Volume III of III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

JAMAAL HINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-001316

APPENDIX

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MICHAEL D. DAVIDSON
Assistant Attorney General
1000 Assembly Street
Columbia, SC 29201
(803) 734-1680

ATTORNEYS FOR RESPONDENT

Pages 1001-1382

INDEX

INDEX i

TRIAL TRANSCRIPT DATED NOVEMBER 14-18, 2011 1

INITIAL BRIEF OF APPELLANT 978

INITIAL BRIEF OF RESPONDENT 1009

INITIAL REPLY BRIEF OF APPELLANT 1054

STATE V. HINSON, 2014-UP-113 (S.C. Ct. App. Filed March 19, 2014) 1071

PETITION FOR REHEARING 1078

PETITION FOR REHEARING EN BANC 1110

ORDER DENYING PETITION FOR REHEARING 1143

PETITION FOR WRIT OF CERTIORARI 1144

RETURN TO PETITION FOR WRIT OF CERTIORARI 1180

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI 1219

ORDER DENYING PETITION FOR WRIT OF CERTIORARI 1233

REMITTITUR 1234

APPLICATION FOR POST-CONVICTION RELIEF 1235

RETURN 1242

AMENDED APPLICATION FOR POST-CONVICTION RELIEF JULY 26, 2017 1249

AMENDED APPLICATION FOR POST-CONVICTION RELIEF JANUARY 9, 2018 1252

POST-CONVICTION RELIEF HEARING TRANSCRIPT JANUARY 24, 2018 1254

MEMORANDUM FILED JANUARY 25, 2018 1354

ORDER OF DISMISSAL 1361

INDICTMENT 1380

SENTENCE SHEET 1382

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 instruction even though the judge stated "I did not rule as to the elements of self-defense or the elements of the accident because the State did not object to the instruction," (R. p. ___; Tr. p. 814, ll. 18-21), before announcing her ruling disallowing an involuntary manslaughter charge 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. ____; Tr. p. 815, 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. ____; Tr. p. 816, l. 25 – p. 817, l. 8).

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. _____; Tr. p. 819, 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. The judge completely ignored the reasoning that Mr. Hinson was entitled to arm himself vis a vis Andina Lee and her threatening behavior, and her focus on whether or not Mr. Salley had a weapon was wrong.

Ultimately, "the jury should have been allowed to determine how the shooting occurred," *Mekler*, 379 S.C. at 17, 664 S.E.2d at 479, and to not charge the finder of fact with the elements of involuntary manslaughter was reversible error.

CONCLUSION

Judge Benjamin erred by dismissing a juror when she herself recognized the juror had not intentionally concealed his limited knowledge of the general identity of an after the fact witness. Further, Judge Benjamin erred by failing 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 reverse Mr. Hinson's conviction and remand the case to the Richland County Court of General Sessions for a new trial.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Reid T. Sherard

Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Greenville, South Carolina

Dated: 11/12/12

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE

Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

C/A No. 2010-GS-40-0829

The State of South Carolina, ... Respondent,

v.

Jamaal Hinson,..... Appellant.

APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant hereby designates the following matters to be included in the Record on Appeal:

1. Indictment;

2. Transcript as cited in Appellant's brief; and

3. Sentencing sheet.

We the undersigned counsel of record for Appellant hereby certify that this DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL contains no matter which is irrelevant to the appeal.

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NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Reid T. Sherard

Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Greenville, South Carolina

Dated: 11/12/12

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE

Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2010-GS-40-0829

The State of South Carolina,..... Respondent,

v.

Jamaal Hinson,..... Appellant.

PROOF OF SERVICE

I certify that on November 13, 2012, I served the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal, by having a copy of the same hand delivered, to Respondent's attorney of record, Donald J. Zelenka, Rembert Dennis Building, 1000 Assembly Street, Columbia, S.C. 29201.

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SC Court of Appeals

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Reid T. Sherard

Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Greenville, South Carolina

Dated: 11/13/12

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE

Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343

Attorneys for Appellant

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2011-203569

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMAAL HINSON,

APPELLANT

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INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 1987
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

APPELLANT'S STATEMENT OF ISSUES ON APPEAL v

RESPONDENTS STATEMENT OF THE CASE 1

RESPONDENT'S STATEMENT OF THE FACTS 2

ARGUMENT

I. **Trial Court Did Not Commit Reversible Error By Dismissing A Juror, Even Though Juror Did Not Intentionally Conceal His Knowledge Of The Identity Of One Of The Witnesses and the Fact that He Played Basketball With Him and Possibly Other Witnesses, Where The Juror's Removal Did Not Prejudice Appellant At Trial Because The Removed Juror Was Replaced By An Alternate, And The Removal Occurred Prior to Deliberations Based Upon An Abundance of Caution and Concern** **6**

II. **Appellant Was Not Entitled To A Charge On The Elements Of Involuntary Manslaughter Where There Was No Evidence That Appellant Was Lawfully Armed In Self-Defense When He Fired The Fatal Shot.** **24**

CONCLUSION 37

DESIGNATION OF MATTER

CERTIFICATE OF SERVICE

TABLE OFAUTHORITIES

FEDERAL CASES

Batson v. Kentucky, 476 U.S. 79 (1986) 21

Georgia v. McCollum, 505 U.S. 42 (1992) 21

Strickland v. Washington, 466 U.S. 668 (1984) 20

United States v. Hankish, 502 F.2d 71 (4th Cir.1974) 16

STATE CASES

Ballentine v. State, 390 S.E.2d 887 (Ga. App. 1990) 21

Barker v. State, 487 S.E.2d 494 (Ga. App. 1997) 22

In re Spencer R., 387 S.C. 517, 522–23, 692 S.E.2d 569, 572 (Ct.App.2010) 27

Lee v. State, 11 S.W. 3d 553 (Ark. 2000) 22

Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007) 19

State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007) 13

State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010) 26, 27

State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) 21

State v. Bryant, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999) 33

State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) 13, 19

State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) 26, 28, 29

State v. Cabrera–Pena, 361 S.C. 372, 380–81, 605 S.E.2d 522, 526 (2004) 27, 30

State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69-70 (Ct. App. 2000) 14

State v. Dickey, 394 S.C. 491, 502-03, 716 S.E.2d 97, 103 (2011) 35

State v. Gibson, 390 S.C. 347, 356, 701 S.E.2d 766, 770-71 (Ct. App. 2010) 27

State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101-02 (Ct.App.2004) 14, 18

State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982) 15

State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998) 15

State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) 29

State v. McDaniel, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980) 13, 15, 21

State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008) 26

State v. Pettigrew, 860 P. 2d 777 (N.M. App. 1993) 22

State v. Rayfield, 369 S.C. 106, 113, 631 S.E.2d 244, 248 (2006) 6

State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006) 26

State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010) 26, 27

State v. Rogers, 263 S.C. 373, 210 S.E.2d 604 (1974) 21

State v. Santiago, 370 S.C. 153, 161, 634 S.E.2d 23, 28 (Ct. App. 2006) 35

State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991) 15, 16

State v. Simmons, 599 S.E.2d 448 (2004) 6

State v. Slater, 373 S.C. 66, 70, 644 S.E.2d, 50, 53 (2007) 28, 30, 35

State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 265-66 (Ct. App. 1999) 13

State v. Smith, 391 S.C. 408, 706 S.E.2d 706 S.E.2d 12 (2011) 27

State v. Stone, 290 S.C. 380, 382, 350 S.E.2d 517, 518 (1986) 16, 19

State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002) 16, 17

State v. Williams, 321 S.C. 455, 469 S.E.2d 52 (1996) 21

State v. Williams, 469 S.E.2d 49 (1996) 21

State v. Woods, 345 S.C. 583, 592, 550 S.E.2d 282, 286 (2001) 13-16, 18

Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986) 15, 16

Thornberg v. State, 985 P. 2d 1234 (Okla. Crim App. 1999) 22

STATE STATUTES

S. C. Code Ann. § 16–23–410 (2003) 27

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did The Trial Court Err By Dismissing 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 Even If The Juror Had Intentionally Failed To Reveal The Knowledge It Was Of Such Limited Value It Would Not Have Supported A Challenge For Cause Nor Been A Material Factor In The Use Of The State's Peremptory Challenges?

2. Did The Trial Court Err By Refusing 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?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Jamaal Hinson, was indicted by the Richland County Grand Jury on April 14, 2010 for murder involving the January 16, 2010 death of Anthony Salley. State v. Jamaal Hinson, 2010-GS-40-829. ROA _ . Following his indictment, Appellant was tried before the Honorable DeAndrea G. Benjamin and a jury on November 14, through November 18, 2010 in Richland County. At trial, Appellant was represented by Eleanor D. Cleary, while the State was represented by K. Luck Campbell and Nicole M. Simpson. (Tr. p. 1).

At the conclusion of trial, the jury convicted Appellant of murder. On November 18, 2010, Judge Benjamin sentenced Appellant to 40 years on the murder charge. (Tr. p. 961); (Tr. p. 975).

The Appellant timely served the notice of appeal on November 22, 2011. This appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

On the morning of January 16, 2010, Jamaal Hinson, the Appellant, left Lauren Banks' house in the Vineyard Crossing subdivision of Blythewood, South Carolina to complete a series of marijuana transactions. (Tr. p. 644). While leaving Vineyard Crossing, Hinson saw Richard Thomas and Anthony Salley [the victim of the murder] outside of Mr. Salley's own home, two houses down from Ms. Banks' house. (Tr. pp. 506-07, 645). Hinson and Mr. Thomas were enemies with a contentious history and "(didn't) like each other at all." (Tr. pp. 640, 689). Appellant beat Mr. Thomas with a pistol after an altercation at the AM-PM gas station in the Fall of 2009. (Tr. pp. 641-43). Hinson's testimony acknowledged tension with Mr. Salley, but claimed he did not know him well and the two never fought. (Tr. pp. 641, 689). Nevertheless, Lauren Banks' statement to police indicated that Hinson referred to Mr. Salley as a "pussy," stated he did not like Mr. Salley, and that he'd beaten Mr. Salley up before. (Tr. p. 689). Upon seeing each other on January 16, 2010, Appellant and Mr. Thomas exchanged threats. (Tr. p. 640). Afterwards, Appellant left Vineyard Crossing to complete his marijuana sales. (Tr. pp. 644-45).

Later that day, Hinson encountered his friend Devan Bailey at a gas station. Bailey was with Derrick Diamond, and Quinton Emerson, who was driving the trio around in a silver/gray pickup truck. (Tr. p. 474). Bailey asked if Appellant could provide him with any marijuana. (Tr. pp. 644-45). Appellant indicated he could, but first required a ride to his house. (Tr. pp. 646, 692). Appellant wanted to stop at his house first so he could obtain a gun. (Tr. p. 646). After Appellant retrieved his gun from his house, Bailey, Emerson and Diamond took Appellant back to Lauren Banks' house in Vineyard Crossing. (Tr. pp. 694-95).

After dropping Appellant off at Lauren's house, Bailey called Appellant asking for a cigar. (Tr. p. 647). Though either Emerson or Diamond could have legally purchased a cigar (Tr. pp. 170, 204-05, 912), Appellant testified that he told Bailey to return to Lauren Banks' house for a cigar, because he was uncomfortable allowing Bailey to obtain one illegally. (Tr. p. 647). Upon their return, Bailey instructed the driver, Emerson, to stop in front of Anthony Salley's house two doors down from where they dropped Appellant off previously. (Tr. p. 479). At the time, Anthony Salley was sitting with Andina Lee in his car in the driveway. (Tr. p. 121). Andina Lee testified that the truck blocked the driveway when it was parked behind them. (Tr. p. 121). Bailey got out of the truck and called Appellant to tell him he was outside. (Tr. pp. 182, 215-17, 647, 698). Salley got out of his car and spoke to Bailey. (Tr. pp. 215-17). Appellant then emerged from Lauren Banks' house and saw Salley and Bailey talking. (Tr. p. 699). Salley was not making any gestures or raising up his fists, and Appellant could not hear what he was saying. (Tr. p. 701) . Appellant advanced toward the area where Salley and Bailey were talking, while armed with his gun. (Tr. pp. 648, 700).

As Appellant was approaching the area, Appellant claimed that Salley saw Appellant and went toward him. (Tr. pp. 648, 702). Appellant did not know Salley to carry a gun, and saw nothing that day to indicate otherwise. (Tr. pp. 641, 702). Nevertheless, when Appellant was within arms' length of Salley Hinson pulled out his gun and aimed it at Salley, according to Hinson's testimony. [1] (Tr. p. 702). The state's evidence contradicted this account.

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[1]Hinson testified that he pulled the gun out to scare him away. Tr.p. 702-703. He stated that he felt that Salley was a threat to him when he was approaching Devan Bailey, because when Salley saw him he started to take off his jacket and ran towards him. Tr.p. 702, l. 13-18. Appellant admitted that before the victim ever laid a hand on him that Appellant had already pulled his gun out. Tr.p. 704. In his testimony, Appellant claimed that the victim had "walked up

Andina Lee testified that as Appellant approached the scene, he said "Yes, you bitch ass nigger. This is exactly what I want." (Tr. pp. 123-24). Andina testified that she saw Hinson walk toward Salley pull the gun out and point it directly at Salley. Tr.p. 124, l. 6-11. Quinton Emerson testified that when Appellant was face-to-face with Salley he "racked the gun" to demonstrate that it was ready to fire and pointed it at Salley's head. (Tr. pp. 217, 219). Eventually, Salley hit Appellant, knocking the gun from his hand. Tr.p. 124, l. 18-19. See Tr. pp. 704-07. Appellant and Salley commenced to fighting. (Tr. p. 124,219).[2] While they were fighting neither had a weapon. Tr.p. 125. After forcing Salley to the ground, Appellant punched Salley in the head,

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to the pistol and said if you are going to shoot me, shoot me." Tr.p. 704, l. 17-23. He claimed that the victim punched him and then he stumbled and that he was hit again. He claimed that at that point he dropped the pistol and then began fighting with the victim. Tr.p. 707, l. 17- 708, l. 14. He declared that he got the best of the victim and finished fighting. When he got up from the fight that he saw the victim's girlfriend Andina had the pistol in her hand. Tr.p. 708, l. 15-16. At that point, he saw her throw it down. Tr.p. 708, l. 17-25. He dined in his testimony that he told Devan Bailey to "bust him." TR.p. 709, l. 6-14. According to Hinson, when Andina threw the gun down on the ground, the victim was on the ground from the fight. Tr.p. 709-710. Hinson stated that he saw Devan run off when Hinson picked up the gun off the ground. Hinson stated that he picked up the pistol to put it in his waistband and he turned around and pointed it at the victim, saw the victim fall and knew that he shot him and then ran. Tr.p. 711-712. He stated that he was scared so he ran. Tr.p. 712, l. 17. He claimed that he threw the gun away as he was running through the neighborhood. Tr.p. 713. He stated that he threw the gun away because he could have gone to jail that day and would have gotten a pistol charge also. Tr.p. 713.

