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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

Unpublished Opinion No. 2014-UP-113

The State of South Carolina, ... Respondent,

v.

Jamaal Hinson, ... Petitioner.

PETITION FOR REHEARING

Petitioner, by and through his undersigned counsel and pursuant to Rule 221, SCACR, requests rehearing because this Court apparently overlooked two mistakes by the trial judge.

First, the trial judge improperly removed a juror at the request of the prosecution when it was uncontested the juror did not intentionally conceal his remote knowledge of the general identity of an after-the fact prosecution witness, when it was uncontested the juror affirmatively brought the unintentional concealment to the attention of the trial judge on the third day of trial, when it is uncontested the juror repeatedly stated he could be fair and impartial, and when it is uncontested the trial court admittedly did not perform the legal analysis required under *State v. Stone*, 350 S.C. 442, 448-49, 567 S.E.2d 244, 247-48 (2002).

Second, the trial judge improperly failed to instruct the jury on the elements of involuntary manslaughter when evidence existed that the petitioner lawfully armed himself in self-defense in case deadly force was necessary and that the petitioner did not intentionally fire the single shot.

I. Juror 226 was improperly dismissed at the request of the prosecution after he unintentionally concealed his remote knowledge of the identity of a prosecution witness.

Judge Benjamin made a reversible error of law by dismissing Juror 226 at the request of the prosecution after the juror unintentionally concealed his remote knowledge of the identity of a prosecution witness and the trial court did not perform the proper legal analysis to support removal. This Court erroneously affirmed the mistake but in doing so never referenced whether the removal was proper.

A. The trial mistake.

During voir dire of the venire at Mr. Hinson's murder trial, the trial judge read aloud and individually the name of all anticipated witnesses, including the name "Jarrod Crudup." (R. pp. 23-27). Those witnesses present in the courtroom stood when the judge announced their respective names; Mr. Crudup was not present when his name was called. (R. p. 25, l. 8). Judge Benjamin then asked the following questions:

> "[I]s there anyone related by blood or marriage or has a close personal or social relationship with any of the witnesses that I have called?" (R. p. 27, ll. 20-25).
>
> "Does any member of the jury panel know of any reason whatsoever why he or she should not serve as a juror in this case with particular emphasis being placed on your ability to be fair and impartial to both the State and the Defendant? If so, please stand." (R. p. 31, ll. 2-7).

Juror 226 had no reason to respond to either question and he did not respond. He was placed on the jury with each side having peremptory strikes remaining.

Late in the afternoon on the second day of trial, the State called Jarrod Crudup as a witness regarding Mr. Hinson's actions after he left the scene of the shooting. (R. pp. 199-212). Mr. Crudup did not have eyewitness knowledge - he was not present for the fight between Mr. Hinson and the decedent, did not see a gun, and did not hear a gunshot - but he cooperated with law enforcement by telling what he knew of the aftermath. (R. p. 205, l. 22 - p. 206, l. 1; p. 208, ll. 4-23). He willingly chose a photograph of Mr. Hinson out of a law enforcement photo array, and willingly identified Mr. Hinson sitting at counsel table during trial. (R. p. 208, l. 24 - p. 212, l. 1). There was no argument by the State that Mr. Crudup was aligned with Mr. Hinson or that he was a hostile witness. As Mr. Hinson's actions after the shooting were largely undisputed by the defense, the defense did not cross-examine this witness. (R. p. 211, l. 24 - p. 212, l. 1).

The following morning, on the third day of the trial and before the jury was in the courtroom, the first sentence of the transcript of the proceedings reflects Judge Benjamin stating on the record "Juror 226 wants to talk to me. I have no idea why . . . " (R. p. 322, ll. 19-21). Instead of bringing Juror 226 into the courtroom and having that conversation on the record in the presence of counsel, Judge Benjamin and her law clerk stepped into the hallway to speak with Juror 226, leaving counsel in the courtroom. (R. p. 322, l. 22 - p. 323, l. 5). Upon returning to the courtroom, Judge Benjamin initially stated "I'm going to bring in Juror 226 and let him explain it to you

all," (R. p. 323, ll. 6-7), but immediately upon bringing the juror into the courtroom Judge Benjamin did not let Juror 226 "explain it to you all," instead announcing:

> He has informed me that he does not recognize the name. He did not recognize the name of the - - some of the witnesses because he doesn't know them, but he wanted to let us know that he works - - he plays basketball at North Springs and Killian, and he has seen them there before. He wanted to know if that was a problem.

(R. p. 323, ll. 8-17).

After making this announcement, the judge asked Juror 226 if her summary reflected what he had told her in the hallway and he agreed with a simple "yes, ma'am." (R. p. 323, ll. 18-20).

Thereafter, Judge Benjamin and the juror had the following exchange in the presence of counsel:

> The Court: And the fact that you have seen some of the people before, you don't know their name, but you have seen them at the gym, would that affect your ability to be fair and impartial in this trial?
>
> Juror 226: No, ma'am.

(R. p. 323, l. 21 – p. 324, l. 1).

The senior assistant solicitor inquired "which witnesses?," leading to the following exchange where Juror 226 was finally given the opportunity to speak for himself in open court:

> The Court: Which *witnesses*?
>
> Juror 226: The *one* with the - -
>
> The Court: He doesn't know *their* names.
>
> Juror 226: The *one* with the dreads.
>
> The Court: Any of the other ones? *Anybody else*?

> Juror 226: *No. That's the only one I know, the one that came up.* I played with *him* not too long ago at the gym.
>
> The Court: Okay. All right. And the fact that you played with *him* at the gym, does that affect your ability to be fair and impartial?
>
> Juror 226: No. *I don't even know him.*

(R. p. 324, ll. 2-18) (emphases added).

When given the chance to speak for himself, Juror 226 consistently stated he recognized only ONE witness.

Judge Benjamin did not:

- Challenge Juror 226's statements in the open court inquiry before all counsel as being less than or different than what he told her in the hallway after voluntarily bringing the matter to her attention in the first instance.
- Question the juror about his knowledge other than as stated above.
- Call upon her law clerk as a witness to the hallway conversation.
- Offer either counsel the ability to question the juror.

