

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Certiorari to Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2014-UP-113 (S.Ct.App. filed March 19, 2014)

10-GS-40-00829

The State of South Carolina,..... Respondent,  
v.  
Jamaal Hinson,..... Petitioner.

APPELLATE CASE NO. 2014-001368

**PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 20, 2014.

## QUESTIONS PRESENTED

1.

Did the Court of Appeals err by affirming the trial court's dismissal of a juror when it is uncontested the juror did not intentionally conceal his limited knowledge of the general identity of an after-the-fact witness, and the knowledge was of limited value?

2.

Did the Court of Appeals err by affirming the trial court's refusal to charge the elements of involuntary manslaughter to the jury when evidence exists that the appellant lawfully armed himself in self-defense in the event deadly force was necessary and that he did not intentionally fire the single shot?

## STATEMENT OF THE CASE

### **Procedural history**

The Richland County Grand Jury indicted petitioner on April 14, 2010 on a single count indictment of murder and Judge DeAndrea G. Benjamin tried him beginning November 14, 2011. (R. p. 760).

Eleanor Duffy Cleary represented petitioner. (R. p. 1). Senior Assistant Solicitor K. Luck Campbell and Assistant Solicitor Nicole M. Simpson served as prosecutors. (R. p. 1). The State called twenty-one witnesses in support of its case. Petitioner testified, and he was the only witness testifying for the defense. Over petitioner's objection, Judge Benjamin only instructed the jury on the elements of murder, self-defense, and accident. (R. pp. 673-752).

On November 18, 2011, the jury returned a verdict of guilty on the sole count in the indictment – murder. (R. pp. 754-756). Judge Benjamin sentenced petitioner to forty years imprisonment for murder. (R. p. 759, ll. 21-23; p. 762).

The Court of Appeals entertained oral argument on November 14, 2013, and thereafter issued unpublished Opinion No. 2014-UP-113 on March 19, 2014 (the "Opinion"). (App. 1-7).

Petitioner timely filed a Petition for Rehearing and a Petition for Rehearing En Banc, both dated April 3, 2014. (App. 8-72). On May 20, 2014, the Court of Appeals denied both the Petition for Rehearing and the Petition for Rehearing En Banc. (App. 73-74). This petition follows.

### **Relevant Facts**

On January 15, 2010, Petitioner Jamaal Hinson stayed the night at his girlfriend Lauren Banks' house in Blythewood, South Carolina. (R. p. 575, ll. 2-8; p. 592, l. 24 – p. 593, l. 1). The next morning, petitioner borrowed Ms. Banks' vehicle so he could deliver marijuana to

purchasers. (R. p. 575, ll. 14-24). Before petitioner left, he saw Richard Thomas and Anthony Salley on the same street as Ms. Banks' house. (R. p. 576, ll. 11-14). Thomas and petitioner 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). Petitioner did not know 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). Salley’s girlfriend Andina Lee acknowledged Salley did not like petitioner. (R. p. 126, ll. 17-22). Both Thomas and Salley exchanged threats with petitioner that morning. (R. p. 576, ll. 11-19). Thomas was known to carry a pistol. (R. p. 577, ll. 8-16; p. 600, ll. 5-7).

While petitioner was out making deliveries, he encountered Devan Bailey, who asked petitioner for a quantity of marijuana. (R. p. 411, ll. 13-22; p. 575, l. 21 – p. 576, l. 1). Then returned to Ms. Banks’ house and waited for Bailey to pick him up. (R. p. 576, ll. 1-6 and 20-25).

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 petitioner and took him to his house to get his pistol, since petitioner was scared of what 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). Petitioner wanted to be in a position to defend himself due to Thomas likely being armed. (R. p. 577, ll. 8-16).

After retrieving his pistol, petitioner 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 petitioner off, the three men in the pickup truck left but 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). Bailey phoned petitioner seeking a cigar and petitioner told him to return to the neighborhood, call him upon arriving, and petitioner 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 Ms. Banks' street. Bailey directed the group where to stop on the street, which was a couple of houses up from Ms. Banks' house because Bailey thought petitioner 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 Bailey, petitioner 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). Bailey and Salley were standing in the driveway with the small black car, talking, along with Salley's girlfriend. (R. p. 181, ll. 1-3; p. 579, ll. 1-3).