[2]Andina Lee testified that while they were fighting another male got out of a car and came over and started Salley to make him get on the ground. Tr.p. 125. She stated that at that point Andina picked up the gun from the ground and told them they needed to stop fighting. She said she pointed the gun at the guy who came to Hinson's aid who then came toward her and that she then threw the gun back down to the ground because she was afraid of him. Tr.p. 125-129. She stated that she was afraid and feared someone trying to take the gun from her hand. She stated that the fight had stopped on its own. Tr.p. 128-129. She stated that she and Salley then tried to go to the house. However, Hinson picked up the gun while she was trying to get Salley off the ground and shot Salley. Tr.p. 129-130. She stated that Salley was defenseless without a weapon and Hinson was within a few steps when he shot him. Tr.p. 130 -132. Lee stated that Hinson pointed the gun at Salley's stomach. Tr.p. 132-133. She described the fact that Anthony Salley fell and grabbed his stomach after he was shot. Tr.p. 133-134.

face, and chest until Salley no longer fought back. (Tr. pp. 707-08). Derrick Diamond testified that during the fight, Appellant told Bailey to "Bust him!" (meaning shoot Salley with the gun). (Tr. p. 184).

After Appellant won the fight, Appellant claimed he stood up and he saw Andina Lee toss the gun to the ground. (Tr. p. 650, 708). Appellant claimed he went over, picked up the gun, turned, and fired the gun, hitting Anthony Salley. (Tr. pp. 651-52). Andina Lee testified that she was helping Salley get up from the ground in order to retreat into the house, and Appellant pointed the gun and shot Salley. (Tr. pp. 129, 133). Salley died that afternoon from a single gunshot wound to his abdomen. (Tr. pp. 427-38).

After shooting Salley, Appellant ran to Jerrod Crudup's house where Demario Evans was parked. (Tr. pp. 653-54).[3] Appellant asked Mr. Evans to drive him away from Vineyard Crossing. (Tr. pp. 241, 654). Later that day, Appellant met with Devan Bailey to "get their story straight." (Tr. p. 718). Appellant eventually fled to Atlanta, where he was later apprehended and brought back to South Carolina for trial. (Tr. pp. 716-17, 722).

[3]The gun was not recovered.

ARGUMENT

I. Trial Court Did Not Commit Reversible Error By Dismissing A Juror, Even Though Juror Did Not Intentionally Conceal His Knowledge Of The Identity Of One Of The Witnesses and the Fact that He Played Basketball With Him and Possibly Other Witnesses, Where The Juror's Removal Did Not Prejudice Appellant At Trial Because The Removed Juror Was Replaced By An Alternate, And The Removal Occurred Prior to Deliberations Based Upon An Abundance of Caution and Concern .

It has been stated that a criminal defendant does not have a right to be tried by a particular juror, but only to have fair and impartial jurors decide his fate. See State v. Rayfield, 369 S.C. 106, 113, 631 S.E.2d 244, 248 (2006). See State v. Simmons, 599 S.E.2d 448 (2004)(trial court did not abuse its discretion by dismissing a juror after a murder trial had begun, where juror admitted that he had unauthorized contact with his wife about the personal effect of a guilty verdict would have on them, and the trial judge had admonished the jury not to discuss the case with anyone). This case evidences the discretion that should be used by trial judges to insure a fair trial when a juror indicates that he has knowledge of a witness from personal contact with that witness in playing basketball and had initially indicated to the court that he identified other witnesses. This removal and replacement with a selected fair and impartial alternate was reasonably appropriate where that newly disclosed information would have led to a peremptory challenge by the State due to a connection between that witness and other witnesses and that court was concerned that future witnesses in the case might develop a similar disclosure by the juror based upon his comments to the court.

Appellant is not entitled to a new trial because he has not demonstrated that he was prejudiced by the trial court's removal of Juror 226. State court precedent, doctrinal structure and

prudential considerations all require that the "abuse of discretion" language be read to mandate independent findings of both legal error and prejudice to reverse a trial court's decision to dismiss a juror. Juror 226's dismissal did not prejudice Appellant, and Appellant's brief fails to make any assertion to the contrary. Therefore, Appellant's conviction should be affirmed.

HOW THE ISSUE WAS RAISED BELOW

On November 14, 2011, the trial court conducted voir dire in Appellant's trial for murder. Judge Benjamin read the names of every anticipated witness, **including the name "Jarrod Crudup,"** and asked that each witness present stand upon hearing their name called. (Tr. pp. 23, 25). After reading the names, the judge asked:

> Q, "[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?" (Tr. p. 27)
>
> Q. "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." (Tr. p. 31).

Juror 226 [Guy Rodgers, a single male employed by Richland School District One as a painter] did not respond to either question. He was ultimately placed on the jury. (Tr. p. 49, ll. 1-12).

The Testimony of Jarrod Crudup

On November 15, 2011, [the second day of the trial], the State called Jarrod Crudup to testify about Appellant's departure from the Vineyards Crossing neighborhood after shooting Anthony Salley. (Tr. pp. 235-48). Crudup recounted the afternoon of January 16, 2010, when he was hanging out with his sister, his niece, and his friend, Demario Evans.[4] (Tr. p. 238). Devan

[4]Demario Evans was one of Appellants chauffeurs (meaning he would drive Appellant around in exchange for marijuana and gas money). (Tr. 653).

Bailey and Appellant came to his house around 2:30. (Tr. p. 239). Crudup knew Bailey from school and playing football together (Tr. p. 239), and knew of Appellant through friends. (Tr. pp. 237, 240). Appellant told Crudup that he and Bailey had been in a fight, and asked Evans for a ride. (Tr. pp. 239, 241). Crudup later identified Appellant and Devan Bailey in photo lineups as the individuals who had come to his house that day. (Tr. pp. 244-47), and identified Appellant again at trial. (Tr. p. 247).

Juror 226 Requests To Speak to the Court

Early on the third day of trial, November 16, 2011, Judge Benjamin stated that "Juror 226 wants to talk to me. I have no idea why...," and stepped out of the courtroom with her law clerk to inquire into the matter. (Tr. pp. 359-60). Judge Benjamin returned and reported that Juror 226 had not recognized the name of some of the witnesses because he doesn't know them, but recognized them from playing basketball in the area where he works. (Tr. p. 360).

The Trial Court's Inquiry of Juror 226

After she made this announcement, the judge asked Juror 226 if her summary reflected what he had told her in the hallway and he responded "yes, ma'am." (Tr. p. 360, II. 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.

(Tr. p. 360, 1. 21 - p. 361, 1. 1).

The Senior Assistant Solicitor Campbell then inquired "which witnesses?", and the trial judge then inquired :

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 J 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.

(Tr. p. 361, 11. 2-18) (emphases added).

Prosecution Requests to Remove Juror 226.

The State asked that Juror 226 be removed. (Tr. p. 365). Particularly, the prosecution stated:

Solicitor Campbell: 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.

(Tr. p. 361, 1. 23 - p. 362, 1. 8). [5]

[5]In his brief before this Court, the Appellant claims that the State misrepresented the juror's statements - asserting that he never indicated even communicating with Mr. Crudup, much less a social relationship with him. *Initial Brief of Appellant*, p. 12. The statements by the prosecution - read in context speak for themselves as to the reference of connection with Crudup playing basketball with the juror. The fact is that the prosecution identified witness Crudup as the witness with "the dreads" and it was never contested in the trial court. Tr. p. 362, ll. 10-14. See

Essentially, the State argued that Jarrod Crudup was closely connected with friends of the Appellant,[5] and Juror 226 had at least "some type of communication with [Crudup] playing basketball." (Tr. pp. 362, 363, 367). The State went on to assert that had they known about Juror 226's connection to Jarrod Crudup, the matter would have been a consideration in their use of strikes. (Tr. p. 364). Particularly, the prosecutor stated:

> 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.

Tr. p. 363, l. 13-17.

It was pointed out that Demario Evans, Crudup's friend, was also a potential witness in the case.[6] The prosecution stated that Evans was eluding the state at that point. Tr.p. 364, l. 14-19. The prosecution stated that the evidence already in the record was that Demario was at his house at the time of the crime and helped Appellant escape. Tr.p. 364, l. 20-24.

Counsel Cleary responded asserting that the juror said that he does not know the people, but had seen them and played basketball with them and did not know their names. She further asserted that it was not central to any issue in the trial and did not know what relevance it would have. Particularly, she pointed out that the juror could not be struck for cause because he played

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Tr.p. 361, ll. 9-14. In fact, counsel Cleary interpreted the identification similarly. Tr.p. 362, ll. 20-21. Counsel Cleary however did assert that there was no indication that he even had a conversation with him, "other than playing basketball." Tr.p. 362, l. 23- p. 363, l. 2.

[5] The prosecution stated that Crudup was best friends with Demario Evans and that he was closely affiliated with Hinson. Tr.p. 363, l. 9-12.

[6]Evans did not end up testifying at the trial. The prosecution presented testimony that he could not be located. Tr.p. 524-525.

basketball with somebody." Tr.p. 365, l. 11-12. However, Judge Benjamin pointed out that "if she (Campbell) had known it she said she would have struck him." Tr.p. 365, l. 13-14.

Assistant Solicitor Campbell pointed out that their concern was that they had kept out the gang issue and that her client was a member of the Folk Nation and PAN organization within that gang. She opined that this affiliation would be a concern. She noted that she did not know whether it would work for her or against her, but "in fairness to everyone," she asked that the juror be removed and replaced with an alternate. Tr.p. 365, l. 15-23. She also stated that Appellant had self-proclaimed himself to be a member of the Gangster Disciples which was coming up in the next witness. Tr.p. 366.

The Trial Judge's Decision To Remove The Juror.

Judge Benjamin at that time took a break to consider the matter. Upon her return, she indicated that she would dismiss the juror:

> In an abundance of caution, because I don't know who you all are going to call next , and I just don't want him standing up again saying oh, I know that person too. He said he believed - - -initially he said he knew some of the witnesses, but when he came in he said he knew one of the witnesses. And he said that a lot of them come and – he said a lot of the guys come up there and play and they play on a team or something together, so I guess in an abundance of caution I will take him off. And considering that we only have one alternate left, I will make that alternate the permanent juror.

Tr.p. 365, l. 6-18.

The defense objected, arguing there was no evidence Juror 226 could not be fair and impartial, and Appellant was entitled to a fair and impartial jury. (Tr. p. 367).

The prosecution reiterated that the dismissed juror had initially indicated that he knew witnesses and that the defense had acknowledged that she had allowed an earlier juror to be excused because that juror knew more than one witness. Tr. p. 367, l. 16-22, citing Tr. p. 367, l.

3-6.[7] The prosecutor also noted that in addition, it would be the defendant's friends that he knew.

Judge Benjamin called the juror back into the courtroom. At that point, she dismissed the juror with the following colloquy:

Court:	. . .because you know the witnesses and our concern - - my concern is that some of these other witnesses may be people that you know through playing at the - - basketball at the gym.
Juror :	Yes, ma'am.
Court :	In an abundance of caution, I am going to go ahead and remove you from service. I appreciate you serving thus far and I know that you have been attentive in listening to the witnesses, but I think in an abundance of caution I'm going to probably – I'm going to go ahead and remove you from service.
Juror:	Yes, ma'am.
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 names with faces. And that happens all the time.
Juror:	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.
Court:	Okay. All right. Thank you.

Tr.p. 368, l. 12- p. 369, l. 12. The trial judge replaced the juror with alternate juror Jennifer Waller. Tr. p. 369.

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[7] Counsel Cleary stated that she had agreed to the dismissal of the first juror because it was early in the process and the juror "seemed to know more than one witness and something about these people." Tr.p. 367, l. 3-6. The record reflects that juror 180 was dismissed after he had spoken with the court and advise her that he had not realized that he knew the Appellant until he saw him and that the other witnesses he did not realize their names because they go by nicknames, but apparently that they all live in the same neighborhood. Tr.p. 70. The trial judge replaced the juror with an alternate. Id.

STANDARD OF REVIEW

A trial court's decision to remove a juror and replace them with an alternate is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007); State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 265-66 (Ct. App. 1999). A defendant is not entitled to a new trial where the trial court's decision to replace a juror with an alternate does not prejudice the defendant. See State v. McDaniel, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980). In State v. McDaniel, the appellant argued that the trial court erred by removing a juror who was seen making improper gestures, and replacing the juror with an alternate. Id. The Supreme Court affirmed the trial court's decision and explained that, even if the trial court's procedure was irregular, the appellant failed to establish the manner in which the irregular procedure prejudiced him. Id. (Stating that "the procedure employed by the trial court, however irregular, was not sufficient to deprive appellant of his right to a jury trial"). McDaniel's holding indicates that granting a new trial based on a juror's removal requires a showing of prejudice, in addition to legal error.

The standard for granting a new trial has occasionally been phrased as simply requiring "abuse of discretion" where appellants challenge a trial court's decision not to remove a juror after finding the juror failed to disclose information on voir dire. See State v. Woods, 345 S.C. 583, 592, 550 S.E.2d 282, 286 (2001) (Stating that "...trial judge's denial of a new trial motion will not be disturbed on review absent an abuse of discretion"); State v. Bell, 374 S.C. at 147, 646 S.E.2d at 894 (Stating that "...such decision will not be reversed on appeal absent an abuse of discretion"); State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) (Holding that "...the judge acted within his discretion in finding the juror could be fair and impartial").

However, this phrasing simply masks the underlying requirement that a defendant must be prejudiced by the trial court's error to obtain a new trial. The Court of Appeals decision in State v. Covington revealed this requirement by conditioning reversal upon finding a "prejudicial abuse of discretion." State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69-70 (Ct. App. 2000) ("Where a new trial motion is based upon allegations that a juror gave misleading and incomplete answers on voir dire, the trial court's denial of that motion will be affirmed absent a prejudicial abuse of discretion").

"Determining whether a juror's failure to respond to a voir dire question amounts to intentional concealment is a 'fact intensive determination that must be made on a case-by-case basis.' " State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101-02 (Ct.App.2004)(quoting State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004)).

The simple "abuse of discretion" language makes sense where the trial court does not remove a potentially biased juror, because in such circumstances, prejudice is implied. Courts apply the Woods test to determine whether a juror should be removed for failure to disclose information in voir dire. Woods, 345 S.C. at 587-88, 550 S.E.2d at 284. The Woods test asks, 1) whether a juror's failure to disclose information was intentional, and 2) if so, whether such information would support removal for cause, or have been a material factor in use of the party's peremptory challenges. Woods, 345 S.C. at 592, 550 S.E.2d at 286-87. The Woods test is designed to protect a defendant's right to trial by an impartial jury (Id. at 587-88, 284) and presumes bias from a juror's unjustified concealment of information. Id. at 589, 285. Where the trial court misapplies Woods and decides not to remove the juror in question, it is sensible to reverse the trial court and grant a new trial solely upon a finding of legal error, because such error

leaves a potentially unfair or biased juror on the jury and necessarily threatens the defendant's right to a fair and impartial jury. Thus, a trial court's error in applying or failing to apply Woods is inherently prejudicial where that error leaves the potentially biased juror on the jury.