After having been twice asked whether he could continue to be fair and impartial and answering both times in the affirmative without hesitation, (R. p. 323, l. 21 - p. 324, l. 18), the juror then left the courtroom and the prosecution immediately devoured Juror 226's honesty, stating:

> Your Honor, we do have a concern. And I understand he didn't mean to do that or anything, but that would have been one of the witnesses that is friends with the Defendant. Apparently, he has some type of at least social - - or some type of communication with him playing basketball. It is not his fault or anything like that, but we would be concerned that he does have affiliation with the Defendant in this case or someone closely affiliated with the Defendant, and that would be a grave concern to us.

(R. p. 324, l. 23 - p. 325, l. 8).

A close review of the transcript shows that the State misrepresented the juror's statements – he never indicated even communicating with Mr. Crudup, much less a social relationship with him. In fact, the only person in the courtroom who even identified Mr. Crudup as the witness the juror recognized was the assistant solicitor – Juror 226 never used the witness's name because Juror 226 did not know the witness's name. (R. p. 325, ll. 10-14).

The State then argued:

> The information, if we had it, we would have used - - opted to use a strike on him. We did have enough . . . It is of grave concern to the State, and we just feel like had we had this information - - and we're not blaming the juror - - of course it would have been a consideration of use of strikes, and it would have been a neutral reason for us to strike him.

(R. p. 326, ll. 6-18).[1]

The State closed the deal by impugning the juror with a veiled reference to the juror possibly being affiliated with an organized street gang and claiming the juror should be dismissed "in fairness to everyone." (R. p. 328, ll. 15-23).

After a break, Judge Benjamin announced she was removing the juror "in an abundance of caution," which "standard" she referenced twice in announcing her decision. (R. p. 329, ll. 6-18).

Defense counsel repeated her objection that the juror did not know any witness and had said he could be fair and impartial. (R. p. 329, l. 19 – p. 330, l. 10). The

[1] On appeal, the State acknowledged "whether the [concealed] information would have been a material factor in the use of a preemptory challenge is inapplicable to this case." (Brief of Respondent p. 18). This is important, as at the trial level this argument impacted the trial judge as seen by her response of "[y]es, but if [the assistant solicitor] had known it she said she would have struck him" to the protests of defense counsel. (R. p. 328, ll. 11-14).

State responded by stating "[h]e said he knew witnesses, then he changed it to one witness." (R. p. 330, ll. 16-17). In actuality, a close review of the transcript shows that while the juror agreed with the judge's summary of the hallway exchange, he never specifically stated he knew of multiple witnesses. It is true that outside of the juror's presence Judge Benjamin stated "initially he said he knew some of the witnesses, but when he came in he said he knew one of the witnesses." (R. p. 329, ll. 10-12). Respectfully, there is no reason for Judge Benjamin to (a) have the initial conversation in the hallway outside of the presence of the record and counsel, (b) usurp the juror's ability to tell what he knows with his own words,[2] (c) to allow Juror 226 to make the alleged change in the story that he himself brought forward without being questioned about the alleged change, and (d) remove Juror 226 without performing the required legal analysis.

To recap, the judge herself **acknowledged both** the juror's **honesty** in affirmatively bringing the matter forward **and** the **unintentional nature** of the concealment, and the State **three times acknowledged** the juror's lack of complicity. The fact that the concealment was unintentional is further supported by common sense. It would be inexplicable to intentionally conceal information during voir dire and throughout the first two days of trial to then affirmatively bring an intentional

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[2] Judge Benjamin should have allowed the juror to speak for himself from the very beginning. *See State v. Bell*, 374 S.C. 136, 144, 646 S.E.2d 888, 892 (Ct. App. 2007):

> [Court]: ... I understand you had something that happened at lunch you wanted to inform the court about?
>
> [Juror]: Yes, sir.
>
> [Court]: Tell us about that, please.

concealment to the trial judge's attention on the third day of trial. However, the judge removed the juror "in an abundance of caution" in part based on the State's fantastical claim of "this person is affiliated or is in contact with friends of [Mr. Hinson]."[3] (R. p. 327, ll. 6-7).

B. The appellate mistake.

The Opinion affirmed the removal of the juror, focusing on the lack of prejudice to the petitioner. Mr. Hinson is not required to prove prejudice and even if he is so required prejudice exists here.

1. Petitioner was not required to show prejudice to receive a reversal for improper dismissal of a properly seated juror, or alternatively such removal was prejudicial as a matter of law.

It appears this Court agrees Judge Benjamin did not perform the legal analysis required before a juror may be removed; the Opinion never specifically addresses the issue but does state "[e]ven if the removal of Juror 226 was error . . . we find such error harmless." (Opinion p. 6). Stated another way, the Opinion finds that Mr. Hinson's conviction should not be reversed because he did not prove prejudice from the removal.

Many times in the past 13 years the appellate courts of this State have published opinions regarding the removal of a juror, including major opinions in *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244

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[3] Mr. Crudup never testified he was friends with Mr. Hinson – he said "I know of him" in response to the question "Do you know [Mr. Hinson]?" (R. p. 201, ll. 12-15). At best, the State showed (due to the juror's own admission) that Juror 226 played basketball with someone [Crudup] who (a) merely knew of Mr. Hinson and (b) testified for the prosecution including both out of court and in court identifications of Mr. Hinson.

(2002), and *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010). This Court is familiar with these decisions as it specifically cites to all of them in the Opinion, and cites to *Woods* and *Stone* in detail – this is no surprise since *Woods* and *Stone* are the controlling authorities[4] for determining whether juror concealment (unintentional or not) requires juror removal. However the Opinion misconstrues these three binding precedents by inserting a need to show prejudice.

The Opinion notes that *Stone*, in reversing the trial court's disqualification of a juror at the State's behest, stated:

> It is patent here that [the juror's] failure to disclose her acquaintance with [the witness] was innocent. Moreover, we find her scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its peremptory challenges. [The juror] clearly indicated her former acquaintance with a witness whose name she did not even know, would not have affected her in any way.

Id. at 5 (citing *Stone*, 350 S.C. at 448-49, 567 S.E.2d at 247-48).

The facts of *Stone* are nearly identical to this case, with similarities including:

(1) the removed juror in both cases did not recognize the name of a witness during voir dire because of the lack of personal knowledge of the identity of the respective witness;

(2) the removed juror in both cases recognized the respective witness only once the witness took the stand;

(3) the removed juror in both cases affirmatively brought his/her recognition of the respective witness to the trial court's attention; and

[4] "[J]uror concealment claims are governed by the analysis set forth in *Woods* . . ." *McCoy v. State*, 401 S.C. 363, 372, 737 S.E.2d 623, 628 (2013).