### **The confrontation**

Petitioner began walking from Ms. Banks' house to the house where Bailey was so that he could give him the cigar; as soon as Salley saw petitioner, Salley removed his jacket and rushed at petitioner 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). Petitioner was at the bottom of an incline, and Salley ran down from the top of the hill towards him. (R. p. 150, ll. 22-26). Salley was a larger man than petitioner. (R. p. 658, ll. 14-17). Afraid, petitioner drew his pistol to scare the advancing Salley, but Salley was unfazed, moving closer and demanding petitioner shoot him. (R. p. 579, ll. 7-11 and 21-25; p. 635, ll. 17-20). Salley was not afraid. (R. p. 196, ll. 12-15).

Petitioner stood frozen. (R. p. 580, ll. 3-4). Sensing advantage, Salley knocked the gun from petitioner's hand and then struck petitioner 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). Salley's blows landed with terrific force, and petitioner'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 petitioner and Salley were fighting, the pistol was lying on the ground where it had fallen after being knocked out of petitioner's hand. (R. p. 183, ll. 17-21). Thus, neither man had a weapon. (R. p. 101, ll. 10-12). Bailey was standing beside the fight. (R. p. 146, ll. 15-17).

Petitioner 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). 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 Bailey, demanding the fight stop. (R. p. 101, ll. 21-24; p. 1146, ll. 6-8). Her intent in grabbing the gun was "just really to scare [petitioner] . . ." (R. p. 103, ll. 15-16). She gave it her best effort, yelling "get the fuck back" three times and telling 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, Bailey retreated by running up the street. (R. p. 422, ll. 21-24; p. 423, ll. 7-8; p. 424, ll. 7-8).

Salley eventually stopped fighting back, though he remained conscious. (R. p. 580, ll. 20-25; p. 662, ll. 3-6). Petitioner voluntarily stopped fighting. (R. p. 639, ll. 10-12). As petitioner 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). Petitioner 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, 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). Petitioner 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). Petitioner was afraid of this scenario, particularly of being shot in the back as he retreated. (R. p. 582, ll. 19-21).

Petitioner 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, Salley was moving and facing petitioner, and just a couple of steps separated them. (R. p. 129, l. 22 – p. 130, l. 10; Tr. p. 584, ll. 3-5). In being so positioned, Salley startled petitioner. (R. p. 583, ll. 1-6). Petitioner 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 Salley scared petitioner by being up and moving just a couple of feet away, petitioner flinched and accidentally pulled the trigger; the gun fired once and the bullet struck Salley. (R. p. 583, ll. 4-6; p. 584, ll. 3-5). Petitioner did not continue firing because “it was an accident that [petitioner] shot him the first time.” (R. p. 590, ll. 10-14).

## ARGUMENT

1.

The Court Of Appeals Erred By Affirming the Trial Court's Dismissal Of A Juror When It Is Uncontested The Juror Did Not Intentionally Conceal His Limited Knowledge Of The General Identity Of An After-The-Fact Witness, And The Knowledge Was Of Limited.

### **Standard Of Review**

Impartiality of the juror is addressed to the discretion of the trial judge. *State v. Johnson*, 248 S.C. 153, 163-64, 149 S.E.2d 348, 353 (1966) (quotation omitted).

### **The trial error**

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

The court began the trial process by first resolving voir dire requests from the lawyers. After bringing the venire into the courtroom, the judge read aloud and individually the name of all anticipated witnesses, including the name "Jarrod Crudup." (R. p. 23-27). Those witnesses present in the courtroom stood when the judge announced their respective names; Mr. Crudup **was not present** in the courtroom when his name was called. (R. p. 25, l. 8). The judge asked the following questions of the venire:

- "[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).

Having no reason to respond, Juror 226<sup>1</sup> remained silent in response to these two questions, and he was ultimately placed on the jury panel.

Late in the afternoon on the second day of trial, the State called Jarrod Crudup as a witness regarding petitioner’s actions after he left the scene of the shooting. (R. p. 199-212). Mr. Crudup testified that he “knew of” petitioner through friends and actually knew Salley from the neighborhood. (R. p. 201, ll. 12-22). The assistant solicitor asked Mr. Crudup what he had been doing when he saw petitioner on the day of the incident, and he responded “I had just got home from basketball practice.” (R. p. 202, ll. 4-6). Mr. Crudup went on to testify that petitioner and Devan Bailey came into his house – uninvited – about 2:30 p.m. that afternoon saying they had been in a fight. (R. p. 202, l. 18 – p. 203, l. 24; p. 208, ll. 17-21). Shortly after arriving at Mr. Crudup’s house, petitioner left. (R. p. 204, ll. 4-8).

