STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Lancaster County

Brooks P Goldsmith Circuit Court Judge

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THE STATE

RESPONDENT,

V

JAMES J CURRY,

APPELLANT

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1 Did the trial court err in denying appellant's directed verdict motion based on S C Code Section 16-11-440(C) which provides that a person not engaged in an unlawful activity and who is attacked in another place where he has a right to be has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, when appellant, while visiting his mother's home, shot and killed his cousin who was attacking him?

2 Did the trial court err in denying appellant's request to omit from his jury charge on self –defense the language "if the defendant had no other way to avoid the danger" because it conflicted with the language from 16-11-440 (C) which the judge did charge that provided that if the defendant was attacked in a place where he had a right to be, then he had no duty to retreat and had the right to stand his ground and meet force with force?

3 Did the trial court err in denying appellant's motion to set aside the verdict and grant a new trial since the case could be decided as a matter of law under Section 16-11-440 (C ) and the immunity from prosecution provision under Section 16-11-450 when appellant, while visiting his mother's home, was protecting himself from attack by his cousin ?

## STATEMENT OF THE CASE

On April 23, 2009, the Lancaster County Grand Jury indicted James J Curry, Jr , on the charges of murder and possession of a firearm during the commission of a violent crime On February 24 – 26, 2010, Curry proceeded to trial before the Honorable Brooks P Goldsmith and a jury He was represented by William Frick, Esquire The jury found Curry guilty of the lesser included offense of voluntary manslaughter and possession of a firearm during a crime of violence Judge Goldsmith sentenced Curry to eighteen years on the voluntary manslaughter and five years on the gun charge to run concurrently R 427, ll 12 – 18 Curry's attorney filed a notice of appeal This appeal follows

## ARGUMENT

I

The trial court erred in denying appellant's directed verdict motion based on S C Code Section 16-11-440(C) which provides that a person not engaged in an unlawful activity and who is attacked in another place where he has a right to be has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, when appellant, while visiting his mother's home, shot and killed his cousin who was attacking him

On New Year's Eve, 2008, James Curry, his fiancee, and their two month old daughter left their home in Rock Hill and went to visit Curry's mother and sister in Lancaster R 53 – R 58, ll 1 – 25, R 59, ll 1 – 25, R 60, ll 1 – 25 Curry took a 22 caliber pistol he had previously found with him to fire off at midnight as they had done in the past, and as many people did in the apartments where Curry's mother lived, and where Curry grew up R 250, ll 9 – 25, R 251, ll 1 – 25, R 258, ll 1 – 25, R 259, ll 1 – 25, R 260, ll 1 – 25, R 261, ll 1 – 25, R 262, ll 1 – 25, R 263, ll 1 – 25

When he arrived in Lancaster, he went to Devion Collins' house because Devion was his cousin to whom he was very close because they had grown up together R 255, ll 22 – 25, R 256, ll 1 – 25, R 263, ll 25 – R 264, ll 1 -3 , R 54, ll 1 – 25, R 62, ll 1 – 23 Curry invited Devion, and Devion's fiance, Samantha, along with their three month old baby to go with Curry to Curry's mother's house which they did R 263 l 25, R 264, ll 1 – 25, R 265, ll 1 – 25

While they were at Curry's mother's house, which Curry said was in the "projects," a couple next door got into a fight and someone pepper sprayed that couple They came into

Curry's mother's house for help with cleaning their eyes The police were called and were outside these apartments Curry's fiancee wanted to leave with the baby which she did, but Curry stayed to make sure his mother and sister were okay with all of the people going in and out of the house R 268, ll 1 – 25, R 269, ll 1 – 25, R 270, ll 1 – 25, R 63, ll 1 – 25, R 271, ll 1 – 25, R 272, ll 1 – 25, R 273, ll 1 – 25, R 274, ll 1 – 25, R 275, ll 1 – 25

When they went back inside the house, Curry asked his sister, April, and Samantha, Devion's fiancee to go into the kitchen with him as he wanted to ask them something He said he was going to ask them to call his fiancee to get her to come back after all calmed down R 276, ll 1 – 25, R 277, ll 1 – 25, R 278, ll 1 – 25 When he did, De (nickname for Devion), became extremely angry or "mad", and told Curry that whatever Curry wanted to say to De's girl, he could say in front of De Curry said to him "That's why I don't come down here and F with you now" R 279, ll 1 – 25 Curry then told his sister to call Curry's fiance and tell her to come back and get him as he was ready to leave R 280, ll 1 – 25 That was when De, who was six feet three inches tall and weighed 200 pounds, punched Curry, who was five feet nine inches tall and weighed 135 pounds, in his head Curry was on the floor and De got on top of him and was hitting him Other guys there had to pull De off of Curry who was not hitting back R 281, ll 1 – 25, R 282, ll 1 – 25