(4) the removed juror in both cases indicated he/she could continue to be fair and impartial after the respective revelation of limited knowledge.

Nevertheless, the Opinion offers a divergent analysis of *Stone* starting with the State's position that "although Stone recognized a legal error in a similar factual scenario, *Stone* did not indicate a prejudice inquiry is not required when dealing with a juror's unintentional concealment during *voir dire*." *Id.* at 5. Stating this double negative another way, in reversing *Stone* did indicate an abuse of discretion and did not indicate a prejudice inquiry is required, as *Stone* never uses the word prejudice. *See also State v. Hurd*, 480 S.E.2d 94, 97 (Ct. App. 1996) ("[w]hether to replace a juror with an alternate is a matter within the sound discretion of the trial judge, and we will not reverse him on appeal absent an abuse of discretion") and *Greer v. Norvill*, 21 S.C.L. (3 Hill), 1837 WL 1472, 1, 3 (Ct. App. 1837) ("[i]t is probable that a new trial will result in the same verdict. But the motion for a new trial must be granted").

The Opinion further contorts *Stone* by stating it "does not necessarily support [Petitioner's] assertion that the removal of a juror who unintentionally concealed information inquired into during *voir dire* requires automatic reversal." (Opinion at 5). The basis for this misapprehended view is because:

> Although the court in *Stone* determined that removal of the juror was an abuse of discretion, this determination was not crucial to its ultimate holding. The *Stone* court held the trial court's failure to instruct the jury on mitigating circumstances, as well as the trial court's failure to give a parole ineligibility charge "require[d] reversal."

Id. at 5-6 (citing *Stone*, 350 S.C. at 450, 452, 567 S.E.2d at 248, 249). This position, which tries to parse the hierarchy of importance of three different significant errors by the trial court in that case, fails to abide by the Supreme Court's explicit statement in

Stone that "we hold the trial court abused its discretion in removing [the juror]." 350 S.C. at 449, 567 S.E.2d at 248. Thus, part of the holding in *Stone* related to the removal of the juror and the Opinion of this Court not only overlooked this part of the *Stone* holding but downplayed the removal of the juror. Further, South Carolina appellate courts do not address nondispositive issues when disposition of addressed issues requires reversal, *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), and therefore the Supreme Court would not have considered the juror issue in *Stone* if it was not dispositive. *Stone* addressed the juror issue (which again, is very similar to the facts of this case) and in doing so did not address a prejudice analysis; that error was dispositive and the Opinion inaccurately applied *Stone* to this case.

The Opinion references *Burgess*, but does not recognize the impact of that decision on this case. In that 2010 opinion, this Court concluded its analysis with language that mandates reversal in the instant case:

> When a party contends a juror should be removed for failure to disclose information during voir dire, *Stone* requires the trial judge to consider the two criteria from *Woods*. If the judge finds both of the *Woods* criteria exist, the judge must remove the juror. However, if **either** of the criteria is absent, the judge **may not** remove the juror on that basis. Here, we need only look to the absence of the first criterion to affirm.

Burgess, 391 S.C. at 19, 703 S.E.2d at 514 (emphases added).

In *Burgess*, as in *Stone*, the juror's failure to disclose was innocent and thus removal of the juror, if it had occurred, "would have been error." *Id.* at 20, 514. The word prejudice was not used.

The Opinion concludes its analysis by addressing the fact that a defendant does not have a right to be tried by a jury composed of particular individuals and that the alternate juror that replaced Juror 226 was sufficient. (Opinion pp. 6-7). In this analysis, the Opinion relies on *State v. McDaniel*, 275 S.C. 222, 268 S.E.2d 585 (1980) and *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996).

Importantly, both *McDaniel* and *Williams* were determined on issue preservation grounds, and the language relied upon by the Opinion, to the extent relevant, is dicta. *See McDaniel*, 275 S.C. at 224, 268 S.E.2d at 586 ("appellant waived the right to raise this [juror removal] issue on appeal") and *Williams*, 321 S.C. at 459, 469 S.E.2d at 52 (the issue was "not preserved for review"). Thus, the two cases cited by the Opinion as requiring prejudice were based on other grounds, that being issue preservation. There is no binding precedent from a South Carolina court that requires a showing of prejudice. *Cf. State v. Smalls*, 336 S.C. 301, 308, 519 S.E.2d 793, 797 (Ct. App. 1999) ("no showing of actual prejudice is required to find reversible error" for the denial or impairment of the right to a preemptory challenge).

The practical effect of the Opinion in this case is that mistakenly keeping a biased juror in the box is reversible just because of legal error, but mistakenly booting a fair juror from the box is only reversible upon the showing of legal error and a **second showing of prejudice**. Both the Supreme Court and this Court have had every opportunity to make that pronouncement in several recent published cases, and each time the respective appellate courts have avoided such a statement.

Alternatively, the dismissal was prejudicial as a matter of law. The Supreme Court previously noted that fundamental unfairness in jury selection is *per se* prejudicial:

> [W]e find that the method of empaneling the jury employed by the trial judge was more than a mere irregularity and was prejudicial as a matter of law. Under our system, the empaneling is performed in a side to side fashion. It is each side, not each party, which is entitled to the statutorily provided number of strikes. To allow one side an increased number offends the balance and fairness of that system. Such a practice is highly unfair to the single party side of the lawsuit because the multiple party side is allowed an inordinate influence and is allowed to dominate the jury selection process. As a result, this practice is prejudicial as a matter of law.

Moore v. Jenkins, 304 S.C. 544, 547, 405 S.E.2d 833, 835 (1991); *see also Dunn v. State*, 308 Ga.App. 103, 105, 706 S.E.2d 596, 599 (Ct. App. 2011) ("[d]ismissal of a juror without any factual support or for a legally irrelevant reason is prejudicial [to the defendant]") (quoting *State v. Arnold,* 280 Ga. 487, 489, 629 S.E.2d 807 (2006)). It follows that allowing the prosecution to arbitrarily seek the removal of a juror who has already been sworn and participated in two days of trial before volunteering a remote connection to a prosecution witness is highly unfair, allows the might of the State to have an inordinate influence at any moment, and is prejudicial as a matter of law.

2. Even if a showing of prejudice is required, prejudice exists.

Prejudice, to the extent required, exists here for many reasons.