*Mr. Crudup did not have eyewitness knowledge – he was not present for the fight between petitioner 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 petitioner out of a law enforcement photo array, and willingly identified petitioner 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 petitioner or that he was a hostile witness. Petitioner’s counsel did not ask Mr. Crudup a single question on cross-examination, as the defense consistently acknowledged petitioner’s actions after the single*

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<sup>1</sup> Juror 226 is Guy Rodgers, a single male employed by Richland School District One as a painter. (R. p. 49, ll. 1-12). For ease of reference this petition will refer to him as “Juror 226.”

gunshot including going to Mr. Crudup's house and ultimately leaving the state. (R. p. 211, l. 24 – p. 212, l. 1).

The next 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 the judge 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, the judge 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, the judge 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 the judge did not let Juror 226 “explain it to you all.” Instead, the judge herself announced:

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 she made 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, the judge 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 the juror 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.

The judge 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.

Immediately, the prosecution pounced, devouring Juror 226's honesty with an argument that ultimately led to the juror's dismissal. Ms. Campbell stated:

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 whom the juror recognized was the prosecutor Ms. Campbell – Juror 226 never used the witness's name because Juror 226 did not know the witness's name. (R. p. 325, ll. 10-14).

After petitioner's counsel protested, Ms. Campbell continued on:

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).

The defense again protested, stating “[h]e certainly couldn't be struck for cause because he played basketball with somebody” but the judge responded “[y]es, but if [Ms. Campbell] had known it she said she would have struck him.” (R. p. 328, ll. 11-14). 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 the quote earlier in this paragraph.

Emboldened by the judge's approval of her hindsight argument of how she would have used her strikes differently,<sup>2</sup> (an argument that the State admits on appeal is inapplicable), the prosecutor 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).

The judge announced she was removing the juror "in an abundance of caution," which "standard" she referenced twice in her announcement. (R. p. 329, ll. 6-18). She did not perform any legal analysis.

Defense counsel again 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 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.

Moreover, the judge, on **three** separate occasions, used the word "name", corroborating Juror 226's reference to a single individual (as opposed to "names", which would indicate reference to multiple individuals):

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.

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<sup>2</sup> Ms. Campbell later vacillated in her hindsight position, stating "of course *it would have been a consideration* of use of strikes . . ." and "if we had that information and knew, *it would have been a consideration* on our strikes." (R. p. 326, ll. 15-16) (emphases added).

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

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) (emphasis added).

Respectfully, there is no reason for the judge 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,<sup>3</sup> (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.

After alerting the lawyers to the ruling dismissing the juror, the judge brought Juror 226 back into the courtroom:

The Court: I appreciate you being honest and bringing it to our attention. And everybody understands that you didn't intentionally do this, that you just did not put the names with the faces. And that happens all the time.

Juror 226: Yes, ma'am. I mean, they are kids, and I don't socialize with them kids. I mean, I play ball, but I don't have one-on-one conversation with them.

(R. p. 332, 4-11).

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<sup>3</sup> The judge 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.

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 concealment to the trial judge's attention on the third day of trial. However, the judge removed the juror "in an abundance of caution" based on the State's fantastical claim of "this person is affiliated or is in contact with friends of [petitioner]." <sup>4</sup> (R. p. 327, ll. 6-7).

The Court of Appeals mistakenly affirmed the removal of the juror, focusing on the lack of prejudice to the petitioner. Petitioner 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 the Court agreed the trial judge did not perform the legal analysis required before a juror may be removed; the Opinion never specifically addresses the issue. Stated another way, the Opinion finds that petitioner'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

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<sup>4</sup> Mr. Crudup did not testify he was friends with Petitioner – in response to the question "Do you know [Petitioner]?" he responded "I know of him." (R. p. 210, ll. 12-15). At best, the State can show (due to the juror's own admission) that Juror 226 played basketball with someone (a) who merely knew of Petitioner and (b) who testified on behalf of the prosecution including both out of court and in court identifications of Petitioner.

S.E.2d 282 (2001), *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002), and *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010). The Court of Appeals misconstrued these precedents by inserting a need to show prejudice.