However, this rationale does not apply where the court decides to remove a juror and replace them with an alternate. Replacing a juror with an alternate, even where removal was in error, does not result in prejudice or jeopardize the defendant's right to a trial by a fair and impartial jury. See McDaniel, 275 S.C. at 224, 268 S.E.2d 586.[8] A defendant has no right to be tried by a jury composed of particular individuals. State v. Williams, 321 S.C. at 460, 469 S.E.2d at 52; McDaniel, 275 S.C. at 225, 268 S.E.2d at 586. An appellant fails to establish prejudice from the removal of a juror where the alternate was approved by both sides at the inception of trial, and the appellant does not demonstrate manner in which he was prejudiced by seating the alternate. Williams, at 321 S.C. at 460, 469 S.E.2d at 52; McDaniel, 275 S.C. at 225,

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[8] Appellant applies the wrong standard when he asserts that removal of a juror is only supported when the removed juror intentionally concealed information which would have supported a challenge for cause or a would have been a material factor in the party's use of peremptory challenges, because it does not address all settings that could lead to the need to remove a juror. See Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986) (affirming denial of motion for new trial based on after-discovered evidence where jurors' relationship with doctor's attorney was not a basis for disqualification). See also State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) (post-verdict motion for new trial should have been granted where juror intentionally concealed prior association with solicitor's office, which denied defendant effective use of peremptory challenges); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998) (affirming denial of new trial motion based on after discovered evidence based on information that juror attended pro-death penalty rally, where information was not intentionally concealed); State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982) (pre-verdict mistrial should have been granted for juror's failure to disclose relationship with police officer, where information would have supported a challenge for cause or would have been a material factor in the exercise of a peremptory strike); State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991) (post-verdict mistrial motion properly denied because no evidence party would have struck juror, and juror's failure to disclose distant relationship with witness was not intentional).

268 S.E.2d at 586.

The goal of the corrective measures is to insure the defendant's right to a fair trial has not been compromised. State v. Stone, 290 S.C. 380, 382, 350 S.E.2d 517, 518 (1986). Cautionary instructions or substitution of alternate jurors may cure the prejudice caused by the publicity. United States v. Hankish, 502 F.2d 71 (4th Cir.1974). The determination of what curative measures are appropriate in a given case rests in the sound discretion of the trial judge. He should exhaust other methods to cure the prejudice before aborting a trial. Id. at 77.

ANALYSIS

Appellant attempts to rely on State v. Stone to demonstrate that the trial court abused its discretion by removing Juror 226, and such abuse of discretion requires reversal. (Initial Brief of Appellant, p. 15-18). However, this reliance is misplaced. The Stone decision simply recognized a legal error without finding that the error prejudiced the defendant, and went on to reverse the trial court on separate grounds. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002).

In State v. Stone, the Court determined that the trial judge had abused its discretion in removing a juror.[9] In particular, at sentencing, the state called the defendant's aunt as a witness.

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[9] In Stone, the Court relied upon State v. Woods, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001), wherein the Court had stated:

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, 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. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct.App.1991).

When she was placed on the witness stand, Juror Thompson indicated to the court that she knew the aunt. Although the aunt had been announced as a witness at the start of voir dire, Thompson later claimed did not know her name. Thompson had lived down the street from the aunt five or six years earlier, and they were casual acquaintances only. Thompson indicated her acquaintance would not affect her ability to be fair and impartial. The Supreme Court concluded that it is patent here that Juror Thompson's failure to disclose her acquaintance with Perry [during the opening voir dire] was innocent. Moreover, the Court concluded that "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. Thompson clearly indicated her former acquaintance with a witness whose name she did not even know, would not have affected her in any way." Stone, supra. The Court held the trial court abused its discretion in removing her. However, a closer reading of the case reveals that the new sentencing proceeding was not granted based upon this alleged error. The Court, unlike its response to the issues related to the failure to instruct on certain mitigating circumstances and the failure to give a parole ineligibility charge did not include any similar language in its opinion that it " required reversal."[10] The harmless error issue was not addressed or whether it warranted a new trial standing alone.[11]

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[10] The failure to specify that the juror issue "required reversal" is a difference with a distinction. The Court was not required to address the issue concerning prejudice and harmless error concerning the removal. The absence of this language is telling of the limitation in the holding.

[11] In Stone, the Supreme Court determined that the trial court abused its discretion by failing to apply Woods and removing a juror where that the juror unintentionally failed to disclosure information in voir dire. Id. at 448-49, 247-48. However, the Stone court did not reverse the trial court's decision on those grounds, despite finding an "abuse of discretion." Id. While Stone explicitly stated that two of the appellant's claims "required reversal" (Id. at 450, 248 and 451, 249), the court omitted such language from its holding that the juror's removal

The Appellant also relies on State v. Woods, supra. Importantly, in Woods, the Court defined that "intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances. Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." In Woods, the court found that the juror's failure to reveal the prior relationship with the solicitor's office during the opening voir dire was intentional concealment and would have impacted on the use of the peremptory challenges. Here, there is no concealment, intentional or otherwise, of information by a juror on the initial voir dire as determined by Judge Benjamin. Thus, the language from Stone regarding whether the information would have been a material factor in the use of a peremptory challenge is inapplicable to this case. [12]

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constituted an "abuse of discretion." Id. at 449, 248.

[12] In State v. Guillebreaux, 362 S.C. 270, 607 S.E.2d 99 (S.C. Ct. App. 2004), the Court of Appeals, through Judge, now Justice Beatty, concluded a juror's failure during voir dire to disclose an alleged social relationship with State witness, who was the confidential informant who purchased crack from defendant, was not intentional. The court of appeals found that the juror's knowledge of who was the confidential informant and a rare exchange of greetings with him in her community did not constitute social relationship. The court found that the juror answered questions posed to her honestly, her failure to reveal her knowledge of confidential informant was reasonable response to question posed. In seeking a new trial based upon the juror's retention and alleged failure to disclosed the unfounded social relationship with the witness, the court concluded that a new trial was not warranted. As the Court stated: "[A]s we find no intentional concealment on Juror's part, we need not further determine whether the information would have been a material factor in the exercise of Guillebeaux's peremptory strikes. [State v.] Sparkman, 358 S.C. at 497, 596 S.E.2d at 377-78. Based on this evidence, we

The Court of Appeals decision in State v. Burgess clarifies Stone's holding that a failure to apply the Woods test constitutes error, but Burgess makes no mention of prejudice, nor any suggestion that such error is per se reversible. State v. Burgess, 391 S.C. 15, 19-20, 703 S.E.2d 512, 514-15 (Ct. App. 2010). Thus, Stone should not be interpreted to permit reversal whenever a trial court improperly removed a juror, if that removal did not prejudice the defendant, particularly as here out of a concern in an abundance of caution concerning future witnesses being identified, as well as the fact that the prosecution may well have used a peremptory challenge.

The facts in this case demonstrate the very flexibility and assurance of impartiality alternate jurors are intended to provide. See State v. Stone, 290 S.C. 380, 382, 350 S.E.2d 517, 518 (1986) (Explaining that the goal of curative measures, such as the use of alternate jurors, is to insure the defendant's right to a fair trial has not been compromised, and the use of such curative measures is at the discretion of the trial court). Though Juror 226 may not have

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find the trial judge did not abuse his discretion in denying the motion for a new trial."

In Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), the Court cited Guillibreaux addressed whether a juror had intentionally concealed a prior relationship with the defendant. The Court found that the juror did not intentionally conceal the existence of his prior relationship with defendant during voir dire. The defendant claimed after the trial that he learned that they had been incarcerated together prior to defendant's murder trial at the detention center and did not recognize the juror due to a change in his appearance by his head being shaved and that he knew him only by a nickname "Rum Gully." He claimed without documentation that he had altercations with him in prison. The Court found that the defendant failed to establish that he suffered a per se violation of his due process right to a fair and impartial jury. It concluded that it was reasonable for juror to remain silent when asked during voir dire whether any member of the jury pool was "related by blood or marriage or a close personal friend of [defendant]." The juror testified that he and defendant were not close friends, juror also testified that he did not have any bias or prejudice against defendant, and he and the other members of the jury held the State to its burden of proof before finding defendant guilty of the two murder charges.

intentionally concealed the information, there was more reason to think he was a threat to the trial's fairness and reliability than for the pre-approved alternate who replaced him.[13] The trial judge expressed this concern that there was a likelihood that future witnesses would cause Juror 226 to again reveal belated recognition from his social contact at the basketball court. Thus, this type of "error" identified by Stone cannot be said to protect the defendant's right to a fair trial. Instead, it must simply protect judicial economy by conserving resources, avoiding delay, and preserving alternates for more severe circumstances. Judicial economy is not the type of competing interest that requires finding reversible error in this case.[14] The trial courts themselves internalize the costs on judicial economy imposed by unnecessary juror removal, and thus, should be allowed to exercise their discretion when determining whether to remove a juror "in abundance of caution," where that juror can be replace with an alternate posing no risk of

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[13] In the instant case, the alternate went through voir dire and approved by both sides (Tr.p. 53). Appellant's brief makes no attempt to demonstrate the manner in which Appellant was prejudiced by the alternate juror. Therefore, Appellant has failed to establish prejudice from the trial court's decision.

[14] Prudential concerns also demand this interpretation. If the decision to remove a juror without finding that the juror's nondisclosure meets the factors laid out in Woods constitutes reversible error, then anytime such a removal occurs without any objection from defense counsel the defendant may well have an ineffective assistance claim in post-conviction relief. While Appellant objected to the juror's removal in the instant case, Appellant's interpretation of Stone would create inadequate representation claims out of less controversial scenarios. Defense counsel may choose not to object for strategic reasons, or simply to avoid undue delay where an alternate was available. In any conceivable post-conviction relief petition arising from such facts, the State would be able to argue that counsel's errors did not deny the defendant a fair trial. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) ("[D]efendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). Therefore, there is no reason to even create the claim by recognizing the facts in this case and Stone as reversible error.

prejudice to the defendant.[15] This was not an abuse of discretion by Judge Benjamin.

Respondent further submits any error is harmless where the alternate was present throughout the proceeding and the Appellant had not shown he was prejudiced by the substitution prior to any deliberations. State v. Williams, 469 S.E.2d 49 (1996) (defendant was not prejudiced from seating an alternate juror after juror was dismissed).[16] See Ballentine v.

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[15] "The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and [an appellate court] will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way". State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Along these lines, the typical appellate standard of review for the discretionary pre-deliberation removal of a juror and replacement with an alternate, is whether or not the trial court's decision was so unreasonable as to be an abuse of discretion resulting in actual prejudice. State v. Rogers, 263 S.C. 373, 210 S.E.2d 604 (1974); State v. Williams, 321 S.C. 455, 469 S.E.2d 52 (1996). In this case, Appellant can show no prejudice from the seating of Alternate, nor can he show that the trial court's decision to excuse Juror 226 was so unreasonable as to amount to an abuse of discretion.

This case is similar to State v. Williams, 321 S.C. 455, 469 S.E.2d 52 (1996). During trial in Williams, a juror spoke to a minister seated at counsel table. The juror testified he had worked with the minister and had heard him preach. The minister was seated at counsel table because he had assisted the defense in contacting witnesses. The trial court excused the juror and replaced him with an alternate to prevent any problems. The Court rejected the defendant's claim that the excusal violated Batson v. Kentucky, 476 U.S. 79 (1986), and Georgia v. McCollum, 505 U.S. 42 (1992), by first noting that the issues were not preserved. However, the Court went on to hold that there was no reversible error, because (1) there is no right to be tried by a jury composed of particular individuals, (2) the alternate juror had been approved by both sides at the inception of trial, and (3) there was no showing of any prejudice from the seating of the alternate juror. Williams, 321 S.C. at 459-60, 469 S.E.2d at 52.

The same result is warranted here as is warranted in Williams. Appellant has no right to be tried by a particular juror, and the alternate juror in this case was approved by both sides Appellant has identified no sustainable reason why he was prejudiced by the seating of the Alternate .

[16] As the Court stated in Williams,

> In any event, in State v. McDaniel, 275 S.C. 222, 268 S.E.2d 585 (1980), this Court held there is no right to be tried by a jury composed of particular individuals. In McDaniel, an alternate was seated after a juror was dismissed for making improper gestures. The

State, 390 S.E.2d 887 (Ga. App. 1990) (replacement of regular juror with alternate during deliberations, due to innocent error as to who was regular juror and who was alternate, was harmless error, where correct number of jurors deliberated, extra juror had no influence upon jurors decision, and alternate juror was drawn from same source, in same manner, had same qualifications as other jurors , and listened to same evidence and charge of court); Barker v. State, 487 S.E.2d 494 (Ga. App. 1997) (no harmful error in court replacing juror with alternate where court found that juror's conduct amounted to immaterial irregularity," if any , and court would thus have been entitled to retain juror, while it was claimed that investigator stated to juror "we got one ," and that juror repeated the statement and shook hands with investigator, trial court conducted inquiry , and determined that only greetings were exchanged, but excused juror out of an abundance of caution and seated alternate); Lee v. State, 11 S.W. 3d 553 (Ark. 2000)(a defendant must show prejudice when the trial court removes a juror and seats an alternate in the juror's place); Thornberg v. State, 985 P. 2d 1234 (Okla. Crim App. 1999)(removal of juror on less than clear and convincing evidence of misconduct did not prejudice murder defendant and did not require reversal, where removed juror was replaced by alternate who had been passed upon by both the state and the defense); State v. Pettigrew, 860 P. 2d 777 (N.M. App. 1993)(defendant's were not prejudiced by court's excusal of juror following unauthorized contact with public defender intern and replaced with alternate chosen in same manner as excused jurors and defendant had no right to a particular juror on the panel).

McDaniel court noted the alternate juror had been approved by both sides at the inception of the trial, and there was no showing in what manner the seating of the alternate prejudiced him. As in McDaniel, we discern no prejudice to Williams from the seating of the alternate juror here.

In the case at hand, Appellant claims the trial judge abused her discretion by removing Juror 226, even though the juror's nondisclosure was unintentional and could not have supported a strike for cause or been a material factor in the prosecution's use of peremptory challenges. (Tr. p. 366-67). However, Appellant never demonstrated the manner in which he was prejudiced by Juror 226's removal, or the seating of the alternate. Moreover, because Juror 226 was replaced by a pre-approved alternate, this is not a case where an error in applying the Woods test would necessarily prejudice the defendant by creating some threat of unfairness or partiality. Therefore, Appellant has failed to establish prejudice, and is not entitled to a new trial. Appellant's conviction and the trial court's decision should be affirmed.

II. Appellant Was Not Entitled To A Charge On The Elements Of Involuntary Manslaughter Where There Was No Evidence That Appellant Was Lawfully Armed In Self-Defense When He Fired The Fatal Shot.

HOW THE ISSUE WAS PRESENTED BELOW

Viewed in the light most favorable to the Appellant, the record demonstrates that after encountering and exchanging threats with Mr. Thomas and Mr. Salley, Appellant arranged for transportation to his house, with the intent to obtain his gun. (Tr. p. 646). By his own testimony, Appellant wanted to get the gun in response Richard Thomas' threats on his life, (Tr. p. 694) and Appellant did not know Mr. Salley to carry a weapon. (Tr. p. 641). After retrieving the gun, Appellant returned to Vineyards Crossing, where he previously encountered and exchanged threats with Mr. Thomas and Mr. Salley, and now knew Mr. Salley to be located. (Tr. p. 693).

After returning to Vineyards Crossing, Appellant received a call from Devan Bailey instructing Appellant to come outside and give Bailey a cigar. (Tr. p. 700). Appellant then went outside, with his gun in his waistband, and saw Salley "yelling at" Bailey two houses down. (Tr. pp. 647-48, 699-701). Appellant chose to advance toward the area where Salley and Bailey were standing, at which point , under Appellant's theory, Salley saw Appellant and came running towards him. (Tr. p. 702). Appellant claimed that saw nothing to indicate that Salley was armed at the time. (Tr. p. 702). As Salley approached, Appellant pulled the gun from his waistband and aimed it at Salley. (Tr. p. 648, 702).