First, the State received an improper post-selection peremptory strike. Pursuant to S.C. Code § 14-7-1110, the State gets five peremptory strikes in murder cases and the defendant gets ten such strikes. During selection, the State used all five of its elective strikes prior to the jury being impaneled. (R. pp. 42-53). On day three of

trial, the assistant solicitor claimed she would have struck Juror 226 if she had known of his remote connection to Crudup during the strike process. (R. p. 326, ll. 6-18).

At the time Juror 226 was seated, the State had used three peremptory strikes and Mr. Hinson had used five. (R. pp. 42-49). While the State did have two peremptory strikes available, had the State stricken Juror 226 as claimed in its hindsight argument the use of its remaining peremptory strike would have necessarily affected the panel. This cannot be disputed because the State used all five strikes before the jury was seated; at the very least, the State would not have been able to strike Juror 50 (on whom its last strike was used). (R. p. 53). Stated another way, the State effectively got six peremptory strikes. Further, had Juror 226 been stricken by the State through a peremptory challenge, Mr. Hinson may well have used his remaining five strikes differently.

The above analysis is particularly important since the State could not have challenged Juror 226 for cause. His connection to Mr. Crudup was remote, and the juror twice affirmed this limited connection would not affect his ability to be fair and impartial. The State has not even attempted to argue that grounds existed to challenge him for cause and no such grounds exist.

Second, Juror 226, having been properly seated, is required to serve by state law and any challenge to this service is waived and of no effect once he was seated. *See* S.C. Code § 14-7-360 ("[w]hen the name of a person is drawn from the jury box for jury service by the jury commissioners the person **shall** serve as a juror unless disqualified or excused by the court as may be provided by law") (emphasis added) and S.C. Code § 14-7-1030 ("[a]ll objections to jurors called to try prosecutions . . . in the

various courts of this State, if not made before the juror is impaneled for or charged with the trial of the prosecution . . . is waived, and if made thereafter is of no effect").

Third, Juror 226, having been properly seated, cannot be removed from service for an improper purpose. When a juror has been dismissed in a fashion that violates constitutional rights and the removal was over the defendant's objection, that alone is sufficient for the defendant to "appeal this violation of [the defendant's] right to a fair and impartial jury." *State v. Floyd*, 353 S.C. 55, 58-59, 577 S.E.2d 215, 216 (2003). *Floyd* also confirms where the jury is affected by a constitutional error, "the line of cases which hold a defendant is entitled only to a fair and impartial jury but has no right to trial by a particular jury, do not apply." *Id.* at 59, 216 n.5. Here, the Opinion relied heavily on the inability of Mr. Hinson to claim he had a right to trial by "his jury" since an appropriate alternate was available, (Opinion at 5-6), which is inconsistent with *Floyd*.

Finally, the undivided Supreme Court in *Floyd* confirmed reversal is appropriate without a prejudice analysis. 353 S.C. at 59, 577 S.E.2d at 217 ("[a]ppellants were denied a fair and impartial jury when the trial judge erroneously excused a juror who objected to taking a religious oath. Accordingly, their convictions and sentences are reversed, and the cases remanded").

Fourth, and perhaps most importantly, Juror 226, having been properly seated, had a right to serve. Over 175 years ago, our Court of Appeals recognized:

> Every tax-paying citizen of South Carolina is liable to be drawn as a juryman; and when it falls to his lot **he has a right to serve**, which no one can deprive him of, unless it can be shown that he labors under some legal disability which disqualifies him, or unless he can be challenged for some good and sufficient cause by the parties in court. A legal exemption

> does not affect the right, or in any wise abridge the privilege, of any man to sit on a jury. This privilege is of little value ordinarily, but there may be occasions and junctures in the republic, when a citizen would sooner perish than yield his privilege.

Greer v. Norvill, 21 S.C.L. (3 Hill), 1837 WL 1472, 1 (Ct. App. 1837) (emphasis in original); *see also Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("[j]ury service preserves the democratic element of the law . . . with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process")

Greer is instructive, as this Court analyzed the dismissal of a juror not just from the perspectives of the parties, but also from the perspective of the juror and the judge.[5]

Regarding the rights of the juror, "he can at no time be arbitrarily discharged against his consent." *Id.* It is readily apparent Juror 226 did not consent to be removed. (R. pp. 322-332). When it is obvious that a juror only gave up his seat as a result of an improper challenge, "the challenge should not only have been rejected, but that the juryman should have been instructed to keep his seat. I do not say that a juryman might not be challenged for favor, by reason of his enmity either to one of the parties or to their counsel; but his incapacity must appear from higher evidence than the assertion or opinion of counsel." *Greer* at 1.

Regarding the rights of the judge, this Court stated the judge has discretion to remove a juror, but failing an appropriate use of discretion "[a]s soon as the trial commences the parties acquire their rights, and can compel the jury charged with the case to decide on it." *Id.* at 2.

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[5] It is also important to note the unfairness in the jury system affects not just the parties, the juror, and the trial court, but threatens all of our free society. *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community").

Finally, regarding the rights of the parties, this Court noted either party has the right to challenge a juror to be removed by the judge without consent of the other party, but "if the challenge is not sustained, the opposite party has a right to the jury as it was empannelled [sic]." *Id.* "[W]here neither party has a right to object to a juror, it is not competent for the court or the other party to remove him, except by consent." *Id.*

The Opinion found Juror 226's removal harmless, which ignores the fact that Juror 226 "formed a part of the tribunal to which the defendant was willing to trust his cause when he announced himself ready for trial; that tribunal was changed contrary to his consent, and a new one formed at the instance of his adversary." *Greer* at 2. Even if the change could be shown not to make a material difference, and even if the change was not done for undue advantage, which here cannot be shown, "[i]t is sufficient to say, however, that such might be the case, if the practice were to receive the sanction of the court." *Id.* This Court has known since at least 1837 that allowing one side to arbitrarily have a fair juror dismissed was a significant threat to the rule of law.

Even if a showing of prejudice is required, which Mr. Hinson certainly does not concede,[6] Mr. Hinson was necessarily prejudiced as the judge improperly removed a fair and unbiased juror from his case without sufficient legal reason. *See id.* ("[b]y getting rid of one juryman and substituting another, a wonderful difference may be made in the tribunal . . . to remove one juror and substitute another, is giving a party a great advantage").

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[6] In a case where the juror is removed for concealing information during voir dire, even if unintentional, the juror's self-proclaimed impartiality is dispositive of the issue as to whether he should be removed. *See State v. Simmons*, 360 S.C. 33, 43, 599 S.E.2d 448, 452 n.4 (2004). Here, it is uncontested Juror 226 repeatedly stated his ability to be impartial. (R. p. 323, l. 21 - p. 324, l. 18).