In *State v. Woods*, the Supreme Court announced a two part test for removal: (1) the juror must have intentionally concealed the revealed information and (2) the intentionally-concealed information would have either (a) supported a challenge for cause or (b) been a material factor in the use of the preemptory challenges. 345 S.C. 583, 550 S.E.2d 282 (2001). Typically, “whether a juror’s failure to respond is intentional is a fact intensive determination which must be made on a case by case basis.” *Id.* at 588, 284. There was no case-specific, fact-intensive determination here because it is uncontested the juror did not intentionally conceal the information; both Judge Benjamin and the State repeatedly and affirmatively acknowledged there was no intentional concealment:

- Ms. Campbell: “And I understand he didn’t mean to do that or anything.” (R. p. 324, ll. 24-25).
- Ms. Campbell: “It is not his fault or anything like that . . . ” (R. p. 325, ll. 4-5).
- Ms. Campbell: “we just feel like had we had this information - - and we’re not blaming the juror . . . ” (R. p. 326; ll. 13-15).
- The Court: “I appreciate you being honest and bringing it to our attention. And everybody understands that you didn’t intentionally do this, that you just did not put the names with the faces. And that happens all the time.” (R. p. 332, ll. 3-7).

Pursuant to *Woods* it was improper to draw any inference that Juror 226 was not impartial and thus subject to removal. The judge compounded this mistake by ignoring the juror’s repeated statements that he could be fair and impartial.

Almost one year to the day after deciding *Woods*, the Supreme Court had the opportunity to put the test in place. In *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002), the prosecution

called the defendant's aunt as a witness. A juror recognized the aunt once the aunt took the witness stand, although the juror had not recognized the aunt's name when it was announced at the beginning of voir dire. The juror stated she "had lived down the street from [the aunt] five or six years earlier, and they were casual acquaintances only. [The juror] indicated her acquaintance would not affect her ability to be fair and impartial." *Id.* at 448, 247. Nevertheless, the trial court removed the juror and replaced her with an alternate, and this Court found the removal was in error:

It is patent here that [the juror's] failure to disclose her acquaintance with [the aunt] 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 preemptory challenge. [The juror] clearly indicated her former acquaintance with a witness whose name she did not even know, would not have affected her in any way. Accordingly, we hold the trial court abused its discretion in removing her.

*Id.* at 448-449, 247-248.

The facts of *Stone* are strikingly similar to the plight of Juror 226, in that (1) both jurors 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) both jurors recognized the respective witness only once the witness took the stand; (3) both jurors affirmatively brought their recognition of the respective witness to the trial court's attention; and (4) both jurors indicated they could continue to be fair and impartial after their respective revelations.

This case is even more egregious as Juror 226 was not even a casual neighbor of Mr. Crudup, but rather played recreational basketball at the same location as Mr. Crudup – "I mean, they are kids, and I don't socialize with them kids. I mean, I play ball, but I don't have one-on-one conversation with them." (R. p. 332, 4-11).

Nevertheless, the Court of Appeals offered 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*." (A. p. 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 Court of Appeals further contorted *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." (A. p. 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."

(A. pp. 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 Court of Appeals 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 incorrectly interpreted *Stone* in this case.

The Court of Appeals referenced *State v. Burgess*, but did not recognize the impact of that decision on this case. In that 2010 opinion, the Court of Appeals 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).<sup>5</sup>

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 Court of Appeals concluded its mistaken 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).

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<sup>5</sup> This is the language relied upon by the Court of Appeals in reversing the trial court's removal of a juror in a very similar case, *State v. Coaxum*, Appellate Case No. 2012-206607, which was argued to this Court on May 8, 2014 and is pending decision.

Importantly, both *McDaniel* and *Williams* were determined on issue preservation grounds, and the language relied upon by the Opinion, to the extent relevant, is dictum. 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 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 South Carolina appellate courts have had every opportunity to make that pronouncement in several recent published cases, and each time the respective appellate courts have wisely avoided such a paradoxical 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. *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.**

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 petitioner 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, petitioner 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 and the State has not even attempted to so argue.

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 petitioner to claim he had a right to trial by “his jury” since an appropriate alternate was available, (A. pp. 5-6), which is inconsistent with *Floyd*.

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.<sup>6</sup>

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.

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 empanelled [sic].”

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<sup>6</sup> 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”).

*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.*

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.* The Court of Appeals 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, and it lost sight of that tenet in this case.

Even if a showing of prejudice is required, which petitioner certainly does not concede,<sup>7</sup> petitioner 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”).

Ultimately, *Greer* 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.

