenge.

party "need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent").

Thus, given that Nysha Jefferies "failed to respond to questions on voir dire which clearly applied to her, and because her concealment deprived [Mr. Ruttle] of information material to his intelligent use of peremptory challenges," it was an abuse of discretion for the trial court to deny Mr. Ruttle a new trial.

III. The circuit court's denial of immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 et. seq. (the "Act" or "PPPA"), constituted an abuse of discretion because the court imposed an improperly elevated burden of proof upon Appellant to establish immunity.

As readily apparent on the face of the September 5, 2018 Order of the trial court denying Mr. Ruttle's Motion for Immunity pursuant to the PPPA, instead of merely requiring Mr. Ruttle to establish his entitlement to immunity by a preponderance of the evidence, the court, while giving lip service to the correct preponderance standard, misapplied the standard in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) to deny Mr. Ruttle immunity because his "claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." R. p. 3; State v. Cervantes-Pavon, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019) ("Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity under the Act, employing a preponderance of the evidence standard."). Further confirming that the denial of immunity was controlled by the court's application of an incorrect legal standard is the court's butchered and incomplete "quotation" of Terwilliger v. Marion, 222 S.C. 185, 188, 72 S.E.2d 165, 155 (1952) for the proposition that "[i]f there is anything tending to create distrust in his truthfulness, the question must be left to the

jury."[27] R. p. 3. Similar to the procedural stance in Curry, it becomes clear from the accurate quotation of Terwilliger that the case involved the denial of a directed verdict not a pretrial immunity hearing governed by a preponderance standard. Unfortunately, in addition to Terwilliger being a directed verdict case, it was also a civil property dispute, not a criminal prosecution, which appears from the court's references to "reasonable inferences" to have resulted in the court incorrectly utilizing the civil directed verdict standard and not the standard applied to criminal prosecutions. Compare Steinke v. S.C. Dep't of Labor, Licensing & Reg., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) ("In ruling on motions for directed verdict or [JNOV], the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."), with State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) ("A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'") (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)); R. p.3. The application of the directed verdict standard, whether civil or criminal, to the request for immunity resulted in Mr. Ruttle improperly being required to establish his claim of self-defense beyond any "question" or

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[27] The quotation utilized by the court from Terwilliger properly reads:

> [T]here still remains the question of its inherent probability and the credibility of the witness or his interest in the result. To justify a Court in instructing a jury that a witness has told the truth, and in directing a verdict based on the truthfulness of his evidence, there must be nothing in the circumstances or surroundings tending to impeach the witness or to throw discredit on his statements. If there is anything tending to create distrust in his truthfulness, the question must be left to the jury.

Terwilliger, 222 S.C. at 188, 72 S.E.2d at 155.

"anything tending to create distrust in his truthfulness," a standard that certainly exceeds the correct preponderance of the evidence standard. Id. The misapplication of Curry and the language utilized therein has been sufficiently widespread that it lead the Supreme Court to recently explain that:

> In Curry, we explained the accused's claim of self-defense presented a quintessential jury question, which did not warrant immunity from prosecution, and therefore, we held the claim was properly submitted to the jury, with the claim of self-defense having been fully presented at that stage of trial. This excerpt from Curry has been the source of much confusion for the bench and bar. We take this opportunity to emphasize that aspect of Curry was related to its specific and unique procedural posture at trial—a motion for directed verdict—and was not intended to allow circuit courts to automatically deny immunity in cases with conflicting evidence.

State v. Andrews, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019) (quotations and citation omitted). From the Supreme Court's clear statement of the applicable standard in Andrews and Cervantes-Pavon, it is clear that the trial court's misapplication of directed verdict standards to Mr. Ruttle's request for immunity was a clear error of law that constituted an abuse of discretion.

IV. The circuit court's denial of immunity under the PPPA was controlled by an error of law because the court misinterpreted the "without fault" element of self-defense by concluding that an individual is debarred from exercising his fundamental right of self-defense simply by doing an action that affords an opportunity for conflict.

The trial court's interpretation of the first element of self-defense, that the defendant be "without fault," was controlled by an error of law in that the court failed to recognize that for an act to debar an individual from his fundamental right to self-defense as guaranteed by the Second Amendment to the United States Constitution, the defendant's conduct must be "reasonably calculated to provoke [the] difficulty", such that it is the "proximate cause of the incident." State v. Glenn, 429 S.C. 108, 120, 838 S.E.2d 491, 497 (2019); see also N.Y. State Rifle & Pistol Ass'n