Curry said he was going but De was at the front door R 282, ll 24 – 25 De went after Curry again, knocked him to the floor again and was sitting on Curry holding him by the hair hitting him in the face Someone pulled De off of Curry again De told Curry that Curry was not going anywhere R 283, ll 1 – 25, R 284, ll 1 – 25, R 285, ll 1 – 25 Curry then pulled his gun from his pocket because he did not know what De might do when he came at him again Curry told the police that he "blacked out" then and did not remember

shooting De R 286, ll 1 – 25 Curry said that he and De had skirmishes before, but this time was different because it was as though De "felt something towards him " R 288, ll 1 – 23

The forensic pathologist, Dr Cynthia Schandel, testified that De was shot six times in the back with three of the bullets penetrating both lungs which was the cause of death R 20, ll 1 – 25, R 34, ll 1 – 13

April Collins, Curry's sister, testified that De started the fight just as Curry said, and hit Curry first She said that Curry did not fight back, and just wanted to leave, but De would not let him leave She went upstairs and did not see the shooting R 79, ll 16 – 25, R 85, ll 1 – 25, R 86, ll 1 – 25, R 87, ll 1 – 25, R 88, ll 1 – 25, R 89, ll 1 – 25, R 90, ll 1 – 25, R 91, ll 1 – 25, R 92, ll 1 – 25 She said that this fight between her brother and De was different as she had never seen De get that aggressive, and Curry did not want to fight De R 107, ll 1 – 25

Other witnesses confirmed that De was the aggressor and started the fight Samantha, De's fiancee, said De got mad a hit Curry first De was on top of Curry hitting him R 118, ll 1 – 25, R 119, ll 1 – 25, R 120, ll 1 – 25, R 121, ll 1 – 25, R 122, ll 1 – 25 She testified that it was only about a minute from the time curry went upstairs until he returned with the gun R 128, l 1 – 25 Quinton Ealey, first cousin to both Curry and De, was at the party He confirmed that De hit Curry first He said De was holding Curry by the hair R 175, ll 1 – 25, R 179, ll – 25, R 180, ll 1 – 25, R 181, ll 1 – 25, R 184, ll 1 – 25 He said that Curry went up the stairs when they pulled De off of him the second time R 185, ll 1 – 25 When Curry came back down the stairs, he had a gun and started shooting

at De Curry then went up stairs again R 188, ll 1 – 25, R 189, ll 1 – 25, R 190, ll 1 – 25 Curry testified that he did not go upstairs R 287, ll 1 – 25, R 288, ll 1 – 23

Detective Pat Parsons testified that he took Curry into custody when he found him upstairs at the apartment after the incident Curry was upset but was cooperative R 206, ll 1 – 25, R 207, ll 1 – 25, R 208, ll 1 – 25, R 209, ll 1 – 25 Curry gave a written statement to him admitting the fight and the gun However, Curry told him he blacked out and did not remember the actual shooting He remembered family members screaming and he put the gun on the dining table R 211 – R 217 He said that Curry was upset, and told him he regretted the incident R 210, ll 1 – 25, R 218, ll 1 – 25

Defense counsel moved for a directed verdict at the close of the State's case He argued that The Protection of Persons and Property Act, which was the common law Castle Doctrine and was codified at S C Code Section 16-11-440( C) , applied He argued that this statute expanded the defense of self-defense as it eliminated the duty to retreat He explained that Section (C) provided that a person who was not engaged in an unlawful activity and who was attacked in another place where he had a right to be including his place of business, had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed it was necessary to prevent death or great bodily injury R 219, ll 1 – 25, R 220, ll 1 – 25, R 221, ll 1 – 25, R 222, ll 1 – 25, R 223, ll 1 – 25, R 224, ll 1 – 25, R 225, ll 1 – 25

Counsel argued that Curry was in his mother's home where he had a right to be and that Devion was the attacker Counsel said that Florida had a similar statute which eliminated the duty to retreat from self-defense R 221, ll 1 – 25, R 222, ll 1 – 25, R 223,

ll 1 – 25 The judge denied the motion for a directed verdict R 225, ll 24 – 25, R 226, ll 1

S C Code Section 16-11-440 (C) provides

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60

S C Code Section 16-11-440(A) provides

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended likely to cause death or great bodily injury to another person if the person (1) against whom the force is used is in the process of unlawfully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence or occupied vehicle, and (2)who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred

S C Code Section (B) explains that subsection (A) does not apply if the person against whom the force is used has a right to be in the place, is trying to remove a child or grandchild who is in the custody of the person against whom the force is used, if the person who uses the deadly force is engaged in an unlawful activity, and if the deadly force is used against a law enforcement officer