Ultimately, in *Greer* this Court held:

> [A]fter the parties announce themselves ready for trial before a particular jury, the judge cannot discharge one of that jury, at the instance of one party and contrary to the consent of the other, unless the ground of challenge be legal and properly sustained. The parties should be regarded as standing on their rights. Vague and capricious objections should not receive the countenance of the court. They only serve to irritate parties and to embarrass the court.

Id. at 3.

"The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86 (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)). *see also Powers*, 499 U.S. at 406 ("[t]he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system"). If this unjust removal of Juror 226 is allowed to stand, it undercuts the safeguards of the jury system and it will have a far-reaching effect on the ability of a criminal defendant - or any litigant - to receive a fair trial in South Carolina.

II. Petitioner was entitled to a jury instruction on the elements of involuntary manslaughter.

A. The facts and the trial mistake.

On January 15, 2010, Jamaal Hinson stayed the night at his girlfriend Lauren Banks' house in the Vineyard Crossing subdivision in Blythewood, South Carolina. (R. p. 575; ll. 2-8; p. 592, l. 24 - p. 593, l. 1). The next morning, Mr. Hinson borrowed Ms. Banks' vehicle so he could deliver marijuana to purchasers. (R. p. 575, ll. 14-24). Before Mr. Hinson left her house, he saw Richard Thomas and Anthony Salley on the

same street as Ms. Banks' house. (R. p. 576, ll. 11-14). Mr. Thomas and Mr. Hinson were adversaries - "they didn't like each other at all" - with multiple verbal and physical incidents between them over the preceding year. (R. p. 571, ll. 13-17; p. 616, ll. 8-10). Mr. Hinson did not know Mr. Salley, but knew of him as being a friend of Mr. Thomas. (R. p. 571, l. 24 - p. 572, l. 1; p. 592, ll. 10-14). Mr. Salley's girlfriend Andina Lee acknowledged Mr. Salley did not like Mr. Hinson. (R. p. 126, ll. 17-22). When they saw each other, both Mr. Thomas and Mr. Salley exchanged threats with Mr. Hinson that morning. (R. p. 576, ll. 11-19). Mr. Thomas was known to carry a pistol. (R. p. 577, ll. 8-16; p. 600, ll. 5-7).

While Mr. Hinson was out making deliveries, the brakes failed on his vehicle and he stopped at a gas station to investigate. (R. p. 575, ll. 21-24). At the gas station, he encountered Devan Bailey, who asked Mr. Hinson for a quantity of marijuana. (R. p. 441, ll. 13-22; p. 575, l. 24 - p. 576, l. 1). Mr. Hinson returned to Ms. Banks' house to drop off the malfunctioning vehicle, and waited for Mr. Bailey to pick him up. (R. p. 576, ll. 1-6 and 20-25).

Mr. Bailey arrived in a pickup truck driven by Quinton Emerson, in which Derrick Diamond was also a passenger. (R. p. 413, l. 1). The three men picked up Mr. Hinson and took him to his house to get his pistol, since Mr. Hinson was scared of what Mr. Thomas might do if they came across him. (R. p. 414, ll. 22-25; p. 577, ll. 1-9; p. 600, ll. 5-7; p. 625, ll. 10-14; p. 626, ll. 21-23). Mr. Hinson wanted to be in a position to defend himself due to Mr. Thomas likely being armed. (R. p. 577, ll. 8-16).

After retrieving his pistol, Mr. Hinson rode with the three men in the pickup back to Ms. Banks' house, where he went inside to spend time with her. (R. p. 96, ll. 16-18; p. 417, ll. 10-15; p. 577, ll. 21-24). After dropping Mr. Hinson off, the three men in the pickup truck left but Mr. Bailey soon realized he had forgotten to get a cigar to use to smoke the marijuana. (R. p. 179, ll. 5-10; p. 416, ll. 15-16). Mr. Bailey phoned Mr. Hinson seeking a cigar and Mr. Hinson told him to return to the neighborhood, call him upon arriving, and Mr. Hinson would give him a cigar. (R. p. 417, ll. 16-21; p. 577, l. 25 - p. 578, l. 11; p. 629, ll. 1-24). The group in the pickup truck returned to the street in question in the Vineyard Crossing subdivision. Mr. Bailey directed the group where to stop on the street, which was a couple of houses up from Ms. Banks' house because Mr. Bailey thought Mr. Hinson was sitting in a small black car parked in a nearby driveway. (R. p. 417, l. 22 - p. 418, l. 17). In actuality, the black male smoking marijuana in that car was Anthony Salley. (R. p. 117, ll. 21-22).

After receiving the second phone call from Mr. Bailey, Mr. Hinson came out of Ms. Banks' house and saw the pickup parked in front of the house with the small black car in the driveway. (R. p. 578, ll. 11-13; p. 629, l. 23 - p. 630, l. 4). Mr. Bailey and Mr. Salley were standing in the driveway with the small black car, talking, along with Mr. Salley's girlfriend. (R. p. 181, ll. 1-3; p. 579, ll. 1-3). Mr. Hinson began walking from Ms. Banks' house to the house where Mr. Bailey was so that he could give him the cigar; as soon as Mr. Salley saw Mr. Hinson, Mr. Salley removed his jacket and rushed at Mr. Hinson in a threatening manner. (R. p. 144, ll. 24-25; p. 579, ll. 4-6; p. 631, ll. 13-14; p. 633, ll. 13-16). Mr. Hinson was at the bottom of an

incline, and Mr. Salley ran down from the top of the hill towards him. (R. p. 150, ll. 22-26). Mr. Salley was a larger man than Mr. Hinson. (R. p. 658, ll. 14-17). Afraid, Mr. Hinson drew his pistol to scare the advancing Mr. Salley, but Mr. Salley was unfazed, moving closer to the pistol and demanding Mr. Hinson shoot him. (R. p. 579, ll. 7-11 and 21-25; p. 635, ll. 17-20). Mr. Salley was not afraid. (R. p. 196, ll. 12-15).

Mr. Hinson stood frozen. (R. p. 580, ll. 3-4). Sensing advantage, Mr. Salley knocked the gun from Mr. Hinson's hand and then struck Mr. Hinson twice in the face. (R. p. 100, ll. 17-19; p. 119, ll. 9-22; p. 145, ll. 15-21; p. 580, ll. 4-7). Mr. Salley's blows landed with terrific force, and Mr. Hinson's face instantly started to swell. (R. p. 161, l. 20 – p. 162, l. 2).