v. Bruen, 597 U.S. __ at 25 (2022) ("As we stated in Heller and repeated in McDonald, 'individual self-defense is 'the central component' of the Second Amendment right.' McDonald, 561 U.S., at 767 (quoting Heller, 554 U.S., at 599); see also id., at 628 ('the inherent right of self-defense has been central to the Second Amendment right')"); State v. Goodson, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1993) (holding the "burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide."); State v. Douglas, 411 S.C. 307, 321 n.8, 768 S.E.2d 232, 240 n.8 (Ct. App. 2014) (affirming grant of immunity under subsection 440(C) and trial court's "implicit finding" that respondent was without fault despite respondent having prior violent experience with decedent whereby he "should have known that sharing almost two full bottles of vodka with [decedent] was a bad idea" because "[o]ne who merely does an action [that] affords an opportunity for conflict is not thereby precluded from claiming self-defense…Before an act may cause forfeiture of the fundamental right of self-defense it must be willingly and knowingly calculated to lead to conflict") (emphasis in original; citation omitted). Although Mr. Ruttle possibly "should have known" that trying to go speak with the Decedent who had ongoing issues with Mr. Ruttle's friend, Lorenzo, "was a bad idea," the fact is that "fault" or "provocation" of that nature is not sufficient to denies one's fundamental right of self-defense. State v. Jacobs, 78 S.C. 29, 4 S.E. 799, 800 n.1 (1888) (affirming trial court's statement of the law with regard to the first element of self-defense: "A defendant cannot invoke the plea of self-defense if he provoked or brought on the difficulty, or is not reasonably free from fault. The acts provoking the combat must be clearly calculated to have such effect."). Thus, applying the proper interpretation of the

"without fault" element of self-defense, there is no evidence to support a conclusion that Mr. Ruttle clearly calculated to provoke combat with the Decedent.

V. The circuit court's denial of immunity under the PPPA constituted an abuse of discretion because it was grounded in factual conclusions, including that Appellant "confronted" decedent with a gun and that decedent knew anything about the presence of individuals other than Appellant, that are without evidentiary support.

"[W]hile the trial court's pretrial immunity ruling and the jury's verdict on a claim of self-defense may apply the same statutory justification standard, the court's ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different." Cervantes-Pavon, 426 S.C. at 452-53, 827 S.E.2d at 569 (citation omitted). Limiting review of the record regarding the immunity determination to the evidence that was presented during the immunity hearing, a number of the key elements upon which the trial court bases its "reasonable inferences" and ultimately its denial are without evidentiary support in the record. Specifically, the trial judge "reasonably infers" that the Decedent was "minding his own business" when Mr. Ruttle "confronted" the decedent "with a gun." R. p. 3. However, there is simply no evidence that Mr. Ruttle "confronted" the Decedent or initiated the difficulty. In fact, directly contrary to the court's conclusion that Mr. Ruttle "confronted" the Decedent "with a gun," all testimony and evidence in the record supported that Mr. Ruttle had the gun concealed in his waistband under his hoodie and that the gun was not known to Decedent until Mr. Ruttle armed himself in self-defense in response to the Decedent pulling a knife and charging in a threatening manner.

Similarly, the court speculates that Decedent "believed he was in danger of losing his life" based on the "fact that there [were] three men, two of whom were armed with firearms, and

the man approaching him with a gun in his waistband was in the company of [Lorenzo] less than a month prior when [Lorenzo] threatened [Decedent] while brandishing a gun."[28] R. p. 3. With the record establishing that the gun was concealed under Mr. Ruttle's hoodie so as to ensure that its presence remained unknown to Decedent and that Mr. Ruttle was approaching the Decedent by himself to speak to Decedent in a non-threatening manner with his hands in plain sight, the "reasonable inferences" reached by the trial court are merely rank speculation that is unsupported by the facts in the record. State v. Sims, 426 S.C. 115, 144, 825 S.E.2d 731, 746 (Ct. App. 2019) (holding "inferences must be grounded in fact and not mere speculation"); see State v. Cain, 419 S.C. 24, 30, 795 S.E.2d 846, 849 (2017) ("The State may not obtain a conviction when its proof as to any one element requires the jury to speculate or guess whether the defendant engaged in the [criminalized conduct]."); State v. Palmer, 413 S.C. 410, 422–23, 776 S.E.2d 558, 564 (2015) (affirming the reversal of a petitioner's conviction where there was "no evidence other than rank speculation that such an incident occurred"); see also State v. Bodie, 33 S.C. 117, 11 S.E. 624, 630 (1890) (holding that if the finder of fact has a reasonable doubt as to which way is the preponderance of evidence as to a plea of self-defense, she must give the defendant the benefit thereof). Given the fact that key factual findings of the trial court's denial of immunity to Mr.

[28] Regarding the court's statement that there were three men, this incorrect statement is apparently based on the court's incorrect belief that Lorenzo was driving Hunter's truck and following Mr. Ruttle when he stopped Hunter's truck and both Lorenzo and Hunter jumped out of the truck. The testimony presented at the immunity hearing establishes that Hunter was driving his truck and Lorenzo was riding in his truck as a passenger when Lorenzo attempted to jump out of Hunter's moving truck. To avoid Lorenzo injuring himself, Hunter slowed down to let Lorenzo out of the truck at which time Hunter left the scene in his truck. Moreover, there is also no evidence that Lorenzo, after getting in Mr. Ruttle's car, exited the car, approached the Decedent, or was even seen by the Decedent. R. pp. 31:10-20; 46:9-17; 64:17-65:7; 66:7-67:16.

Ruttle are not just unsupported by the record, but rather are directly contrary to it, the court's September 5, 2018 Order constituted an abuse of discretion.