S C Code Section is entitled Presumption of reasonable fear of imminent peril when using deadly force against another unlawfully entering residence, occupied vehicle, or place of business

The Florida statute 776 013 entitled Home Protection, use of deadly force, presumption of fear of death or great bodily harm, was cited by defense counsel as being very similar to the South Carolina statute R 339, ll 24 – 25, R 340, ll 1 – 25, R 341, ll 1 – 25, R

42, ll 1 – 25 Florida Statute 776 013(3) has the same language as S C Code Section 16-11-440 (C) providing that the person has no duty to retreat and has the right to stand his ground

There is no current case law in South Carolina interpreting this issue The only two cases found in South Carolina regarding 16-11-440 rule on the issue that the law is not retroactive which is not an issue in Curry's case State v Dickey, 380 S C 384, 669 S E 2d 917 (Ct App 2008) certiorari granted October 20, 2010, State v Bolin, 381 S C 557, 673 S E 2d 885 (Ct App 2009)

In the Florida case of McWhorter v State, 971 So 2d 154 (2007), the District Court of Appeal of Florida reversed and remanded the case because the trial court erred in instructing the jury on self defense The Florida court held that the instructions given by the trial court were inconsistent with the new statute 776 013 "which expanded the right of self-defense and eliminated the 'duty to retreat' before using deadly force in certain circumstances " In the McWhorter case, McWhorter approached his former girlfriend when they left a riverfront club in Ft Lauderdale, and the two men started fighting Appellant said that the date punched him first and he was only trying to protect himself

A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty Id , State v Cherry, 361 S C 588, 594, 606 S E 2d 475, 478 (2004) Unless there is a total failure of competent evidence as to the charges alleged,

refusal by the trial judge to direct a verdict of acquittal is not error State v Arnold, 361 S C 386, 605 S E 2d 529 (2004) A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged State v Gentry, 363 S C 93, 610 S E 2d 494 (2005)

The trial court should have granted the directed verdict motion for appellant Curry was trying to protect himself from deadly force De was much bigger than Curry, and De stood by the front door and told Curry that he was not going anywhere Curry was trapped because De would not leave him alone, and would not let him leave Curry testified he did have a gun but he kept it in the trunk of the car until he got to his mother's house and then he put it under her mattress He did not have a permit for a concealed weapon, but he was over twenty-one and there was no reason he could not obtain a permit When it was close to midnight, he went upstairs and put the gun in his pocket R 260 – 271 Curry was not involved in an unlawful activity as he tried not to fight, and just wanted to leave He stood his ground and used the force necessary to stop De

In State v Goodson, 312 S C 278, 440 S E 2d 370 (1994), the Supreme Court held that the mere unlawful possession of a firearm did not preclude a defense to homicide on the ground of accident, in light of the burden on the state to prove beyond a reasonable doubt that the accused's unlawful act was at least the proximate cause of the homicide

## ARGUMENT

II

The trial court erred in denying appellant's request to omit from his jury charge on self –defense the language "if the defendant had no other way to avoid the danger" because it conflicted with the language from 16-11-440 (C) which the judge did charge that provided that if the defendant was attacked in a place where he had a right to be, then he had no duty to retreat and had the right to stand his ground and meet force with force

When the judge asked for proposed jury charges, defense counsel asked that the judge charge self defense but leave out element four which was the duty to retreat The solicitor argued that 16-11-440 applied when the person who was shot was making an unlawful entry R 233, ll 5 – 25, R 234, ll 1 – 25, R 235, ll 1 – 25, R 236, ll 1 – 25, R 238, ll 1 – 25, R 239, ll 1 – 25, R 239, ll 1 – 25, R 240, ll 1 – 25

The trial judge agreed to charge self-defense as one of the jury charges R 354, ll 1 – 25, R 355, ll 1 – 25, R 356, ll 1 – 5 Defense counsel requested that the trial judge include in his jury charge on self-defense the language from 16-11-44-(C) which provided that Curry did not have a duty to retreat and could stand his ground Counsel cited the Florida Statute 776 013 and the Florida case of McWhorter v State, 971 S 2d 154 (District Court of Appeal, Fourth District 2007) R 336 – R 354 The judge agreed to use that language, but he also then included as part of the self-defense charge that the defendant had no other probable way to avoid the danger, death, or serious bodily harm other than to act as the defendant did in this instance R 354, ll 12 – 25, R 355, ll 1 – 25, R 356, ll 1 - 5

Defense counsel objected to the judge charging ' avoidance of the danger " Counsel argued that it conflicted with the language of "no duty to retreat " The judge said that was the law R 356, ll 1 – 25, R 357, ll 1 – 25