While Appellant was armed and pointing the weapon at Salley , Salley then struck Appellant. (Tr. p. 648). Appellant lost the gun, and proceeded to fight Salley, eventually beating him until he no longer resisted. (Tr. p. 649). After the fight was over, Appellant saw that Andina Lee had the gun. (Tr. pp. 651, 708). Andina Lee then threw the gun to the ground, and

Appellant went to retrieve it. (Tr. pp. 651, 708). As he reached the gun, Appellant picked it up with his finger on the trigger. (Tr. pp. 710-11). Appellant claims he accidentally fired the gun in the process of retrieving it, shooting Anthony Salley in the stomach. (Tr. p. 710 - 712). Salley later died as a result of the gunshot wound. (Tr. pp. 427-38).

During the charge conference, the Defense requested a charge on involuntary manslaughter, claiming that evidence supported the theory that Appellant was acting lawfully in self-defense, when he recklessly shot Salley.. (Tr. pp. 788-89, 792-94)

The trial court denied the charge, finding no evidence that Appellant was acting lawfully. (Tr. p. 815 - 818). Particularly, Judge Benjamin found that all the evidence in the case indicated that the Appellant was acting unlawfully at the time of the killing and that as a result he was precluded from an instruction on involuntary manslaughter. Tr.p. 815, l. 8-22. Judge Benjamin found that from the Appellant's testimony that he was engaged in selling drugs in the community at the time of the incident and that he was unlawfully in possession of a firearm because he was a felon. Tr.p. 815 - 816. She found that at the time of the shooting the victim was on the ground and defeated and the Appellant even claimed that he had won the fight. Tr.p. 816. At the time, the Appellant had no reason to think that the victim was armed at the time he was either pointed at by the weapon he had knocked away or defeated while still on the ground. Judge Benjamin further concluded that at the time of the actual shooting the Appellant was again unlawfully armed and was clearly pointing and presenting a firearm. She concluded that any claim that he was acting in self-defense was negated by Appellant's own testimony because he was aware that Salley was not carrying a weapon and had won the altercation. Tr.p. 816.

Judge Benjamin found that Appellant was not justified in re-arming himself at the time

the gun discharged since he claimed to have won the fight and that the victim was on the ground, where there was no testimony that the victim ever possessed the gun or was with a gun at or near the time of the incident. Tr.p. 817. Judge Benjamin sought to distinguish State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008) and State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). because in Mekler there was evidence that the victim was armed and acting in a threatening manner at the time of the shooting and in Burris two men had attacked and knocked down the defendant and continued to attack after he had picked up the gun. Neither situation occurred in this case. Tr.p. 817-818.

SUMMARY

Appellant was not entitled to an involuntary manslaughter charge because there was no evidence presented at trial to support the claim. The evidence at trial necessarily showed that Appellant unlawfully possessed the gun when he shot Anthony Salley. Appellant could not demonstrate lawful possession in self-defense, because Appellant's unlawful possession of a weapon proximately caused the incident and ultimately Anthony Salley's death. Therefore, Appellant's conviction should be affirmed.

STANDARD OF REVIEW

The law to be charged is determined by the evidence presented at trial. State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). "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). "In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). The negligent handling of a

loaded gun can be sufficient to support a charge on involuntary manslaughter. Brayboy, 387 S.C. at 180, 691 S.E.2d at 485. "In order to amount to reversible error, the failure to give a requested charge must be both erroneous and prejudicial." State v. Gibson, 390 S.C. 347, 356, 701 S.E.2d 766, 770-71 (Ct. App. 2010).

Involuntary manslaughter is defined as: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Smith, 391 S.C. 408, 706 S.E.2d 706 S.E.2d 12 (2011);[17] State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010); State v. Cabrera–Pena, 361 S.C. 372, 380–81, 605 S.E.2d 522, 526 (2004). "It is unlawful for a person to present or point at another person a loaded or unloaded firearm." S. C. Code Ann. § 16–23–410 (2003). Presenting a weapon means "to offer to view in a threatening manner, or to show in a threatening manner." In re Spencer R., 387 S.C. 517, 522–23, 692 S.E.2d 569, 572 (Ct.App.2010). Thus Appellant must have been acting lawfully at the time he shot Salley to be entitled to a charge on involuntary manslaughter.

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[17] In State v. Smith, 391 S.C. 408, 706 S.E.2d 706 S.E.2d 12 (2011), the Supreme Court held that found that he second definition of involuntary manslaughter did not apply in his case. The Court found that 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, the Court found that there was 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

ANALYSIS

Appellant claims that he lawfully armed himself in self-defense before the gun went off. (*Initial Brief of Appellant*, p. 20). There is no doubt 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). A defendant can claim they were lawfully armed in self-defense, despite being in unlawful possession of a weapon, if the unlawful possession was merely incidental to the lawful act of arming themselves in self-defense. State v. Slater, 373 S.C. 66, 70, 644 S.E.2d, 50, 53 (2007). Nevertheless, the unlawful possession of a weapon can render a defendant's actions unlawful, and thus preclude a defense of accident if the weapon was the proximate cause of the killing. State v. Slater, 373 S.C. at 71, 644 S.E.2d at 53. This reasoning applies equally to an involuntary manslaughter charge premised on the lawful possession of a firearm in self-defense. Id. Therefore, Appellant's involuntary manslaughter claim rests on the lynchpin assertion that Appellant lawfully armed himself in self-defense and was therefore acting lawfully when he recklessly fired the gun.

In State v. Slater, the Supreme Court determined that the appellant was not lawfully armed in self-defense because his unlawful possession of the firearm proximately caused the resulting homicide. Slater, 373 S.C. at 71, 644 S.E.2d at 53. In making this proximate cause determination the Slater Court analyzed the appellants' actions and the general circumstances surrounding the possession of the gun. Id. at 71, 53. The court noted that the appellant displayed a cocked gun as he approached the scene of an ongoing confrontation he was not involved in. Id. The Court of Appeals decision in State v. Burriss provided further clarification on when an

appellant can claim to be lawfully armed in self-defense. In Burriss, the court found the appellant lawfully armed himself in self-defense by "snatching" his gun after being attacked by two men who had been smoking crack-cocaine, one man moved threateningly toward him, and appellant had reason to believe one of the men had a gun. Burriss, 334 S.C. at 262-63, 513 S.E.2d at 108.

Slater and Burriss illustrate how Appellant's actions, including his unlawful possession of a weapon, proximately caused the homicide of Anthony Salley. Like the appellant in Slater, Appellant approached what he understood to be an "argument" between Salley and Bailey, with a loaded weapon. (Tr. p. 648, 702). Whereas the appellant in Burris had reason had already been attacked, in the instant case, the fight did not begin until Appellant aimed a gun at Salley from point blank range. (Tr. pp. 648-49). Moreover, Appellant had no reason to believe Salley had a weapon, unlike the appellant in Burris. (Tr. pp. 641, 702). Finally, by pointing the gun at Salley from point blank range, Appellant mirrored Slater appellant's actions in displaying a loaded handgun as he approached the fray. Both actions unnecessarily escalated an already tense situation, and caused other parties to react in a way that eventually led to homicide.[18]

Appellant argues that despite the preceding events, he was entitled to lawfully arm himself in self defense when he ended the fight as the victor and saw Andina Lee with the gun.

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[18]In State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), 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, 468469. Light is distinguishable because the victim here never possessed any weapon. To the contrary, it was Appellant who brought upon th difficulty by initially presenting the weapon he brought to the confrontation that the victim had knocked out of his hand, but never possessed. At the time of the shooting, there was no struggle over the weapon, no threatening by its use by the victim as in Light. Hinson was never armed in self-defense, he was armed in intimidation.

(Tr. p. 823). See *Initial Brief of Appellant*, p. 23. However, the proximate cause language in Slater prevents the Appellant from obscuring the factual timeline in this way. By asking whether Appellant's unlawful possession proximately caused the subsequent homicide, Slater requires the court to look back in time to find the point at which the victim's death was proximately caused. See Slater, 373 S.C. at 73, 644 S.E.2d at 53. If Appellant's analysis were accepted, appellants could parse the factual timeline down to the point at which they were in danger and claim they lawfully possessed the weapon any time they faced danger, regardless of their role in creating that danger. The so-called re-arming of Appellant after the fight caused by his pointing and presenting of the firearm improperly in the first place placed this alleged standard for involuntary manslaughter in an improper state. At the time of initially arming himself he was not in imminent fear or death or serious bodily injury. In fact, he stated that he point ed the weapon initially to scare and threaten Salley. Tr.p. 649, 727. He also claimed that he could have killed Salley had he wanted to when he won the fight. Tr.p. 731-732.

In State v. Rivera, the Court found that where the defendant testified that he was not in imminent fear of death or serious bodily injury, involuntary manslaughter did not apply. InState v. Cabrera Pena, 361 S.C. 372, 605 S.E. 2d 522 (2004), The Court found that Cabrera -Pena was not entitled to an involuntary manslaughter instruction when he took advantage of and unfair and extremely dangerous situation that he created by bringing a loaded , deadly weapon into an area of potential dispute as Hinson did in this case. In addition, in Cabrera Pena, the Court found that the negligent handling of a weapon was insufficient to support the involuntary manslaughter charge and it is insufficient here under the second definition of involuntary manslaughter. The Appellant's testimony is that he recovered his own weapon that cause the fracas after defeating

the victim and then flinched when he saw the victim and shot him. Tr.p. 710-712. His claim is that the shooting was unintentional. However, unlike Burris, there is no suggestion that the victim was armed at the time of the shooting - to the contrary Hinson knew he was not armed because he had recovered his illegally possessed weapon. Unlike Burris, Hinson was not acting lawfully when the gun was fired, he was still acting unlawfully as he had been throughout the confrontation.

In Mekler, the South Carolina Supreme Court found that involuntary manslaughter should have been charged. Therein, the Court concluded that the following supported a charge:

(1) the three statements given by Mekler and introduced at trial in which Mekler stated she did not remember pulling the trigger or the shotgun discharging;

(2) Mekler's trial testimony in which she stated she did not remember pulling the trigger and had to be told by Spires that she shot Victim;

(3) Mekler's trial testimony in which she stated the gun was positioned at her hip so she could cock the hammer back and that her finger must have slipped on the trigger, causing the gun to fire suddenly;

(4) testimony by a neighbor who looked out of her window right before the shot was fired and saw one of Mekler's arms down at her side and the other waving when she talked; and

(5) Mekler's insistence at trial that she did not intend to shoot Victim and that she was shocked when the gun fired immediately after she cocked the hammer.

Here, Hinson's actions are distinguishable from Mekler. Unlike Mekler, where the victim approached the defendant screaming while armed with a knife after an earlier confrontation,

Salley was unarmed when the Appellant pointed and presented the gun to scare Salley who he did not know to be armed. Unlike Meklar where the defendant testified that the victim had approached him with a knife and stood in the yard threatening to get the defendant, it was the Appellant who came upon the scene. Unlike Meklar who claimed that she pulled the hammer back on her shotgun and the gun shot when the victim leaned in, here as a result of the presenting the gun was knocked from his hand and a physical fracas occurred, not over the gun but against each other with Appellant the victor. The fight was over when he recovered his weapon when he turned and shot the victim. Although he similarly claimed he did not intend to kill, like Meklar, it was the illegal activity in presenting the gun that caused the fracas which cannot turned it into a later involuntary manslaughter when his initial intent to display was to scare and intimidate.

Plainly, one could understand the Appellant to have brought on the difficulty by pointing and presenting the gun when he aimed it at Salley before the fight began which caused the physical encounter. Appellant should not be able to claim his actions prior to the fight were justified under the four prongs of self-defense. Therefore aiming the gun at Salley constituted illegal pointing and presenting. This illegal pointing and presenting would form the predicate "unlawful activity" to show that Appellant brought on the difficulty he encountered after Salley hit him knocking the gun from Hinson's possession.

Appellant's did not act in self-defense by pulling the gun out and aiming it at Salley, therefore those actions constituted illegal pointing and presenting. To be acting in self-defense, a defendant must establish four elements:

> "First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in

> imminent danger of losing his life or sustaining serious bodily injury. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger."

State v. Bryant, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999).

When Appellant pulled the gun on Salley, evidence shows that he did not believe he was in actual or imminent danger of losing his life or sustaining serious bodily injury, if he did believe he was in such danger, his belief was unreasonable, and he had other means of avoiding the danger. In State v. Goodson, evidence showed that the appellant pulled a gun out after another man threatened him with a pool stick. State v. Goodson, 312 S.C. at 279, 440 S.E.2d at 372. After a the victim intervened and took the appellant outside, the gun fired, hitting the victim. The Goodson court rejected the appellant's defense of accident on the grounds that appellant never offered any evidence to suggest he believed he was in imminent danger, nor was he in any actual danger. Appellant in this case also fails to present such evidence.

The only evidence that Appellant might point to as suggesting danger would be Appellant's previous earlier confrontations with Richard Thomas in the fall of 2009 where Salley was not present (Tr. p, 640-643, 666, 685), a verbal confrontation that he had with Thomas and Salley on the morning of the incident that prompted Appellant to get his pistol although he told Bailey that it was to get marijuana (Tr.p. 645 - 646) and his claim that Salley running towards Appellant before the fight began. (Tr.p. 180-181, 197). However, Appellant testified that he did not know Salley to carry a weapon before or at the time of the incident. Tr.p. 641, ll. 9-10.

However, Goodson demonstrates that an appellant does not necessarily believe they are in

danger simply because of some threatening actions made towards them. More importantly, the Hinson, just like the appellant in Goodson, did not present any evidence that he believed he was in danger, nor does any independent evidence of such danger exist. Appellant only stated that he pulled out the gun because he did not want to fight Salley, and that he didn't want to lose a fight in front of his friends. (Tr. p 648, 702-03). Furthermore, Appellant stated he did not see anything to indicate Salley had a weapon (Tr.p. 641, 701-702), and acknowledged he (the Appellant) was a good fighter after the fight. (Tr.p. 707-708). Finally, Appellant consistently stated that he was afraid of what Richard Thomas would do to him, not Anthony Salley. (Tr.p. 640, 642-643, 645, 667-669, 671). Appellant failed to demonstrate that he believed he was in imminent danger, or that any real danger existed. [19] Therefore, Appellant was acting unlawfully when he aimed the gun at Anthony Salley.

The evidence presented at trial also shows Appellant could have avoided the danger. Appellant's failure to avoid the danger provides another reason why pulling the gun on Anthony Salley was not justified by self-defense, and therefore unlawful pointing and presenting. In State v. Santiago, the Court of Appeals found that an appellant had other probable means of avoiding the danger where the perceived threat was unarmed and the appellant was at the time of the

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[19] Hinson did testify at trial that he beat up Salley to the point that he stopped defending himself. Tr.p. 649, l. 20-22. Hinson stated that he felt the fight was over at that point because there was no need to keep fighting him because there was not any fighting back, Tr.p. 649, l. 20-25. He stated that after he got up and saw Andina had stopped pointing the gun at Devan and thrown it on the ground, he reached down and got the pistol. He stated he did this because he had just beaten Salley up so why would he turn his back on him and leave it for Andina to pick it up or to give the pistol to Salley where he could shoot him. Tr.p. 651. He claimed that when he picked up the pistol he saw that the victim was off the ground and walking toward him, although he had thought he was still on the ground. Hinson claimed that he flinched and pulled the trigger and the victim was hit. Tr.p. 651-652.

incident. State v. Santiago, 370 S.C. 153, 161, 634 S.E.2d 23, 28 (Ct. App. 2006). Much like the situation in Santiago, the Appellant here was the only party with a gun, and had no reason to think any other party had a gun. Though Appellant testified that Salley ran toward him at the initial confrontation, there was no evidence of any significant physical disparity between Appellant and Salley (such as a gap in age or a disability) that would have prevented Appellant from running away.[20] Cf. State v. Dickey, 394 S.C. 491, 502-03, 716 S.E.2d 97, 103 (2011). The Dickey decision is also distinguishable because the appellant in that case had reason to believe that his assailant was armed. Id. at 503, 103. Thus, the evidence shows that Appellant had other probable means of avoiding the danger, and he cannot claim to have been acting lawfully in self-defense when he pointed and presented the gun at Anthony Salley.