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<sup>7</sup> 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).

“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.

## ARGUMENT

2.

The Court Of Appeals erred by affirming the trial court's refusal to charge the elements of involuntary manslaughter to the jury when evidence exists that the appellant lawfully armed himself in self-defense in case deadly force was necessary and that he did not intentionally fire the single shot.

### **Standard Of Review**

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"). 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).

### **Discussion**

After the conclusion of the evidence, the defense sought for the judge to charge the jury with instructions including the elements on involuntary manslaughter. (R. p. 706, l. 23 – p. 718, l. 16; p. 720, l. 24 – p. 722, l. 15; p. 723, l. 16 – p. 726, l. 19; p. 729, ll. 4-19). This crime is defined as:

- (1) The unintentional killing of another,
- (2) Without malice,
- (3) While engaged in *either*
  - (a) an unlawful activity not naturally tending to cause death or great bodily harm
  - or*
  - (b) a lawful activity with reckless disregard for the safety of others.

*State v. Mekler*, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). For more than forty years, South Carolina appellate courts have recognized that the negligent handling of a loaded firearm will support a charge of involuntary manslaughter. See *State v. White*, 253 S.C. 475, 171 S.E.2d, 712 (1969).

The key issue in the instant case is whether petitioner 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. 577, 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). The Opinion, in its one paragraph analysis of petitioner's right to a jury charge of involuntary manslaughter, App. p. 7, misapprehended or ignored key facts regarding the instruction.

In its Opinion, the Court of Appeals only considered two cases,<sup>8</sup> *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

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<sup>8</sup> The Court cited to *Mekler* for the definition of involuntary manslaughter.

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).

There are two major differences in the instant case. First, the Opinion focused solely on the claim that “there is no evidence to suggest [petitioner] was without fault in bringing on the difficulty.” (A. p. 7). This is incorrect, as there is evidence that petitioner was walking uphill across yards to give his friend a cigar and Salley, who was a larger man than petitioner and who earlier in the day had threatened petitioner, removed his jacket and rushed downhill at petitioner 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 “[petitioner] 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 Salley, who is obviously aligned with him and who knew Salley did not like petitioner, (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 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 [petitioner] . . .” (R. p. 103, ll. 15-16). In addition, Salley was up off the ground and moving before petitioner 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 two-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 petitioner 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) and *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994).

“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 the Court of Appeals 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 trial court improperly stated because “*all* of the evidence in this case indicates [petitioner] 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).

The judge elaborated:

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

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

The judge 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 petitioner could be “acting” in self-defense. In any event, whether or not 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). The Court of Appeals failed to correct this error.

In fact, 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 petitioner and Salley, Salley’s girlfriend went over and scooped up the gun, pointing it at petitioner’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 ambulatory Salley to pick up in revenge or for herself to pick up for a second time and carry through with her previous threats – petitioner 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 petitioner was entitled to arm himself vis-a-vis Andina Lee and her threatening and felonious behavior.

The Opinion also focused on the fact that petitioner was a convicted felon and not ever entitled to possess a firearm. App. p. 7. Whether petitioner 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 the Court of Appeals. *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**

The Court of Appeals erred by affirming the trial court's dismissal of a juror when the judge herself recognized the juror had not intentionally concealed his limited knowledge of the general identity of an after the fact witness. Further, the Court of Appeals erred by affirming the trial court's failure to charge the jury with the elements of involuntary manslaughter when evidence in the record supported the charge.

As a result of either or both of these errors of law, this Court should grant certiorari pursuant to Rules 242(b)(3) and (b)(4), SCACR to review the Opinion of the Court of Appeals.

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Attorneys for Petitioner

The 29<sup>th</sup> day of July, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Richland County  
DeAndrea G. Benjamin, Circuit Court Judge.

\_\_\_\_\_  
Opinion No. 2014-UP-113 (S.C. Ct. App. filed 3/19/2014)  
10-GS-40-00829  
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JUL 29 2014  
**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

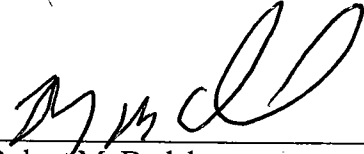
JAMAAL HINSON,

PETITIONER.

APPELLATE CASE NO. 2014-001368

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Donald J. Zelenka, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 29th day of July, 2014.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day  
of July, 2014.

Rhonda Demese Zorawski (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 17, 2021