The judge's charge to the jury on self-defense was

> The following elements are required to establish self-defense First, the defendant must be without fault in bringing on the difficulty If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal on self-defense The next element is that the defendant was actually in imminent danger of death or serious bodily injury, or that the defendant actually believed he was in imminent danger of death or bodily injury I tell you that if the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, even to the extent of using deadly force or great bodily injury if it was necessary to prevent death or great bodily injury to himself or others If the defendant was actually in imminent danger, it must be shown that the circumstances would have warrant a person of ordinary firmness and courage to strike the fatal blow to prevent death or bodily injury the final element of self-defense is that the defendant had no other probable way to avoid the danger or death or serious bodily injury than to act as the defendant did in this particular instance I tell you that a person could not be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm, therefore, in self-defense a defendant has the right to use the force needed to avoid death or serious bodily harm

R 403 – R 406

Defense counsel objected again after the judge instructed the jury to the judge including the language "no other way to avoid the danger " R 407, ll 20 – 25, R 408, ll 1 – 3

In the Florida case of McWhorter v State, *supra* the District Court of Appeal of Florida, Fourth District, reversed and remanded the case because the trial court erred in instructing the jury on self defense The Florida court held that the instructions given by the trial court were inconsistent with the new statute 776 013 "which expanded the right of self-defense and eliminated the 'duty to retreat' before using deadly force in certain circumstances " The Florida appellate court wrote that the trial judge "properly eliminated all express references to a 'duty to retreat' from the jury instructions, but he left in language explaining that the appellant should try to 'avoid the danger' before using force "

The law to be charged must be determined from the evidence presented at trial State v Knoten, 347 S C 296, 302, 555 S E 2d 391 (2001), State v Lee, 298 S C 362, 364, 380 S E 2d 834, 835 (1989) A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied State v Rye, 375 S C 119, 651 S E 2d 321 (2007)

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case State v Curry, 370 S C 674, 636 S E 2d 649 (Ct App 2006) Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error State v Smith, 315 S C 547, 446 S E 2d 411 (1994) The Supreme Court has frequently accepted jury questions as evidence that the trial judge's original instructions were not sufficiently clear Belmontes v Brown, 414 F 3d 1094 (9th Cir 2005) citing Shafer v South Carolina, 532 U S 36 (2001)

After the jury retired to deliberate, they sent a note to the judge asking for an explanation on the law of self-defense The judge gave them his same jury charge on self-

defense R 408, ll 1 – 25, R 409, ll 1 – 25, R 410, ll 1 – 25, R 411, ll 1 – 25 The jury's questions in Curry's case indicate the confusion of the jury and that the original instructions were not clear

A jury charge is no place for purposeful ambiguity State v Belcher, 385 S C 597, 685 S E 2d 802 (2009)

## ARGUMENT

### III

The trial court erred in denying appellant's motion to set aside the verdict and grant a new trial since the case could be decided as a matter of law under Section 16-11-440 (C ) and the immunity from prosecution provision under Section 16-11-450 when appellant, while visiting his mother's home, was protecting himself from attack by his cousin

After the jury returned their verdict of guilty of voluntary manslaughter, defense counsel made the motion that the verdict be set aside pursuant to the Thirteenth Juror Doctrine He argued that there was sufficient testimony that the case could still be decided as a matter of law based on 16-11-440 (C) and 16-11-450 The judge denied the motion R 417, ll 1 – 10

In South Carolina, a trial judge may grant a new trial following a jury verdict, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts Lane v Gilbert Construction Company, LTD , 383 S C 590, 681 S E 2d 879 (2009)

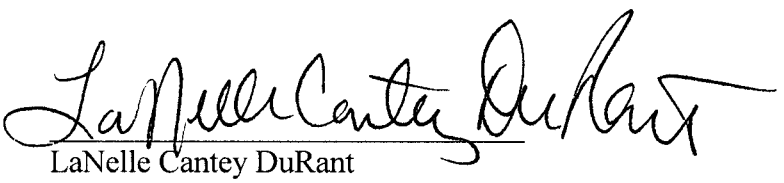
Under the "Thirteenth Juror" doctrine, which is the standard for granting a new trial in state law actions, the trial judge essentially sits as the thirteenth juror and may grant a new trial based solely upon the facts if he finds that the evidence does not justify the verdict Norton v Norfolk Southern Railway Company, 350 S C 473, 567 S E 2d 851 (2002) Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law Id

The trial judge should have granted a new trial because Curry's case met the elements of 16-11-440 (C)

## CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial in Issues Two and Three, and a directed verdict of acquittal in Issue One

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of August, 2011

CFRTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings"

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THE STATE,

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Harold M Coombs, Jr, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 16th day of August, 2011

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of August, 2011

(L.S.)
Notary Public for South Carolina

My Commission Expires December 4, 2017