This unlawful pointing and presenting brought on the ultimate difficulty by initiating a fight between Appellant and Salley, and therefore Appellant cannot claim he acted in self-defense when he fought and eventually shot Salley after retrieving the gun. **Since Appellant brought on the difficulty by unlawfully pointing and presenting the gun, he cannot meet the threshold elements of self-defense and therefore was not lawfully armed in self-defense.**[21] Alternatively, one could regard the illegal pointing and presenting unlawful activity that proximately caused the homicide, precluding Appellant from claiming he acted lawfully in self-defense when he shot Salley. See Slater, 373 S.C. at 71, 644 S.E.2d at 53; State

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[20] In fact, Appellant claimed that he did not want to fight Salley because he was bigger. He claimed that he pulled the weapon because he thought Salley would leave him alone. Tr.p. 727. However, at the time of the shooting he had already beaten up the beaten to the ppoint of his surrender.

[21] Oddly, at trial, Appellant stated that he could not legally carry a gun, but that he can carry a gun in self-defense. Tr.p. 669, l. 10-13.

v. Goodson, 312 S.C. at 281, 440 S.E.2d at 372.

His claim that he was entitled to lawfully pick up the weapon that he had brought illegally since it could have been used to shoot him should provide a basis for an involuntary manslaughter charge where there was no threat to him at the time. The victim was never armed. His claim that when Andina threw the gun to the ground, that it could have allowed the defeated victim to carry through with his alleged threats from earlier in the morning, [22] however he testified that he did not want to shoot him when he initially pulled the pistol because he wanted to scare him and that he did not want to fight him. He noted that this led to the fight where he beat up the victim and that there was no need to fight him further because he was not even fighting back. Tr.p. 649. Hinson stated that when Andina threw the pistol on the ground that Salley was on the ground and he realized that Andina could have shot him, but did not so and he then recovered the weapon. Although he claimed that he did not leave the pistol on the ground because Andina could have picked it up and given the pistol to the victim or shot him, this assertion is also defeated by the facts that she had just dropped the weapon to the ground rather than shoot him. Nevertheless, this retrospective hindsight cannot defeat the fact that it was Appellant who brought the initially and illegally brought the gun on the scene and was not arming himself in self-defense, but had armed himself and initially used the weapon in intimidation as a response to coming into the area where Thomas might be and potentially Salley. His suggestion otherwise does not provide entitlement to this instruction. Had Petitioner been

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[22] Jamaal Hinson testified that he had gotten into a verbal altercation with Richard and Anthony but that he did not recall the words but did state that "we were threatening each other." Tr.p. 645, l. 17-19. He claimed that he armed himself against Richard after that, but made no similar claim concerning Salley. Id.

unlawfully pointing the firearm at Salley and then dropped it and then picked it up and the gun fired prior to the fist-fight, Hinson would not be entitled to an involuntary manslaughter instruction. The brief time lapse which occurred in this setting should not provide a different result.

The evidence at trial shows that Appellant's unlawful actions proximately caused Anthony Salley's death. Since Appellant did not lawfully possess the gun in self-defense, he was acting unlawfully when he shot Salley. Therefore, the evidence cannot support an involuntary manslaughter charge, which requires Appellant to have been acting lawfully with reckless disregard. The trial court's decision should be affirmed.

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed and judgment of conviction affirmed.

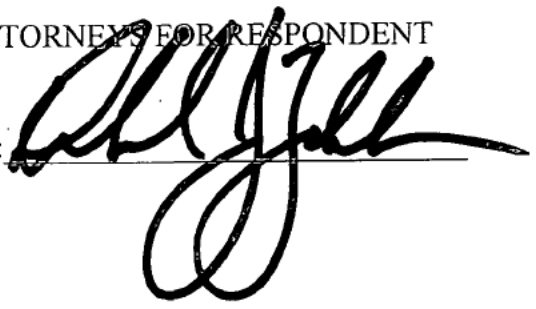
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Columbia, South Carolina
March 29, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2011-203569

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMAAL HINSON,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following portions of the trial transcript to be included in the Record on Appeal transcript as coted in the Initial Brief of Appellant and Initial Brief of Respondent including, but not limited to:

1. Tr. p. 1-54.
2. Tr. p. 70
3. Tr. p. 80-151, 159-164, 170-234, 236-339, 341-370, 394-450, 452-542.
4. Tr. p. 546-578, 579-609, 615-741, 746-790, 792-825.

I certify that this Designation contains no matter which is irrelevant to this appeal.

DONALD J. ZELENKA
Assistant Deputy Attorney General

March 29, 2013

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SC Court of Appeals

CERTIFICATE OF SERVIE

I, Donald J. Zelenka, hereby certify that I have served the ***Initial Brief of Respondent and Designation of Matter*** in the foregoing action by depositing copies in the United States mail, postage prepaid, to:

Reid T. Sherard, Esquire
NELSON MULLINS RILEY &
SCARBOROUGH LLP
P. O. Box 10084
Greenville, SC 29603-0084

Robert M. Dudek
Chief Attorney
S.C. Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, SC 29211

This 29th day of March, 2013.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

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SC Court of Appeals

C/A No. 2010-GS-40-0829

Appellate Case No. 2011-203569

The State of South Carolina,..... Respondent,

v.

Jamaal Hinson,..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

NELSON MULLINS RILEY & SCARBOROUGH LLP
Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE
Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT I 1

A. The State Admits Juror 226 Did Not Conceal Information. 1

B. The State Improperly Attempts To Impugn Juror 226 For Being Honest And Impartial. 1

C. The State Admits The Trial Court Committed An Error Of Law By Dismissing Juror 226. 2

D. The State Improperly Attempts To Require A Showing Of Prejudice In Addition to Legal Error. 2

ARGUMENT II 8

A. The State's Reliance On *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) Is Misplaced 8

B. The State Improperly Attempts To Equate Being Armed In Self-Defense With Acting In Self-Defense. 10

C. The State Improperly Ignores Evidence Regarding A Third Party's Conduct. 11

TABLE OF AUTHORITIES

Cases

Greer v. Norvill, 21 S.C.L. (3 Hill), 1837 WL 1472, 1 (Ct. App. 1837) 5, 6, 7

McCoy v. State, 737 S.E.2d 623, 627-628 (2013) 3

State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010) 11

State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010) 2, 4

State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) 8, 9

State v. McDaniel, 275 S.C. 222, 268 S.E.2d 585 (S.C. 1980) 3

State v. Simmons, 360 S.C. 33, 43, 599 S.E.2d 448, 452 n.4 (2004) 7

State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007) ..... i, 8, 10

State v. Smalls, 336 S.C. 301, 308, 519 S.E.2d 793, 797 (Ct. App. 1999) 3

State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002) 1, 2

State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) 3

State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) 2, 3

Rules

Rule 208(b)(4), SCACR 1

ARGUMENT I

A. The State Admits Juror 226 Did Not Conceal Information.

The State acknowledges "[h]ere, there is no concealment, intentional or otherwise." (Brief of Respondent p. 18).

B. The State Improperly Attempts To Impugn Juror 226 For Being Honest And Impartial.

Since there was no concealment, the State acknowledges "the language from *Stone*[1] regarding 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).[2] Curiously, the State then posits "[t]hough Juror 226 may not have intentionally concealed the information, there was more reason to think he was a threat to the trial's fairness and reliability than for the pre-approved alternate who replaced him." (Brief of Respondent pp. 19-20). This naked statement is utterly without any supporting evidence,[3] and is a continuation of the prosecutor's attempt to somehow make the situation the fault of the juror even though it is uncontested Juror 226 did not intentionally conceal any information and in fact affirmatively brought the matter to the attention of the trial judge. The trial judge improperly at least somewhat relied on this argument when defense trial counsel argued "[Juror 226] certainly couldn't be struck for cause because he played basketball with somebody" and the judge responded by saying

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[1] *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002).

[2] This is different than the position taken at trial by the prosecuting attorney. (R. p. ____; Tr. p. 363, ll. 6-18).

[3] There is no citation to the transcript as anticipated by Rule 208(b)(4), SCACR.

"[y]es, but if [the prosecutor] had known it [the prosecutor] said she would have struck [Juror 226]." (R. p. ____; Tr. p. 365, ll. 11-14).

The State points out that the trial judge also based her decision on her speculation that Juror 226 might know another witness to be called – "I just don't want him standing up again saying, oh, I know that person too." (Tr. p. 366, ll. 8-9). This is yet another example of the trial judge failing to properly apply the law. The State slants this as saying the trial judge thought the problem with Juror 226 was serious enough to remove him because doing so potentially effects "internalized costs" to the trial court such as use of resources and delay. (Brief of Respondent p. 20). That argument is better left to one surrounding the funding of the judicial branch than to whether a man convicted of murder should get a new trial when a fair and unbiased juror was improperly removed

C. The State Admits The Trial Court Committed An Error Of Law By Dismissing Juror 226.

The State concedes Judge Benjamin made an error of law. In its brief, the State recognizes this Court's "decision in *State v. Burgess*[4] clarifies *Stone's* holding that a failure to apply the *Woods*[5] test constitutes error." (Brief of Respondent p. 19). There is no evidence Judge Benjamin applied the *Woods* test, and the State does make that argument.

D. The State Improperly Attempts To Require A Showing Of Prejudice In Addition to Legal Error.

Having admitted there was no concealment by the juror and the trial judge made an error of law, the State is left to frame the decision on appeal around the issue of prejudice.

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[4] *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010).
[5] *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001).

As recently as three months ago, the Supreme Court reaffirmed that "a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) 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. *McCoy v. State*, 737 S.E.2d 623, 627-628 (2013) (citing *Woods* for the proposition that a juror's intentional failure to disclose a relationship gives rise to an inference of bias and rejecting the State's argument that a new trial should be warranted only where an individual shows he was prejudiced by the juror's failure to disclose information). Noting such a circumstance "necessarily threatens the defendant's right to a fair and impartial jury," the State agrees "it is sensible to reverse the trial court and grant a new trial solely upon a finding of legal error . . ." (Brief of Respondent, pp. 14-15).

However, according to the State, "[r]eplacing a juror with an alternate, even where removal was in error, does not result in prejudice or jeopardize the defendant's right to a trial by a fair and impartial jury." (Brief of Respondent, p. 15, citing *State v. McDaniel*, 275 S.C. 222, 268 S.E.2d 585 (S.C. 1980)[6]). In that situation, the State argues

[6] The language relied upon by the State in *McDaniel*, to the extent relevant, is dicta, as the Supreme Court affirmed in that case after it concluded "appellant waived the right to raise this [juror removal] issue on appeal." *Id.* at 224, 586. In its 1996 opinion in *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996), the Supreme Court stated "in *State v. McDaniel*, this Court held there is no right to be tried by a jury composed of particular individuals." 321 S.C. 455, 469 S.E.2d 49. That was not the holding in *McDaniel*, as described above. *Williams* is also a case where the holding was that the issue was "not preserved for review." *Id.* at 459, 52. Thus, the two cases cited by the State 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 defendant must prove prejudice in addition to legal error. (Brief of Respondent p. 15).

Stated another way, the State's position, based at least partially on policy concerns,[7] 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 cases, and each time the respective appellate courts have avoided such a statement.[8] The State recognizes "*Burgess* makes no mention of prejudice. . ." (Brief of Respondent p. 19).

The State is silent as to why prejudice should not be presumed when a fair and unbiased juror is improperly removed. Under the State's position, improper removal of a fair and unbiased juror is held to a higher standard than keeping a biased juror; that is, it would be perfectly acceptable at any time during any trial to remove a fair and unbiased juror from service and that removal would only require reversal if the appellant could prove prejudice (in addition to the legal error). That is not the law in South Carolina, and if it were, it would significantly undercut the ability of either the State or a defendant to receive a constitutionally adequate trial.

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[7] The State argues that reversing and remanding in this case may promote increased post-conviction relief filings. (Brief of Respondent p. 20, n.14). This bogeyman argument should be ignored as it is not relevant to this appeal and there is no evidence to support it. Mr. Hinson is entitled to appellate review of his case, which should not be confused with the system as a whole.

[8] Oddly, the State notes this Court (twice) and the Supreme Court in recent years have described the standard as "abuse of discretion" as opposed to a specific requirement of a prejudicial showing, (Brief of Respondent p. 13), but then dispenses with those opinions as "simply masking" the alleged required showing of prejudice. (*Id.* at p. 14).

Moreover, Juror 226, having been 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).

Greer is instructive, as the Court of Appeals 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.

Regarding the rights of the juror, he "may be excused at any time when he is not actually engaged in the trial of a cause; but 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. p. ___; Tr. p. 359-369). 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. This is further evidence that a showing of prejudice by Mr. Hinson is not required to show prejudice since Juror 226 was removed as a result of a legal error.

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, the 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 State argues that replacing a seated juror with an alternate sanctioned by both parties does not jeopardize a defendant's right to a fair trial. (Brief of Respondent p. 15). This argument 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 does not concede,[9] 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. The supernumerary jurymen are known, and frequently the order in which they stand; and to remove one juror and substitute another, is giving a party a great advantage").

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 State now admits Juror 226 was not properly removed, and Mr. Hinson's conviction should be reversed and the matter remanded for a new trial.

[9] 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.

ARGUMENT II

A. The State's Reliance On *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) Is Misplaced.

The State begins its analysis of the second issue on appeal with *Slater*. (Brief of Respondent p. 28). In *Slater*, "the court included a manslaughter option in the jury charge." 373 S.C. at 69, 644 S.E.2d at 52.

The State argues "unlawful possession of a weapon can render a defendant's actions unlawful, and thus preclude a defense of accident if the weapon was the proximate cause of the killing." (Brief of Respondent p. 28, citing *Slater* at 71, 53). The State then purports to cite *Slater* for the proposition that "[t]his reasoning applies equally to an involuntary manslaughter charge premised on the lawful possession of a firearm in self-defense." (*Id.*). In fact, that is an improper statement of *Slater*, as the Supreme Court actually said "the analysis is equally applicable in determining if a defendant in unlawful possession of a weapon is entitled to a charge on self-defense." *Slater*, 373 S.C. at 71, 644 S.E.2d at 53. *Slater* equated the analysis between accident and self-defense, not between accident and involuntary manslaughter.

The State further misapprehends *Slater* by claiming the Supreme Court "determined that the appellant was not lawfully armed in self-defense because his unlawful possession of the firearm proximately caused the resulting homicide." (Brief of Respondent p. 28, citing *Slater* at 71, 53). Again, this is not a correct recapitulation of *Slater*. In fact, the Supreme Court merely noted unlawful possession of a firearm can, under some circumstances, constitute an unlawful activity *so as to preclude an accident defense* if the weapon is the proximate cause of the killing." *Id.* at 71, 53 (citing *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (emphasis added). Receiving an accident

charge is not the same thing as being lawfully armed in self-defense; "[t]here is a difference between being lawfully *armed* in self-defense and *acting* in self-defense." *Burriss*, 334 S.C. at 265, 513 S.E.2d at 109 n.10 (1999) (emphasis in original).