VI. In light of the new rule enunciated by the Supreme Court in State v. Burdette, 427 S.C. 490, 501–03, 832 S.E.2d 575, 582–83 (2019) and State v. Smith, 430 S.C. 226, 233-34, 845 S.E.2d 495, 498-99 (2020), the trial court committed reversible error by giving an implied malice charge where evidence had been presented that the Appellant acted in self-defense.

Throughout the course of the trial, in opening statements and again in closing arguments, counsel for Mr. Ruttle conceded that Mr. Ruttle concealed a handgun on his person without a concealed weapons permit, but denied the murder charge and asserted a claim of self-defense. R. p. 173:5-10; pp. 510:19-511:4; pp. 514:20-515:7; p. 517:16-20. "In doing so, [Mr. Ruttle] implicitly acknowledged he had an express intent to kill the [Decedent] at whom he was shooting, but asserted his actions were justified given his belief that he faced an imminent threat to his own life." State v. Smith, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020). The State ultimately conceded that Mr. Ruttle presented evidence that he acted in self-defense, and that therefore a jury charge to that effect was appropriate for the judge to give. Id.; see R. p. 455:13-23. "The law at the time of trial precluded an implied malice jury charge (based on the use of a deadly weapon) when a viable self-defense claim existed." Smith, 430 S.C. at 229, 845 S.E.2d at 496. Accordingly, the trial court did not specifically charge the jury that malice could be inferred from Mr. Ruttle's use of a deadly weapon, however, the court nonetheless proceeded, without discussion with the parties or request by the State, to give the jury an implied malice charge despite the presentation of evidence that Mr. Ruttle acted in self-defense. State v. Burdette, 427 S.C. 490, 501–03, 832 S.E.2d 575, 582–83 (2019); R. pp. 537:15-538:15. Expanding upon the inferred malice prohibition in Burdette, the Supreme Court subsequently

held in Smith that "any implied malice charge cannot be given if there is also evidence presented that the defendant acted in self-defense." 430 S.C. at 229 n.2, 845 S.E.2d at 496 n.2 (emphasis in original). The trial court's error in charging implied malice was further compounded by the closing argument of the State that Mr. Ruttle was illegally armed with a firearm and that "based on these circumstances and the shooting and the number of shots that you can infer malice…If you carry a gun somewhere to hurt somebody, I submit you're going there with malice." R. p. 482:3-4, pp. 483:22-484:2. Between the erroneous inferred malice charge and the argument the State made regarding Mr. Ruttle's use of a deadly weapon, the court's charge unjustifiably undermined Mr. Ruttle's claim of self-defense by making it all but impossible for Mr. Ruttle to satisfy the jury that he was without fault in bringing on the difficulty that necessitated his exercise of self-defense. Given the fundamental nature of Mr. Ruttle's right to self-defense, which is clearly protected by the Second Amendment to the United States Constitution, the undermining of that right by an erroneous jury charge cannot be said to have been a harmless error. Smith, 430 S.C. at 233-34, 845 S.E.2d at 498-99 ("For a constitutional error of this magnitude, 'We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt.' [State v.]Belcher, 385 S.C. [597,] 611, 685 S.E.2d [802,] 809 [(2009)] ('[W]e are firmly convinced that instructing a jury that malice may be inferred by the use of a deadly weapon is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide. A jury charge is no place for purposeful ambiguity.")); Bruen, 597 U.S. __ at 25 ("[I]ndividual self-defense is the central component of the Second Amendment right.") (internal quotations and citation omitted); Dist. of Columbia v.

Heller, 554 U.S. 570, 628 (2008)("[T]he inherent right of self-defense has been central to the Second Amendment right") (internal quotations omitted).[29]

CONCLUSION

Appellant Devin Ruttle respectfully requests that this Court REVERSE the September 5, 2018 Order of the lower court denying Appellant's Motion for Immunity pursuant to S.C. Code Ann. § 16-11-410 et seq., GRANT Appellant immunity from prosecution in connection with the events of May 5, 2017, and VACATE Appellant's convictions for Murder and Unlawful Carrying of Handgun. In the alternative, Appellant request that this Court GRANT Appellant a new immunity hearing and/or a new trial on the charges of Murder and Unlawful Carrying of Handgun.

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[29] It is Mr. Ruttle's position that this issue is appropriate for review by this Court pursuant to the Supreme Court's citation of Griffith v. Kentucky, 479 U.S. 314, 328,(1987) for the holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases...pending on direct review or not yet final"). Burdette, 427 S.C. at 505, 832 S.E.2d at 583. Although the Burdette Court included the language "so long as the issue is preserved," in noting the retroactivity of its newly announced rule, review of the United States Supreme Court's Griffith Opinion makes clear that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith, 479 U.S. at 323, 328 ("If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all…In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.") (emphasis added; citation omitted).

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2019—001570

State of South Carolina……Respondent,

vs.

Devin Zachary Elijah Ruttle……Appellant.

CERTIFICATE OF COUNSEL

I certify that Appellant's Final Brief complies with Rule 211(b).

Respectfully submitted,

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