The two men began fist-fighting, both swinging and punching, which later progressed to them fighting while on the ground. (R. p. 145, l. 21 – p. 146, l. 2; p. 183, ll. 20-24; p. 580, ll. 7-10). While Mr. Hinson and Mr. Salley were fighting, the pistol was lying on the ground where it had fallen after being knocked out of Mr. Hinson's hand. (R. p. 183, ll. 17-21). Thus, neither man had a weapon. (R. p. 101, ll. 10-12). Mr. Bailey was standing beside the fight. (R. p. 146, ll. 15-17). The fight moved towards Mr. Bailey, and he threw an elbow to push the men away from him, causing Mr. Salley to stumble. (R. p. 421, ll. 2-15).

Mr. Hinson made no effort to get the pistol during the fight. (R. p. 661, l. 22 – p. 662, l. 2). In fact, the pistol was not close to where the men were fighting. (R. p. 121, ll. 4-20). Mr. Salley's girlfriend Andina Lee went over to where the gun was lying on the ground and picked up the pistol. (R. p. 101, ll. 21-22; p. 103, ll. 10-11;

p. 121, ll. 21-23; p. 417, ll. 17-19). She pointed the gun at Devan Bailey, demanding the fight stop. (R. p. 101, ll. 21-24; p. 146, ll. 6-8). Her intent in grabbing the gun was "just really to scare [Mr. Hinson] . . ." (R. p. 103, ll. 15-16). She gave it her best effort, yelling "get the fuck back" three times and telling Mr. Bailey if he moved she was going to shoot him. (R. p. 123, l. 17 - p. 124, l. 11; p. 147, ll. 14-22). Scared, Mr. Bailey retreated by running up the street. (R. p. 422, ll. 21-24; p. 423, ll. 7-8; p. 424, ll. 7-8).

Mr. Salley eventually stopped fighting back, though he remained conscious. (R. p. 580, ll. 20-25; p. 662, ll. 3-6). Mr. Hinson voluntarily stopped fighting. (R. p. 639, ll. 10-12). As Mr. Hinson got up off the ground, he saw Ms. Lee pointing the pistol but then throw it back on the ground. (R. p. 581, ll. 7-14). Mr. Hinson was shocked that Ms. Lee had the pistol, realizing that she could have shot him at any point during the fist-fight. (R. p. 581, ll. 20-23).

After the fight, Mr. Salley was up off the ground and moving. (R. p. 105, ll. 14-19). The pistol remained on the ground just steps away. (R. p. 106, ll. 12-16). Mr. Hinson picked up the pistol, knowing that if he bypassed the opportunity to retrieve it and instead left it on the ground Ms. Lee could pick it up for a second time and shoot him as he returned to Ms. Banks' house. (R. p. 582, ll. 5-18). Mr. Hinson was afraid of this scenario, particularly of being shot in the back as he retreated. (R. p. 582, ll. 19-21).

Mr. Hinson realized he needed to remove himself from the situation. (R. p. 582, l. 25; p. 583, l. 20 - p. 584, l. 1). As he turned to leave, Mr. Salley was moving and facing Mr. Hinson, and just a couple of steps separated them. (R. p. 129, l. 22 -

p. 130, l. 10; p. 584, ll. 3-5). In being so positioned, Mr. Salley startled Mr. Hinson. (R. p. 583, ll. 1-6). Mr. Hinson was holding the pistol by the trigger (as he always does when he handles a firearm) and was moving the gun from his hand to his waistband. (R. p. 641, ll. 22-25; p. 642, ll. 13-18). When Mr. Salley scared Mr. Hinson by being up and moving just a couple of feet away, Mr. Hinson flinched and accidentally pulled the trigger; the gun fired once and the bullet struck Mr. Salley. (R. p. 583, ll. 4-6; p. 584, ll. 3-5). Mr. Hinson did not continue firing because "it was an accident that [Mr. Hinson] shot him the first time." (R. p. 590, ll. 10-14).

Over Mr. Hinson's objection, Judge Benjamin only instructed the jury on the elements of murder, self-defense, and accident. (R. pp. 673-752). The jury returned a verdict of guilty on the sole count in the indictment - murder - and Mr. Hinson was sentenced to forty years imprisonment. (R. pp. 754-56; p. 759, ll. 21-23; p. 762).

B. The appellate mistake.

The Opinion, in its one paragraph analysis of Mr. Hinson's right to a jury charge of involuntary manslaughter, (Opinion p. 7), misapprehended or ignored key facts regarding the instruction.

The facts on appeal must be viewed in the light most favorable to the appellant. *State v. Burriss*, 334 S.C. 256, 258, 513 S.E.2d 104, 105 (1999). "If there is **any** evidence warranting a charge on involuntary manslaughter, then the charge **must** be given." *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006); *see State v. Crosby*, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003) ("[a] trial court should refuse to charge the lesser-included offense **only** where there is **no** evidence the [appellant] committed the lesser rather than the greater offense") (emphases added). This tenet of

law is true even when the evidence provided by appellant himself is conflicting. *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001). "The trial court commits reversible error when it fails to give a requested charge on an issue raised by the indictment and evidence presented." *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989).

The Opinion overlooks that Mr. Hinson was engaging in a lawful activity when the gun went off. At trial he consistently argued he lawfully armed himself in self-defense and the gun went off accidentally. (R. p. 646, ll. 1-16; p. 583, ll. 1-6; p. 584, ll. 3-5; p. 600, ll. 5-7; p. 625, ll. 10-14; p. 626, ll. 21-23; p. 641, ll. 22-25; p. 642, ll. 13-18).

In its Opinion, the Court only considered two cases,[7] *State v. Smith*, 391 S.C. 408, 706 S.E.2d 12 (2011), and *State v. Cabrera-Pena*, 361 S.C. 372, 605 S.E.2d 522 (2004). Both cases are distinguishable.