In any event, this appeal is not about a charge of self-defense, a charge to which the prosecution consented. This appeal is about being lawfully armed in self-defense.

The State argues that could not happen in the instant case because Mr. Hinson approached what he understood to be an argument and "the fight did not begin until Appellant aimed a gun at Salley from point blank range" and "Appellant had no reason to believe Salley had a weapon." (Brief of Respondent p. 29). This recitation of the facts ignores evidence in the record that:

- Earlier in the day, Mr. Hinson saw Mr. Salley with Richard Thomas on that very street. (R. p. ____; Tr. p. 645, 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. ___; Tr. p. 640, ll. 13-17; p. 685, ll. 8-10);
- Mr. Hinson did not know Mr. Salley, but knew of him as being a friend of Mr. Thomas. (R. p. ___; Tr. p. 640, l. 24 – p. 641, l. 1; p. 661, ll. 10-14);
- Both Mr. Thomas and Mr. Salley exchanged threats with Mr. Hinson that morning. (R. p. ___; Tr. p. 645, ll. 11-19);
- Mr. Thomas was known to carry a pistol. (R. p. ___; Tr. p. 646, ll. 8-16; p. 669, ll. 5-7);
- At the time of the incident, when Mr. Salley saw Mr. Hinson walking, Mr. Salley removed his jacket and rushed at Mr. Hinson in a threatening manner. (R. p. ____; Tr. p. 180, ll. 24-25; p. 648, ll. 4-6; p. 700, ll. 13-14; p. 702, 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. ___; Tr. p. 186, ll. 22-26);
- Mr. Salley was a larger man than Mr. Hinson. (R. p. ___; Tr. p. 727, ll. 14-17); and

- Mr. Hinson was afraid. (R. p. ____; Tr. p. 648, ll. 7-11 and 21-25; p. 704, ll. 17-20).

Each and every one of the above facts occurred before Mr. Hinson ever displayed his firearm.

The State then moves to the second possibility of Mr. Hinson lawfully being armed in self-defense, when the fistfight between Mr. Hinson and Mr. Salley was over and Mr. Hinson retrieved the weapon that Mr. Salley had earlier knocked from his hand. The State again resorts to its misconstrued *Slater* language to argue Mr. Hinson is "obscuring the factual timeline" and more alarmingly "[i]f appellant's analysis were accepted, appellants could parse the factual timeline down to the point at which they were in danger and claim they lawfully possessed the weapon at any time they faced danger, regardless of their role in creating the danger." (Brief of Respondent p. 30).

The facts of this case stand alone. Mr. Hinson is not arguing all future appeals, just as he is not arguing post-conviction relief policy or the funding of the judicial branch. He is arguing his own appeal based on controlling law, and that law mandates his receipt of a charge of involuntary manslaughter.

B. The State Improperly Attempts To Equate Being Armed In Self-Defense With Acting In Self-Defense.

The State spends considerable effort attempting to show that Mr. Hinson was not acting in self-defense (Brief of Respondent pp. 31-35) and therefore "since Appellant brought on the difficulty by unlawfully pointing and presenting the gun, he cannot meet the threshold elements of self-defense and therefore was not lawfully armed in self-defense." (*Id.* at p. 35). Acting in self-defense and being lawfully armed in self-defense are two separate things, and the State does not cite any authority for the requirement that

one can only be lawfully armed in self-defense if one is acting in self-defense/is entitled to a charge of self-defense.[10] *State v. Brayboy*, 387 S.C. 174, 182, 691 S.E.2d 482, 487 (Ct. App. 2010) (*State v. Light*, 378 S.C. 641, 647-648, 664 S.E.2d 465, 468 (2008), "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") (emphasis in original).

C. The State Improperly Ignores Evidence Regarding A Third Party's Conduct.

Perhaps most surprisingly, the State attempts to force the analysis to be solely in the context of Mr. Hinson and Mr. Salley, arguing "unlike *Burris*, there is no suggestion that the victim was armed at the time of the shooting – to the contrary Hinson knew he was not armed because he had recovered his illegally possessed weapon." (Brief of Respondent p. 31). In so arguing, the State waits until the very last page of its brief – indeed, the penultimate paragraph before its one sentence conclusion – to address the conduct by Mr. Salley's girlfriend Andina Lee.

During the fistfight between Mr. Hinson and Mr. Salley, the pistol was lying on the ground where it had fallen after being knocked out of Mr. Hinson's hand. (R. p. ____; Tr. p. 219, ll. 17-21). The pistol was on the ground in an area not close to where the men were fighting. (R. p. ____; Tr. p. 145, ll. 4-20). Mr. Salley's girlfriend Andina Lee went over to where the gun was lying on the ground and picked it up. (R. p. ___; Tr. p. 125, ll. 21-22; p. 127, ll. 10-11; p. 145, ll. 21-23; p. 478, ll. 17-19).

[10] Again, in this case, the prosecution consented to a self-defense charge for Mr. Hinson.

She did not pick it up for safekeeping. She affirmatively pointed the gun at Devan Bailey, a witness, demanding the fight stop. (R. p. ___; Tr. p. 125, ll. 21-24; p. 182, ll. 6-8). She admitted her intent in grabbing the gun was "just really to scare [Mr. Hinson] . . ." (R. p. ____; Tr. p. 127, ll. 15-16). To make sure Mr. Hinson knew how serious she was,[11] she yelled "get the fuck back" three times and told Mr. Bailey if he moved she was going to shoot him. (R. p. ____; Tr. p. 147, l. 17 – p. 148, l. 11; p. 183, ll. 14-22). Mr. Bailey was afraid and ran away. (R. p. ___; Tr. p. 483, ll. 21-24; p. 484, ll. 7-8; p. 485, ll. 7-8).

As the fight ended, Mr. Hinson saw Ms. Lee pointing the pistol, which she then threw on the ground. (R. p. ____; Tr. p. 650, ll. 7-14). Mr. Hinson then realized (a) Mr. Salley knew where he was, having seen Mr. Hinson come from his girlfriend's house, and could act on that information including telling his friend Mr. Thomas (known to carry a gun and with whom Mr. Hinson had exchanged threats that day); (b) Ms. Lee had the wherewithal to pick up the pistol the first time and use it in a threatening manner, and she Lee could pick up the pistol a second time and take further action; (c) Mr. Salley – fresh off a loss in a fistfight but already up and moving – could pick up the pistol and take revenge. (R. p. ____; Tr. p. 650, l. 9 – p. 652, l. 7).

Mr. Hinson was lawfully armed in self-defense when he negligently handled the firearm, and he was entitled to a charge of involuntary manslaughter.

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[11] Mr. Hinson "heard some commotion going on the whole time." (R. p. ____; Tr. p. 650, ll. 8-9). Presumably Mr. Bailey was aware of the seriousness of the situation due to the pointing of a pistol at his person.

Respectfully Submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE

By: _____
Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343

Attorneys for Appellant

Columbia, South Carolina

May 8, 2013

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMAAL HINSON,

APPELLANT

Appellate Case No. 2011-203569

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of May, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of May, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jamaal Hinson, Appellant.

Appellate Case No. 2011-203569

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Unpublished Opinion No. 2014-UP-113
Heard November 14, 2013 – Filed March 19, 2014

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, and Reid T. Sherard, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

PER CURIAM: Appellant Jamaal Hinson appeals his conviction for murder, arguing the trial court erred in: (1) removing a juror who unintentionally concealed his affiliation with a witness; and (2) declining to instruct the jury on involuntary manslaughter. We affirm.

FACTS/PROCEDURAL HISTORY

This case arises from the shooting death of Anthony Salley (Victim) at the Vineyard Crossing subdivision in Blythewood, South Carolina. Earlier on the day of the shooting, Appellant exchanged threats with Victim and Victim's friend, Richard Thomas, as he drove by Victim's house. Appellant testified that he subsequently armed himself with a gun because he knew Thomas regularly carried a gun. According to Appellant, he later approached Victim's driveway in an attempt to complete a drug transaction with his friend, Devan Bailey. Upon Appellant approaching the driveway, an altercation immediately began between Appellant and Victim. At some point during the altercation, Appellant drew his gun; however, Victim successfully knocked the gun from Appellant's hand. The two men then engaged in a fist-fight, which Appellant admittedly "won." After winning the fight, Appellant immediately retrieved his weapon. As Victim got up off the ground, he sustained a fatal gunshot wound to the abdomen from Appellant's gun. Appellant claimed that he was startled when Victim moved and faced him and that the gun fired accidentally.

The case proceeded to trial on November 14, 2011. During *voir dire*, the trial judge read the name of every anticipated witness and asked each witness present to stand upon hearing his or her name called. After reading the names from the witness list, the trial judge asked potential jurors the following questions:

> Question 1: [I]s there anyone related by blood or marriage or has [sic] a close personal or social relationship with any of the witnesses I have called?
>
> Question 2: 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 placed on your ability to be fair and impartial to both the State and the Defendant? If so please stand.

Juror 226, Guy Rodgers, did not respond to either question, and was subsequently placed on the jury.

On the second day of trial, the State called Jarrod Crudup as a witness regarding Appellant's whereabouts the night of the shooting. Crudup was not present in the courtroom on the first day of trial when the trial judge read the names on the witness list to potential jurors. Crudup testified that he knew Victim because they lived in the same neighborhood. Crudup also stated that he "knew of" Appellant through friends and that Appellant entered his house "uninvited" on the day of the shooting.

At the beginning of the third day of trial, the trial judge informed counsel that she had spoken to Juror 226, who had informed her that he had not recognized the names of any of the witnesses because he did not know them, but recognized some of their faces from playing basketball with them at a local gymnasium. After the trial judge made this announcement, Juror 226 stated that his acquaintance with some of the witnesses would not affect his ability to be fair and impartial. The State then inquired, "which witnesses?" In response, Juror 226 indicated the only witness he had knowledge of was Crudup. When specifically questioned as to whether his knowledge of Crudup would affect his ability to be fair and impartial, Juror 226 answered "No. I don't even know him."

After Juror 226 left the courtroom, the State asked that he be removed from the jury, expressing concern that Juror 226 had a close connection with a friend of Appellant. The State went on to assert that had it known about Juror 226's connection to Crudup, the matter would have been a consideration in their use of strikes. The trial judge recognized that Juror 226 did not intentionally conceal his relationship with Crudup. Nevertheless, the trial judge removed Juror 226 from the jury "out of an abundance of caution," citing Juror 226's initial disclosure that he knew of "some of the witnesses."

At the conclusion of trial, the jury found Appellant guilty of murder. The trial judge sentenced Appellant to thirty years' imprisonment. This appeal followed.

LAW/ANALYSIS

I. Juror Dismissal

Appellant argues the trial court committed reversible error in removing Juror 226 when it was uncontested that Juror 226 did not intentionally conceal his knowledge of the identity of a witness during *voir dire*. We disagree.

In *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), our supreme court addressed whether a post-verdict discovery that a juror had an affiliation with a victims' rights organization warranted a new trial. The court in *Woods* set forth the following test for the removal of a juror for concealment of information inquired into during *voir dire*:

> When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, *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.

Id. at 587, 550 S.E.2d at 284 (emphasis added). The court explained "intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Id.* at 588, 550 S.E.2d at 284. "Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Id.*

In *State v. Stone*, our supreme court cited to *Woods* in holding that the trial court abused its discretion by removing a juror and replacing her with an alternate. 350 S.C. 442, 448-49, 567 S.E.2d 244, 247-48 (2002). In *Stone*, the State called the defendant's aunt as a witness during the penalty phase of a capital trial. *Id.* at 448, 567 S.E.2d at 247. Once the witness took the stand, one of the jurors realized she knew the witness. *Id.* Although the witness's name had been announced at the beginning of the *voir dire*, the juror did not know the witness's name. *Id.* The juror indicated she had lived down the street from the witness some five or six years earlier, but they were casual acquaintances only. *Id.* She further stated that her acquaintance with the witness would not affect her ability to be fair and impartial. *Id.* In spite of the juror indicating that she could be impartial, the trial court removed the juror and replaced her with an alternate. *Id.* Our supreme court recognized that *Woods* was distinguishable in that it dealt with a new trial matter; nevertheless, it found *Woods* "instructive," noting:

> 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 448-49, 567 S.E.2d at 247-48.

The court in *Stone* ruled that the trial court abused its discretion in removing the juror because neither of the two *Woods* criteria supporting removal were present. *Id.* at 449, 567 S.E.2d at 248. In *State v. Burgess*, this court cited to *Stone* in affirming the trial court's decision not to remove a juror. 391 S.C. 15, 19-20, 703 S.E.2d 512, 514 (Ct. App. 2010), *cert. denied* (May 25, 2012). The *Burgess* court noted the lack of either of the *Woods* criteria "would have independently rendered the trial judge's removal of the *Stone* juror erroneous." *Id.* at 19, 703 S.E.2d at 514.

On appeal, Appellant argues this court should find the trial court abused its discretion in removing Juror 226 because it is uncontested that the first *Woods* criterion was absent. Appellant further contends that pursuant to *Stone*, the erroneous removal of a juror is per se reversible error. The State argues that Appellant's reliance on *Stone* is misplaced because, although *Stone* recognized 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*.

Stone does not necessarily support Appellant's assertion that the removal of a juror who unintentionally concealed information inquired into during *voir dire* requires automatic reversal. In *Stone*, the appellant challenged his conviction on several grounds, including the dismissal of a juror who unintentionally concealed her acquaintance with a witness and indicated such acquaintance would not affect her ability to be fair and impartial. 350 S.C. at 448, 567 S.E.2d at 247. Although the court in *Stone* determined that the 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 450, 452, 567 S.E.2d at 248, 249.

Neither *Stone* nor *Burgess* address whether the erroneous removal of a juror who unintentionally concealed information during *voir dire* requires automatic reversal. However, it is well-recognized that most trial errors, even those that violate a

defendant's constitutional rights, are subject to harmless error analysis and do not automatically require reversal of a conviction. *State v. Mouzon*, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997). Our courts have determined "[t]here is no right to be tried by a jury composed of particular individuals." *State v. McDaniel*, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980); *State v. Rogers*, 263 S.C. 373, 382, 210 S.E.2d 604, 609 (1974). In accordance with this principle, South Carolina case law concerning alternate juror participation directs the appellate court to determine whether an alternate juror's participation affected the outcome of the trial. *See McDaniel*, 275 S.C. at 223-24, 268 S.E.2d at 586 (stating the irregular procedure employed by the trial court in excusing a juror and impaneling an alternate at the conclusion of testimony on the basis that the juror was observed making improper remarks and gestures was not sufficient to deprive the defendant of his right to a jury trial, where the alternate juror had been approved by both sides at the inception of trial, and there was no showing that defendant withdrew his approval at the time of the substitution); *State v. Williams*, 321 S.C. 455, 459-60, 469 S.E.2d 49, 52 (1996) (finding "[a]s in *McDaniel*" there was no prejudice to the defendant from the seating of an alternate juror where the trial court removed a juror who was seen shaking the hand of a pastor who was seated at defense counsel's table and who had assisted defense counsel in the case).

