

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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**APPEAL FROM BEAUFORT COUNTY
COURT OF GENERAL SESSIONS**

SC Court of Appeals

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No.(s)2012-GS-07-2246 & 2012-GS-07-2247

State of South Carolina

Respondent,

v.

Walter Tucker,

Appellant.

APPELLANT'S PETITION FOR REHEARING

**Derek M. Wright
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**Other Counsel of Record:
The Honorable Isaac McDuffie Stone, III
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Attorney for Respondent**

**APPELLANT'S STATEMENT OF ISSUES FOR WHICH COURT OF APPEALS
HAS NOT CONSIDERED IN RENDERING ITS DECISION**

- I. THE COURT OF APPEALS DECISION USED AN IMPROPER STANDARD
FOR ITS ANALYSIS OF THE JUROR MISCONDUCT.**
- II. THE COURT OF APPEALS DECISION EFFECTIVELY DENIES APPELLANT
DUE PROCESS AS THERE IS NO VEHICLE UPON WHICH TO OBTAIN
RELIEF**
- III. THE COURT OF APPEALS DECISION FAILED TO PROVIDE APPELLANT A
RIGHT OF CONFRONTATION**

ARGUMENT & CITATION

I. THE COURT OF APPEALS DECISION USED AN IMPROPER STANDARD FOR ITS ANALYSIS OF THE JUROR MISCONDUCT.

In its decision, the Court of Appeals acknowledged that “classifying the concealment is a fact intensive determination”. Further, the Court of Appeals then went on to state that he party alleging the “innocent or unintentional nondisclosure” has a heightened burden. This set forth the incorrect standard as the facts set forth by Appellant provide for a deliberate and intentional failure to disclose, not an unintentional nondisclosure. Accordingly, the analysis which follows did not consider the facts of Appellant’s case properly. The Court of Appeals should have, as it stated, performed the analysis considering the juror misconduct as “presumptively biased”. Instead, a plain reading of the decision reveals that the analysis seeks to argue whether the facts presented by Appellant are sufficient to meet his burden, whereas the presumption of bias would have required the State to carry the burden of persuasion.

The Woods decision is absolutely on point based on the facts presented in this case. Further, the Woods decision has been examined and its holdings further affirmed recently State v. Coaxum, 410 S.C. 320 (S.C. 2014). Again, it is worth noting the mandatory language set forth in Coaxum which stated:

In the event of such juror misconduct, the trial court MUST inquire into whether the withheld information affects the jury’s impartiality. Kelly, 331 S.C. at 141, 502 S.E.2d at 104. However, the court should not grant a mistrial based on a juror’s concealment of information “unless absolutely necessary.” Id. At 142, 502 S.E.2d at 104. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989)); see also State v. Williams, 321 S.C. 455, 459-60, 469 S.E.2d 49, 52 (1996)(affirming the trial court’s decision to seat an alternate juror midtrial after another juror’s impartiality came into question); State v.

McDaniel, 275 S.C. 222,224, 268 S.E.2d 585, 586 (1980)(same).

We have previously held that a new trial is required “*only* when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party’s peremptory challenges. Woods, 345 S.C. at 587, 550, S.E.2d at 284 (emphasis added). *In the face of a juror’s intentional nondisclosure during voir dire, “it may be inferred, nothing to the contrary appearing, that the juror is not impartial.” Id. At 587-88, 550 S.E.2d at 284. Thus, should the trial court fail to replace such a juror or grant a mistrial, the party need only demonstrate the error of the trial court’s decision by providing the concealment was, in fact, intentional; however, the party need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party’s inability to strike the juror is apparent. Id. At 589, 550 S.E.2d 285.*

II. THE COURT OF APPEALS DECISION EFFECTIVELY DENIES APPELLANT DUE PROCESS AS THERE IS NO VEHICLE UPON WHICH TO OBTAIN RELIEF