In *Smith*, the facts and holding were as follows:

> Smith entered the trailer to sell crack cocaine, a felony, to Victim. Smith pursued the drug deal while armed with a loaded gun, knowing Victim owed him $40 from a previous drug transaction. During the confrontation, Smith brandished the gun and used it to pistol-whip Victim. According to Smith, he pistol-whipped Victim because Victim was approaching him in a "real serious demeanor." Victim was unarmed, the door to Victim's trailer was unlocked, and there is no evidence Smith was unable to retreat from the dangerous situation he created. Based on these facts, we find no evidence to support Smith's assertion that he was acting lawfully by arming himself in self-defense. Specifically, there is no evidence to suggest that Smith was without fault in bringing on the difficulty, that he believed or actually was in imminent danger of losing his life or sustaining serious bodily injury, or that he "had no other probable means of avoiding the danger" other than drawing the loaded weapon.

State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011).

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[7] The Court cited to *State v. Mekler*, 379 S.C. 12, 664 S.E.2d 477 (2008), for the definition of involuntary manslaughter.

There are two major differences in the instant case. First, the Opinion focused solely on the claim that "there is no evidence to suggest [Mr. Hinson] was without fault in bringing on the difficulty." (Opinion p. 7). This is incorrect, as there is evidence that Mr. Hinson was walking uphill across yards to give his friend a cigar and Mr. Salley, who was a larger man than Mr. Hinson and who earlier in the day had threatened Mr. Hinson, removed his jacket and rushed downhill at Mr. Hinson in a threatening manner. (R. p. 144, ll. 24-25; p. 579, ll. 4-6; p. 631, ll. 13-14; p. 633, ll. 13-16). (p. 150, ll. 22-26). (p. 658, ll. 14-17). (p. 576, ll. 11-19). The Opinion also ignored the other two possibilities from *Smith*, that "[Mr. Hinson] believed or actually was in imminent danger of losing his life or sustaining serious bodily injury," or that he "had no other probable means of avoiding the danger" other than picking up the loaded weapon. 391 S.C. at 414, 706 S.E.2d at 15. Both existed here.

Second, in *Smith* there was "no evidence Smith was unable to retreat from the dangerous situation he created." Here, there is plenty of evidence of inability to retreat such to require the charge. The girlfriend of the defeated Mr. Salley, who is obviously aligned with him and who knew Mr. Salley did not like Mr. Hinson, (R. p. 126, ll. 17-22), had moments prior been in possession of the gun and repeatedly used profanity while committing at least one felony (pointing it at Mr. Bailey in violation of S.C. Code § 16-23-410, not to mention telling him she was going to shoot). (R. p. 101, ll. 21-24; p. 103, ll. 10-11; p. 121, ll. 21-23; p. 417, ll. 17-19; p. 146, ll. 6-8; p. 123, l. 17 – p. 124, l. 11; p. 147, ll. 14-22). She admitted her intent in grabbing the gun was "to scare [Mr. Hinson] . . ." (R. p. 103, ll. 15-16). In addition, Mr. Salley was up off the ground and moving before Mr. Hinson picked up the gun. (R. p. 105, ll. 14-19).

Like *Smith*, *Cabrera-Pena* is similarly easily distinguishable. There, the defendant went to an Applebee's where his estranged wife was dining with friends and they had a brief argument. He left, bought and loaded a handgun, and returned to Applebee's parking lot to wait for his wife to exit the restaurant. When she left, he called her over to his van, showed her the gun, and walked her back over to her friends, prompting her to motion to them that he had a gun. He then shot her in the eye, killing her. All of this occurred in the presence of their 2 year old daughter. *Cabrera-Pena*, 361 S.C. at 374-75, 381, 605 S.E.2d at 523, 526. Specifically:

> [W]e find that Cabrera–Pena was not simply carrying a weapon; he was carrying the weapon for the purpose of laying in wait in order to confront his wife. The subsequent confrontation that ensued illustrated that Cabrera–Pena had every intention of using the gun.

Id. at 383, 527 n.6.

Most importantly, "Cabrera–Pena presented no evidence that he was acting in self-defense." *Id.* at 382, 527. Indeed, Cabrera-Pena did not receive a self-defense jury instruction, *Id.* at 376, 524, while here not only did Mr. Hinson receive a self-defense charge, the State consented to it. (R. p. 819, ll. 10-15).

The law on involuntary manslaughter in the context of engaging in a lawful activity has developed in several cases over the past twenty or so years beginning with *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990).

In *McCaskill*, the appellant maintained her right to possess the firearm in self-defense was separate and distinct from the issue of whether she was entitled to use the gun in self-defense, arguing "she was lawfully entitled to arm herself in self-defense in case deadly force was necessary, but that the lethal charge was fired accidentally." *Id.* at 258, 269. The Supreme Court agreed, stating "[w]here a defendant claims that he

armed himself in self-defense, while also claiming that the actual shooting was accidental, this combination of events can 'place the shooting in the context of self-defense.'" *Id.* at 258, 269 (quotation omitted). "[A] homicide is excused when caused by the discharge of a gun . . . where the accused is *lawfully* acting in self-defense and the victim meets death by accident, through the unintentional discharge of a gun or the like . . . " *Id.* at 259, 270 (emphasis in original) (quotation omitted). "Because the defense of accident is not applicable unless the defendant was acting *lawfully*, it is necessary to instruct the jury as to what constitutes a lawful enterprise." *Id.* (emphasis in original).

The Supreme Court expanded the holding of *McCaskill* four years later in *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994). In that case the Court specifically "reject[ed] the State's claim that because Goodson unlawfully possessed a firearm, the defense of accident is precluded. Rather, 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." *Id.* at 281, 372.

"Read together, *McCaskill* and *Goodson* stand for the proposition that a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). After a detailed analysis of the facts, the *Burriss* Court determined a charge of accident was warranted, "and for the same reasons" there was evidence in the record supporting the appellant's claim "he was acting lawfully when the gun fired." *Id.* at 264-265, 109. "Although *Goodson* only specifically dealt with whether unlawful possession of a weapon would preclude an

accident defense, it would be incongruous not to apply this same reasoning in the context of involuntary manslaughter." *Id.* at 265, 109 (citation omitted).

The Supreme Court described Burriss as being entitled to an involuntary manslaughter charge because "the evidence supported a finding that he was lawfully armed in self-defense at the time the fatal shot occurred and there was evidence he handled the loaded gun in a negligent manner." *State v. Light*, 378 S.C. 641, 647-648, 664 S.E.2d 465, 468 (2008).

In *Light*, the Supreme Court noted this Court had correctly found the petitioner was lawfully armed in self-defense because he took the loaded gun from the decedent who had been threatening him with it. *Id.* at 648, 468-469. This is true because "[a]t this point in the analysis, we are concerned only with whether petitioner had a right to be armed for purposes of determining whether he was engaged in a lawful act, *i.e.* was lawfully armed, and not whether he actually acted in self-defense when the shooting occurred." *Id.* at 649, 469 n.6.