Even if the removal of Juror 226 was error pursuant to *Stone* and *Burgess*, we find such error harmless. Here, the regular jurors and the alternate jurors were treated similarly in all respects. Juror 226 was replaced with an alternate who was present throughout the proceeding, heard the same evidence, and was subject to the same instructions of law as the regular jurors. *See* S.C. Code Ann. § 14-7-1340 (1976 & Supp. 2013) (providing alternate jurors "shall have the same opportunities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already sworn and shall attend at all times the trial of the cause in company with the other jurors"). Furthermore, Appellant does not contend that the alternate was unqualified or had not been approved by both sides during *voir dire*. *See* S.C. Code Ann. § 14-7-320 (Supp. 2013) (stating alternate jurors "must be drawn from the same source, in the same manner, have the same qualifications, and be subject to the same examination and challenge as the jurors already sworn"); *see also McDaniel*, 275 S.C. at 224, 268 S.E.2d at 586.

II. Involuntary Manslaughter Charge

Appellant also argues the trial court erred in refusing to charge the jury on involuntary manslaughter. We disagree.

Involuntary manslaughter is defined as (1) the unintentional killing of another without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice but while engaged in 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). A trial court should refuse to charge the lesser-included offense of involuntary manslaughter only where there is no evidence the defendant committed the lesser offense. *Id.* at 15, 664 S.E.2d at 479.

Here, Appellant, a convicted felon, acted in violation of the law by carrying a firearm. *See* S.C. Code Ann. § 16-23-500 (Supp. 2013). In addition to being in unlawful possession of a firearm, there is no evidence to suggest Appellant was without fault in bringing on the difficulty. Earlier on the day of the shooting, Appellant exchanged murderous threats with Victim in front of Victim's house. In spite of this contentious history, Appellant approached Victim's driveway while carrying a gun. *See State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15-16 (2011) (holding the trial court properly refused to charge the jury on involuntary manslaughter where there was no evidence to indicate that the appellant lawfully armed himself in self-defense given that the appellant engaged in a drug deal, while armed with a loaded gun, knowing the victim owed him money from a previous drug transaction); *State v. Cabrera-Pena*, 361 S.C. 372, 383-84, 605 S.E.2d 522, 528 (2004) (finding the appellant was not entitled to an involuntary manslaughter charge because his conduct in arming himself with a deadly weapon and waiting to confront the victim was not a lawful activity and, his conduct, in turn, created the volatile circumstances that led to the victim's death). Accordingly, the trial court did not commit error in denying Appellant's request for a charge on involuntary manslaughter.

For the foregoing reasons, Appellant's conviction is **AFFIRMED.**

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED
APR 0 3 2014
SC Court of Appeals

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

[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

[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).

[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,

NELSON MULLINS RILEY & SCARBOROUGH LLP

Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE

By: _____
Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343
Attorneys for Petitioner

Columbia, South Carolina

Dated: April 3rd, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED
APR 0 9 2014
SC Court of Appeals

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.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED

APR 0 3 2014

SC Court of Appeals

Unpublished Opinion No. 2014-UP-113

The State of South Carolina, ... Respondent,

v.

Jamaal Hinson, ... Petitioner.

PETITION FOR REHEARING EN BANC

Petitioner, by and through his undersigned counsel and pursuant to Rule 219, SCACR, requests rehearing en banc because a panel of 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). This decision is particularly troubling in light of this Court's opinion *State v. Coaxum*, 2011-UP-496 (Ct. App.

Nov. 7, 2011), certiorari to which is set for oral argument before the Supreme Court on May 8, 2014, with the following description from the Supreme Court:

> In this appeal, the Court reviews the court of appeals' decision in State v. Coaxum, Op. No. 2011-UP-496 (S.C. Ct. App. filed Nov. 7, 2011), reversing Coaxum's convictions and remanding for re-trial. At Coaxum's trial, a juror inadvertently concealed information during voir dire and disclosed the information mid-trial, resulting in the trial court excusing the juror from service and requiring the alternate juror to take her place. The court of appeals reversed, and the State now asserts that the removal of a juror from an otherwise competent and impartial jury when the juror is replaced with a qualified alternate juror is insufficient to warrant a new trial and that, even if there was an error, the error was harmless beyond a reasonable doubt.

Supreme Court - Roster of Cases for Hearing, SOUTH CAROLINA JUDICIAL DEPARTMENT,http://www.judicial.state.sc.us/supremeRosters/dspSupRosterMenu.cfm?CurrentDate=05/03/2014 (last visited April 3, 2014).

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]

[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).

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 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

[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.

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 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.

[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.

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 (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.

[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).

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) 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

[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").

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 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").

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

[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).

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).

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

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

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

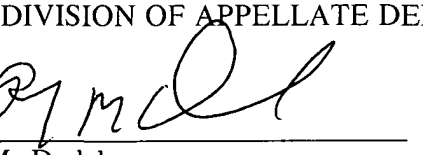
This Court seriously jeopardized a defendant's right to a fair jury trial in South Carolina by holding that the trial court did not commit reversible error when it dismissed a juror at the request of the prosecution after the juror unintentionally concealed his remote knowledge of the identity of a prosecution 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 en banc is necessary in this matter to allow this Court to reconsider its holdings.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE

By: 
Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343
Attorneys for Petitioner

Columbia, South Carolina

Dated: April 3rd 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

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 En Banc 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.

Barbey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

The South Carolina Court of Appeals

The State, Respondent,

v.

Jamaal Hinson, Appellant.

Appellate Case No. 2011-203569

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and, hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

John D. Geathers J.

James E. Lockemy J.

Columbia, South Carolina

cc:
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
The Honorable DeAndrea G. Benjamin

FILED
May 20, 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.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

NELSON MULLINS RILEY & SCARBOROUGH LLP
Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE
Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343

Attorneys for Petitioner

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SC Court of Appeals

INDEX

INDEX 1

CERTIFICATE OF COUNSEL 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE .....

ARGUMENTS

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 as of limited. 8

Standard of Review 9

The trial error 9

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. 27

Standard of Review 27

Discussion 27

CONCLUSION 34

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[1] 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

[1] 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,[2] (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.

---

[2] 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,[3] (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).

---

[3] 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]."[4] (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

[4] 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).[5]

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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[5] 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.[6]

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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[6] 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,[7] 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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[7] 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,[8] *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

[8] 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.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____
Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE

Chief Appellate Defender Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343

Attorneys for Petitioner

The 29th 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

RECEIVED
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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.

RhondeDenuese Dorsett (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021

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

Appellate Case No. 2014-001368

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMAAL HINSON,

PETITIONER

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

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 1987
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED ON CERTIORARI ii

RESPONDENTS STATEMENT OF THE CASE 1

RESPONDENT'S STATEMENT OF THE FACTS 1

ARGUMENT ON WHY CERTIORARI SHOULD BE DENIED

I. Trial Court Did Not Commit Reversible Error By Dismissing A Juror, Even Though Juror Did Not Intentionally Conceal His Knowledge Of The Identity Of One Of The Witnesses and the Fact that He Played Basketball With Him and Possibly Other Witnesses, Where The Juror's Removal Did Not Prejudice Petitioner At Trial Because The Removed Juror Was Replaced By An Alternate, And The Removal Occurred Prior to Deliberations Based Upon An Abundance of Caution and Concern 5

II. Petitioner Was Not Entitled To A Charge On The Elements Of Involuntary Manslaughter Where There Was No Evidence That Petitioner Was Lawfully Armed In Self-Defense When He Fired The Fatal Shot. 21

CONCLUSION 35

CERTIFICATE OF SERVICE

PETITIONER'S QUESTIONS PRESENTED ON CERTIORARI

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 ?

RESPONDENT'S STATEMENT OF THE CASE

The Petitioner, Jamaal Hinson, was indicted by the Richland County Grand Jury on April 14, 2010 for murder involving the January 16, 2010 death of Anthony Salley. State v. Jamaal Hinson, 2010-GS-40-829. ROA 760-61. Following his indictment, Petitioner was tried before the Honorable DeAndrea G. Benjamin and a jury on November 14, through November 18, 2010 in Richland County. At trial, Petitioner was represented by Eleanor D. Cleary, while the State was represented by K. Luck Campbell and Nicole M. Simpson. (R. p. 1).

At the conclusion of trial, the jury convicted Petitioner of murder. On November 18, 2010, Judge Benjamin sentenced Petitioner to 40 years on the murder charge. (R. p. 756); (R. p. 759).

The Petitioner timely served the notice of appeal on November 22, 2011. After briefing, oral argument was held on November 14, 2013. The South Carolina Court of Appeals issued its unpublished opinion affirming the judgment of conviction and sentence on March 14, 2014. State v. Jamaal Hinson, Op.No. 2014-UP-113 (S.C.Ct. App. March 19, 2014). (App.p. 1-7). The Petitioner made a petition for rehearing (App.p. 8-39) and petition for rehearing en banc on April 3, 3014 (App.p. 40-72). On May 20, 2014, the Court of Appeals denied both petitions. App.p. 73-74).

RESPONDENT'S STATEMENT OF THE FACTS

On the morning of January 16, 2010, Jamaal Hinson, the Petitioner, left Lauren Banks' house in the Vineyard Crossing subdivision of Blythewood, South Carolina to complete a series of marijuana transactions. (R. p. 575). While leaving Vineyard Crossing, Hinson saw Richard Thomas and Anthony Salley [the victim of the murder] outside of Mr. Salley's own home, two

houses down from Ms. Banks' house. (R. pp. 445-46, 576). Hinson and Mr. Thomas were enemies with a contentious history and "(didn't) like each other at all." (R. pp. 571, 620). Petitioner beat Mr. Thomas with a pistol after an altercation at the AM-PM gas station in the Fall of 2009. (R. pp. 572-74). Hinson's testimony acknowledged tension with Mr. Salley, but claimed he did not know him well and the two never fought. (R. pp. 508, 620). Nevertheless, Lauren Banks' statement to police indicated that Hinson referred to Mr. Salley as a "pussy," stated he did not like Mr. Salley, and that he'd beaten Mr. Salley up before. (R. p. 620). Upon seeing each other on January 16, 2010, Petitioner and Mr. Thomas exchanged threats. (R. p. 571). Afterwards, Petitioner left Vineyard Crossing to complete his marijuana sales. (R. pp. 575-76).

Later that day, Hinson encountered his friend Devan Bailey at a gas station. Bailey was with Derrick Diamond and Quinton Emerson, who was driving the trio around in a silver/gray pickup truck. (R. p. 413). Bailey asked if Petitioner could provide him with any marijuana. (R. pp. 575-76). Petitioner indicated he could but first required a ride to his house. (R. pp. 577, 623). Petitioner wanted to stop at his house first so he could obtain a gun. (R. p. 577). After Petitioner retrieved his gun from his house, Bailey, Emerson and Diamond took Petitioner back to Lauren Banks' house in Vineyard Crossing. (R. pp. 625-26).

After dropping Petitioner off at Lauren's house, Bailey called Petitioner asking for a cigar. (R. p. 578). Though either Emerson or Diamond could have legally purchased a cigar (R. pp. 134, 168-69, **Tr. pp. 912**), Petitioner testified that he told Bailey to return to Lauren Banks' house for a cigar because he was uncomfortable allowing Bailey to obtain one illegally. (R. p. 578). Upon their return, Bailey instructed the driver, Emerson, to stop in front of Anthony

Salley's house two doors down from where they dropped Petitioner off previously. (R. p. 418). At the time, Anthony Salley was sitting with Andina Lee in his car in the driveway. (R. p. 97). Andina Lee testified that the truck blocked the driveway when it was parked behind them. (R. p. 97). Bailey got out of the truck and called Petitioner to tell him he was outside. (R. pp. 146, 179-81, 578, 629). Salley got out of his car and spoke to Bailey. (R. pp. 179-81). Petitioner then emerged from Lauren Banks' house and saw Salley and Bailey talking. (R. p. 630). Salley was not making any gestures or raising up his fists, and Petitioner could not hear what he was saying. (R. p. 632). Petitioner advanced toward the area where Salley and Bailey were talking, while armed with his gun. (R. pp. 579, 631).

As Petitioner was approaching the area, Petitioner claimed that Salley saw Petitioner and went toward him. (R. pp. 579, 633). Petitioner did not know Salley to carry a gun, and saw nothing that day to indicate otherwise. (R. pp. 572, 633). Nevertheless, when Petitioner was within arms' length of Salley, Hinson pulled out his gun and aimed it at Salley, according to Hinson's testimony. [1] (R. p. 633). The State's evidence contradicted this account.

Andina Lee testified that as Petitioner approached the scene, he said "Yes, you bitch ass

---

[1]Hinson testified that he pulled the gun out to scare him away. R. p. 633-634. He stated that he felt that Salley was a threat to him when he was approaching Devan Bailey, because when Salley saw him he started to take off his jacket and ran towards him. R. p. 633, l. 13-18. Petitioner admitted that before the victim ever laid a hand on him that Petitioner had already pulled his gun out. R. p. 634. In his testimony, Petitioner claimed that the victim had "walked up to the pistol and said if you are going to shoot me, shoot me." R.p. 634, l. 17-23. He claimed that the victim punched him and then he stumbled and that he was hit again. He claimed that at that point he dropped the pistol and then began fighting with the victim. R.p. 638, l. 17- 708, l. 14. He declared that he got the best of the victim and finished fighting. When he got up from the fight that he saw the victim's girlfriend Andina had the pistol in her hand. R.p. 639, l. 15-16. At that point, he saw her throw it down. R.p. 639, l. 17-25. He denied in his testimony that he told Devan Bailey to "bust him." R.p. 640, l. 6-14. According to Hinson, when Andina threw the gun down on the ground, the victim was on the ground from the fight. R.p. 640-41. Hinson stated that he saw Devan run off when Hinson picked up the gun off the ground. Hinson stated that he picked up the pistol to put it in his waistband and he turned around and pointed it at the victim, saw the victim fall and knew that he shot him and then ran. R.p. 642-43. He stated that he was scared so he ran. R.p. 643, l. 17. He claimed that he threw the gun away as he was running through the neighborhood. R.p. 644. He stated that he threw the gun away because he could have gone to jail that day and would have gotten a pistol charge also. R.p. 644.

n-----r. This is exactly what I want." (R. pp. 99-100). Andina testified that she saw Hinson walk toward Salley, pull the gun out, and point it directly at Salley. R. p. 100, l. 6-11. Quinton Emerson testified that when Petitioner was face-to-face with Salley he "racked the gun" to demonstrate that it was ready to fire and pointed it at Salley's head. (R. pp. 181, 183). Eventually, Salley hit Petitioner, knocking the gun from his hand. R.p. 100, l. 18-19. See R. pp. 635-38. Petitioner and Salley commenced to fighting. (R. p. 100,183).[2] While they were fighting neither had a weapon. R.p. 101. After forcing Salley to the ground, Petitioner punched Salley in the head, face, and chest until Salley no longer fought back. (R. pp. 638-39). Derrick Diamond testified that during the fight, Petitioner told Bailey to "Bust him!" (meaning shoot Salley with the gun). (R. p. 148).

After Petitioner won the fight, Petitioner claimed he stood up and he saw Andina Lee toss the gun to the ground. (R. p. 581, 639). Petitioner claimed he went over, picked up the gun, turned, and fired the gun, hitting Anthony Salley. (R. pp. 582-83). Andina Lee testified that she was helping Salley get up from the ground in order to retreat into the house, and Petitioner pointed the gun and shot Salley. (R. pp. 105, 109). Salley died that afternoon from a single gunshot wound to his abdomen. (R. pp. 367-78).