Extending the issue of the preceding section further, if a discussion or analysis of affidavits is being used to determine the right of Appellant to a hearing, then it follows that the Court of Appeals is establishing a procedure which can never be satisfied. First, it is improper and prohibited for Appellant, directly or through counsel, to communicate with jurors and discuss the content of deliberations with jurors. Second, if the juror can be spoken to, the juror can simply refuse to communicate. Third, in the absence of juror cooperation, Appellant would have to investigate juror misconduct through the presentation of external witnesses and evidence. Yet, the very essence of the misconduct is the intent, motive, and actions of the juror which is best obtained from the juror. Fourth, as in the instant case, if a witness sets forth allegations which support a finding of misconduct, a simple affidavit of the juror denying misconduct is sufficient to end the inquiry. Fifth, there is no ability to confront or to examine the juror. Therefore, there

is no ability to assess credibility. Affidavits are hearsay, have not indicators upon which to determine veracity or credibility, and deny Appellant a right of confrontation.

“All criminal defendants have the right to a trial by an impartial jury.” State v. Woods, 345 S.C. 583, 597, 550 S.E.2d 282, 284 (2001) (citing U.S. Const. amends. VI and XIV). To that end, the jury must render its verdict free from outside influences of all kinds. Kelly, 331, S.C. at 141, 502 S.E.2d at 105 (quoting State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993)). To protect both parties’ right to an impartial jury, the trial court **must conduct voir dire of the prospective jurors to determine whether the jurors are aware of any bias or prejudice against a party, as well as to “elicit such facts as will enable [the parties] intelligently to exercise their right of preemptory challenge.” Woods, 345 S.C. at 587, 550 S.E.2d at 284.**

“[T]rial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information. Kelly, 331 S.C. at 145, 502 S.E.2d at 106. Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a preemptory challenge.” State v. Gullede, 277 S.C. 368, 371, 287 S.E.2d 488, 490 (1982).

III. THE COURT OF APPEALS DECISION FAILED TO PROVIDE APPELLANT A RIGHT OF CONFRONTATION

Extending the issue of the preceding section further, the Court of Appeal decision purports to determine that the trial court had enough information to make a credibility determination upon affidavits. It is unreasonable to empower a court on any level to make assessment of credibility upon affidavits. This decision has the legal effects of empowering trial courts to deny evidentiary hearings and Appellant’s right of confrontation, by simple review of the face of affidavits. Does South Carolina law provide that an affidavit can now be used to circumvent the right of Appellant to a fair and impartial juror, a fair trial, a trial and proceeding upon which there are rights of confrontation. Under the theory set forth in this decision, a trial court may

make substantive decision based wholly upon affidavits, then why have jurors or live witnesses at all?

The proper decision of the Court of Appeals would have been to remand the case for further proceedings. Failing to do so, necessitated the Court of Appeals making assessment of credibility on affidavits and speculation as to whether the trial court properly made assessments upon affidavits. Yet the rights at stake are to the very essence of the Appellant's right to a fair trial. The decision appears to be crafting to cut off or keep closed the flood gates of aggrieved Appellants seeking evidentiary hearings on jury misconduct. Since when does juridical economy outweigh the fundamental constitutional right to due process of the Appellant? It should not and cannot. See State v. Aldret, 333 S.C. at 315, 509 S.E.2d at 815 (holding where affidavits supporting juror misconduct are credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred).

CONCLUSION

For the above reasons and citations of authority, Appellant requests as follows:

1. That this Court of Appeals grant a rehearing and issue new decision in the above styled matter;
2. That this Court of Appeals consider this issue en banc; and
3. For such other and further relief which this Court deems just and proper.

This May 3, 2018.

Respectfully submitted,

/s/ Derek M. Wright

Derek M. Wright
Attorney for Appellant

/s/ Robert E. Ferguson, Jr.

Robert E. Ferguson, Jr.
Attorney for Appellant

I CERTIFY that I have this day served the within and foregoing:

- **Appellant's Petition for Rehearing.**

upon all parties to this matter by depositing a true copy of the same in the United States Mail
with proper postage affixed thereto and addressed as follows:

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The Honorable Isaac McDuffie Stone, III
The Honorable Sean Thornton
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This May 3, 2018.

Respectfully submitted,

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