Light thus "makes it clear the question is not whether one is **acting** in self-defense at the time of the shooting, but whether the defendant is **lawfully armed** at the time of the shooting. Therefore, whether a defendant is entitled to a self-defense charge is of no consequence." *State v. Brayboy*, 387 S.C. 174, 182, 691 S.E.2d 482, 487 (Ct. App. 2010) (emphasis in original).

Here, the Court improperly failed to give the involuntary manslaughter because "*all* of the evidence in this case indicates [Mr. Hinson] was acting unlawfully at the time of the killing, and that as a result he is precluded from any instruction as to involuntary manslaughter." (R. p. 743, ll. 18-22) (emphasis added). She elaborated:

> Without any testimony that [Mr. Salley] actually pointed a gun at [Mr. Hinson] or [Mr. Hinson] saw [Mr. Salley] with a gun during or around the time of the altercation clearly means that [Mr. Hinson] would not have been justified in arming himself with a deadly weapon **at the time the gun discharged**, especially since [Mr. Hinson] testified that he won the fight [with Mr. Salley] and that [Mr. Salley] was on the ground when he got up.

(R. p. 744, l. 25 - p. 745, l. 8) (emphasis added).

Judge Benjamin made this pronouncement despite acknowledging "I am not ruling on the self-defense because y'all agreed to it . . . which kind of put me in a curious situation as to involuntary manslaughter." (R. p. 747, ll. 10-15).

The judge's recitation of what the facts in the instant case "clearly mean" was incorrect, particularly so since she appears to be focused on whether Mr. Hinson could be "acting" in self-defense. In any event, whether or not Mr. Salley had a gun is not determinative. *See, e.g., McCaskill*, 300 S.C. at 256-258, 387 S.E.2d at 268-269 (no evidence decedent was armed).

In fact, Mr. Salley's actions or lack thereof are not required for the charge. While the gun was resting on the ground not near the fight between Mr. Hinson and Mr. Salley, Mr. Salley's girlfriend went over and scooped up the gun, pointing it at Mr. Hinson's close friend and telling him that if he moved she would shoot him while repeatedly using expletives. When she later threw the gun to the ground - leaving it free for the momentarily defeated but ambulatory Mr. Salley to pick up in revenge or for herself to pick up for a second time and carry through with her previous threats - Mr. Hinson was entitled to retrieve the weapon so that it could not be used against him. In other words, "[he] was lawfully entitled to arm [himself] in self-defense **in case deadly force was necessary**, but that the lethal charge was fired accidentally."

McCaskill, 300 S.C. at 258, 387 S.E.2d at 269 (emphasis added). As a result, his possession of the gun was lawful, and when it accidentally discharged due to his negligently holding it by the trigger he was entitled to a charge of involuntary manslaughter. *See State v. White*, 253 S.C. 475, 171 S.E.2d, 712 (1969) (the negligent handling of a loaded firearm will support a charge of involuntary manslaughter). The Opinion completely ignored the reasoning that Mr. Hinson was entitled to arm himself vis a vis Andina Lee and her threatening and felonious behavior.

The Opinion also focused on the fact that Mr. Hinson was a convicted felon and not ever entitled to possess a firearm. (Opinion p. 7). Whether Mr. Hinson was carrying a firearm in violation of S.C. Code § 16-23-500 does not in and of itself effect his entitlement to the involuntary manslaughter charge and should not have been relied upon by this Court. *Burriss*, 334 S.C. at 262, 513 S.E.2d at 108 ("[t]he fact that one carries a concealed weapon in violation of the law does not render him criminally responsible . . . where death is caused by the accidental discharge of the weapon, for in such case death cannot be said to be the natural or necessary result of carrying the weapon in violation of law") (citation omitted).

Ultimately, the appellate court "does not sit as a finder of fact. It was for the jury to determine whether appellant's version of the shooting was believable or not." *Cabrera-Pena*, 361 S.C. at 386, 605 S.E.2d at 529 (Moore, J., dissenting). As described above, the oft-repeated black letter standard is **any evidence** of involuntary manslaughter **in the light most favorable to the appellant**. The Opinion should have reversed the trial court's failure to give the appropriate charge.

Conclusion

This Court seriously jeopardized a defendant's right to a fair jury trial in South Carolina by holding that the trial court did not commit reversible error when it dismissed a juror at the request of the prosecution after the juror unintentionally concealed his remote knowledge of the identity of a prosecution witness and the trial court admittedly did not perform the required legal analysis required under *State v. Stone*, 350 S.C. 442, 448-49, 567 S.E.2d 244, 247-48 (2002). This Court compounded the error by not reversing the trial court's failure to charge the jury on the elements of involuntary manslaughter when evidence existed supporting the charge. Rehearing is necessary in this matter to allow this Court to reconsider its holdings.

Respectfully submitted,

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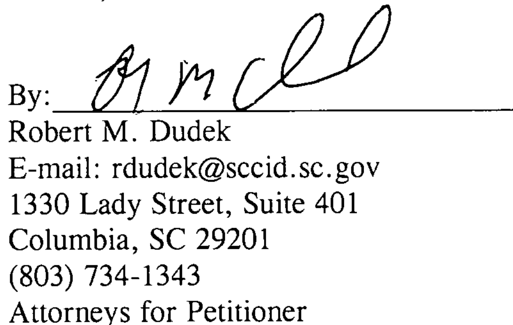

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Dated: April 3rd, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

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STATE OF SOUTH CAROLINA,

RESPONDENT,

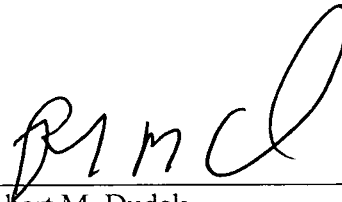
V.

JAMAAL HINSON,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zeleknka, Esquire, this 3rd day of April, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day
of April, 2014.

______________(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

SCCID

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April 3, 2014

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APR 03 2014

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State of South Carolina v. Jamaal Hinson, Appellate Case No. 2011-203569

Dear Mrs. Kitchings:

Enclosed are an original and six copies of the Petition for Rehearing, and an original and six copies of the Petition for Rehearing En Banc in the above-captioned case. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/brr

cc: Donald J. Zelenka, Esquire

Enclosure