After shooting Salley, Petitioner ran to Jerrod Crudup's house where Demario Evans was

[2]Andina Lee testified that while they were fighting another male got out of a car and came over and started Salley to make him get on the ground. R.p. 101. She stated that at that point Andina picked up the gun from the ground and told them they needed to stop fighting. She said she pointed the gun at the guy who came to Hinson's aid who then came toward her and that she then threw the gun back down to the ground because she was afraid of him. R.p. 101-105. She stated that she was afraid and feared someone trying to take the gun from her hand. She stated that the fight had stopped on its own. R.p. 104-105. She stated that she and Salley then tried to go to the house. However, Hinson picked up the gun while she was trying to get Salley off the ground and shot Salley. R.p. 105-106. She stated that Salley was defenseless without a weapon and Hinson was within a few steps when he shot him. R.p. 106 -108. Lee stated that Hinson pointed the gun at Salley's stomach. R.p. 108-109. She described the fact that Anthony Salley fell and grabbed his stomach after he was shot. R.p. 109-110.

parked. (R. pp. 584-85).[3] Petitioner asked Mr. Evans to drive him away from Vineyard Crossing. (R. pp. 205, 585). Later that day, Petitioner met with Devan Bailey to "get their story straight." (R. p. 649). Petitioner eventually fled to Atlanta, where he was later apprehended and brought back to South Carolina for trial. (R. pp. 647-48, 653).

ARGUMENT

I. Trial Court Did Not Commit Reversible Error By Dismissing A Juror, Even Though Juror Did Not Intentionally Conceal His Knowledge Of The Identity Of One Of The Witnesses and the Fact that He Played Basketball With Him and Possibly Other Witnesses, Where The Juror's Removal Did Not Prejudice Petitioner At Trial Because The Removed Juror Was Replaced By An Alternate, And The Removal Occurred Prior to Deliberations Based Upon An Abundance of Caution and Concern .

Certiorari is not warranted where the Petitioner was tried by twelve impartial jurors where a juror's contact with a witness and potentially other witnesses caused the juror to be replaced with an alternate out of an abundance of caution. The Court of Appeals concluded that no prejudice had been shown by the removal. App.p. 5-7. It has been stated that a criminal defendant does not have a right to be tried by a particular juror, but only to have fair and impartial jurors decide his fate. See State v. Rayfield, 369 S.C. 106, 113, 631 S.E.2d 244, 248 (2006). See State v. Simmons, 599 S.E.2d 448 (2004) (trial court did not abuse its discretion by dismissing a juror after a murder trial had begun, where juror admitted that he had unauthorized contact with his wife about the personal effect of a guilty verdict would have on them, and the trial judge had admonished the jury not to discuss the case with anyone). This case evidences the discretion that should be used by trial judges to insure a fair trial when a juror indicates that he has knowledge of a witness from personal contact with that witness in playing basketball and had

[3]The gun was not recovered.

initially indicated to the court that he identified other witnesses. This removal and replacement with a selected fair and impartial alternate was reasonably appropriate where that newly disclosed information would have led to a peremptory challenge by the State due to a connection between that witness and other witnesses and that the court was concerned that future witnesses in the case might develop a similar disclosure by the juror based upon his comments to the court.

Petitioner is not entitled to a new trial because he has not demonstrated that he was prejudiced by the trial court's removal of Juror 226. State court precedent, doctrinal structure and prudential considerations all require that the "abuse of discretion" language be read to mandate independent findings of both legal error and prejudice to reverse a trial court's decision to dismiss a juror. Juror 226's dismissal did not prejudice Petitioner, and Petitioner's brief fails to make any assertion to the contrary. Therefore, Petitioner's conviction should be affirmed.

HOW THE ISSUE WAS RAISED BELOW

On November 14, 2011, the trial court conducted voir dire in Petitioner's trial for murder. Judge Benjamin read the names of every anticipated witness, **including the name "Jarrod Crudup,"** and asked that each witness present stand upon hearing their name called. (R. pp. 23, 25). After reading the names, the judge asked:

> Q, "[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)
>
> Q. "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).

Juror 226 [Guy Rodgers, a single male employed by Richland School District One as a painter] did not respond to either question. He was ultimately placed on the jury. (R. p. 49, ll. 1-12).

The Testimony of Jarrod Crudup

On November 15, 2011, the second day of the trial, the State called Jarrod Crudup to testify about Petitioner's departure from the Vineyards Crossing neighborhood after shooting Anthony Salley. (R. pp. 199-212). Crudup recounted the afternoon of January 16, 2010, when he was hanging out with his sister, his niece, and his friend, Demario Evans.[4] (R. p. 202). Devan Bailey and Petitioner came to his house around 2:30. (R. p. 203). Crudup knew Bailey from school and playing football together (R. p. 203) and knew of Petitioner through friends. (R. pp. 201, 204). Petitioner told Crudup that he and Bailey had been in a fight and asked Evans for a ride. (R. pp. 203, 205). Crudup later identified Petitioner and Devan Bailey in photo lineups as the individuals who had come to his house that day (R. pp. 208-11) and identified Petitioner again at trial. (R. p. 211).

Juror 226 Requests To Speak to the Court

Early on the third day of trial, November 16, 2011, Judge Benjamin stated that "Juror 226 wants to talk to me. I have no idea why...," and stepped out of the courtroom with her law clerk to inquire into the matter. (R. pp. 322-23). Judge Benjamin returned and reported that Juror 226 had not recognized the names of some of the witnesses because he doesn't know them, but recognized them from playing basketball in the area where he works. (R. p. 323).

The Trial Court's Inquiry of Juror 226

After she made this announcement, the judge asked Juror 226 if her summary reflected what he had told her in the hallway, and he responded "yes, ma'am." (R. p. 323, II. 18-20). Thereafter, Judge Benjamin and the juror had the following exchange in the presence of counsel:

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[4]Demario Evans was one of Petitioner's chauffeurs (meaning he would drive Petitioner around in exchange for marijuana and gas money). (R. p. 584).

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. 361, l. 1).

The Senior Assistant Solicitor Campbell then inquired "which witnesses?", and the trial judge then inquired :

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).

Prosecution Requests to Remove Juror 226.

The State asked that Juror 226 be removed. (R. p. 328). Particularly, the prosecution stated:

Solicitor Campbell: 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. 362, l. 8). [5]

Essentially, the State argued that Jarrod Crudup was closely connected with friends of the Petitioner,[5] and Juror 226 had at least "some type of communication with [Crudup] playing basketball." (R. pp. 325, 326, 330). The State went on to assert that had they known about Juror 226's connection to Jarrod Crudup, the matter would have been a consideration in their use of strikes. (R. p. 327). Particularly, the prosecutor stated:

> 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, l. 13-17.

It was pointed out that Demario Evans, Crudup's friend, was also a potential witness in the case.[6] The prosecution stated that Evans was eluding the State at that point. R.p. 327, l. 14-19. The prosecution stated that the evidence already in the record was that Demario was at his house at the time of the crime and helped Petitioner escape. R.p. 327, l. 20-24.

Counsel Cleary responded asserting that the juror said that he does not know the people. He had seen them before and played basketball with them but did not know their names. She

---

[5]In his brief before this Court, the Petitioner claims that the State misrepresented the juror's statements - asserting that he never indicated even communicating with Mr. Crudup, much less a social relationship with him. *Initial Brief of Appellant*, p. 12. The statements by the prosecution - read in context speak for themselves as to the reference of connection with Crudup playing basketball with the juror. The fact is that the prosecution identified witness Crudup as the witness with "the dreads" and it was never contested in the trial court. R. p. 325, ll. 10-14. See R.p. 324, ll. 9-14. In fact, counsel Cleary interpreted the identification similarly. R.p. 325, ll. 20-21. Counsel Cleary however did assert that there was no indication that he even had a conversation with him, "other than playing basketball." R.p. 325, l. 23- p. 326, l. 2.

[5] The prosecution stated that Crudup was best friends with Demario Evans and that he was closely affiliated with Hinson. R.p. 326, l. 9-12.

[6]Evans did not end up testifying at the trial. The prosecution presented testimony that he could not be located. R.p. 463-464.

further asserted that it was not central to any issue in the trial and did not know what relevance it would have. Particularly, she pointed out that the juror could not be struck for cause because he played basketball with somebody." R.p. 328, l. 11-12. However, Judge Benjamin pointed out that "if she (Campbell) had known it she said she would have struck him." R.p. 328, l. 13-14.

Assistant Solicitor Campbell pointed out that their concern was that they had kept out the gang issue and that her client was a member of the Folk Nation and PAN organization within that gang. She opined that this affiliation would be a concern. She noted that she did not know whether it would work for her or against her, but "in fairness to everyone," she asked that the juror be removed and replaced with an alternate. R.p. 328, l. 15-23. She also stated that Petitioner had self-proclaimed himself to be a member of the Gangster Disciples, which was coming up in the next witness. R.p. 329.

The Trial Judge's Decision To Remove The Juror.

Judge Benjamin at that time took a break to consider the matter. Upon her return, she indicated that she would dismiss the juror:

> In an abundance of caution, because I don't know who you all are going to call next , and I just don't want him standing up again saying oh, I know that person too. He said he believed - - -initially he said he knew some of the witnesses, but when he came in he said he knew one of the witnesses. And he said that a lot of them come and – he said a lot of the guys come up there and play and they play on a team or something together, so I guess in an abundance of caution I will take him off. And considering that we only have one alternate left, I will make that alternate the permanent juror.

R.p. 328, l. 6-18.

The defense objected, arguing there was no evidence Juror 226 could not be fair and impartial, and Petitioner was entitled to a fair and impartial jury. (R. p. 330).

The prosecution reiterated that the dismissed juror had initially indicated that he knew

witnesses and that the defense had acknowledged that she had allowed an earlier juror to be excused because that juror knew more than one witness. R. p. 330, l. 16-22, citing R. p. 330, l. 3-6.[7] The prosecutor also noted that in addition, it would be the defendant's friends that he knew.

Judge Benjamin called the juror back into the courtroom. At that point, she dismissed the juror with the following colloquy:

Court:	. . .because you know the witnesses and our concern - - my concern is that some of these other witnesses may be people that you know through playing at the - - basketball at the gym.
Juror :	Yes, ma'am.
Court :	In an abundance of caution, I am going to go ahead and remove you from service. I appreciate you serving thus far and I know that you have been attentive in listening to the witnesses, but I think in an abundance of caution I'm going to probably – I'm going to go ahead and remove you from service.
Juror:	Yes, ma'am.
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 names with faces. And that happens all the time.
Juror:	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.
Court:	Okay. All right. Thank you.

R.p. 331, l. 12- p. 332, l. 12. The trial judge replaced the juror with alternate juror Jennifer Waller. R. p. 332.

STANDARD OF REVIEW

[7] Counsel Cleary stated that she had agreed to the dismissal of the first juror because it was early in the process and the juror "seemed to know more than one witness and something about these people." R.p. 330, l. 3-6. The record reflects that juror 180 was dismissed after he had spoken with the court and advise her that he had not realized that he knew the Petitioner until he saw him and that the other witnesses he did not realize their names because they go by nicknames, but apparently that they all live in the same neighborhood. R.p. 55. The trial judge replaced the juror with an alternate. Id.

A trial court's decision to remove a juror and replace them with an alternate is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007); State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 265-66 (Ct. App. 1999). A defendant is not entitled to a new trial where the trial court's decision to replace a juror with an alternate does not prejudice the defendant. State v. McDaniel, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980). 6 "Determining whether a juror's failure to respond to a voir dire question amounts to intentional concealment is a 'fact intensive determination that must be made on a case-by-case basis.' " State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101-02 (Ct.App.2004)(quoting State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004)).

The simple "abuse of discretion" language makes sense where the trial court does not remove a potentially biased juror, because in such circumstances, prejudice is implied. Courts apply the Woods test to determine whether a juror should be removed for failure to disclose information in voir dire. Woods, 345 S.C. at 587-88, 550 S.E.2d at 284. The Woods test asks, 1) whether a juror's failure to disclose information was intentional, and 2) if so, whether such information would support removal for cause, or have been a material factor in use of the party's peremptory challenges. Woods, 345 S.C. at 592, 550 S.E.2d at 286-87. The Woods test is

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[6] The standard for granting a new trial has occasionally been phrased as simply requiring "abuse of discretion" where appellants challenge a trial court's decision not to remove a juror after finding the juror failed to disclose information on voir dire. See State v. Woods, 345 S.C. 583, 592, 550 S.E.2d 282, 286 (2001) (Stating that "...trial judge's denial of a new trial motion will not be disturbed on review absent an abuse of discretion"); State v. Bell, 374 S.C. at 147, 646 S.E.2d at 894 (Stating that "...such decision will not be reversed on appeal absent an abuse of discretion"); State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) (Holding that "...the judge acted within his discretion in finding the juror could be fair and impartial"). However, this phrasing simply masks the underlying requirement that a defendant must be prejudiced by the trial court's error to obtain a new trial. The Court of Appeals decision in State v. Covington revealed this requirement by conditioning reversal upon finding a "prejudicial abuse of discretion." State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69-70 (Ct. App. 2000) ("Where a new trial motion is based upon allegations that a juror gave misleading and incomplete answers on voir dire, the trial court's denial of that motion will be affirmed absent a prejudicial abuse of discretion").

designed to protect a defendant's right to trial by an impartial jury (Id. at 587-88, 284) and presumes bias from a juror's unjustified concealment of information. Id. at 589, 285. Where the trial court misapplies Woods and decides not to remove the juror in question, it is sensible to reverse the trial court and grant a new trial solely upon a finding of legal error, because such error leaves a potentially unfair or biased juror on the jury and necessarily threatens the defendant's right to a fair and impartial jury. Thus, a trial court's error in applying or failing to apply Woods is inherently prejudicial where that error leaves the potentially biased juror on the jury.

However, this rationale should not apply where the court decides to remove a juror and replace them with an alternate. Replacing a juror with an alternate, even where removal was in error, does not result in prejudice or jeopardize the defendant's right to a trial by a fair and impartial jury. See McDaniel, 275 S.C. at 224, 268 S.E.2d 586.[8] A defendant has no right to be tried by a jury composed of particular individuals. State v. Williams, 321 S.C. at 460, 469 S.E.2d at 52; McDaniel, 275 S.C. at 225, 268 S.E.2d at 586. An appellant fails to establish prejudice from the removal of a juror where the alternate was approved by both sides at the

[8] Petitioner applies the wrong standard when he asserts that removal of a juror is only supported when the removed juror intentionally concealed information which would have supported a challenge for cause or a would have been a material factor in the party's use of peremptory challenges, because it does not address all settings that could lead to the need to remove a juror. See Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986) (affirming denial of motion for new trial based on after-discovered evidence where jurors' relationship with doctor's attorney was not a basis for disqualification). See also State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) (post-verdict motion for new trial should have been granted where juror intentionally concealed prior association with solicitor's office, which denied defendant effective use of peremptory challenges); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998) (affirming denial of new trial motion based on after discovered evidence based on information that juror attended pro-death penalty rally, where information was not intentionally concealed); State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982) (pre-verdict mistrial should have been granted for juror's failure to disclose relationship with police officer, where information would have supported a challenge for cause or would have been a material factor in the exercise of a peremptory strike); State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991) (post-verdict mistrial motion properly denied because no evidence party would have struck juror, and juror's failure to disclose distant relationship with witness was not intentional).

inception of trial, and the appellant does not demonstrate manner in which he was prejudiced by seating the alternate. Williams, at 321 S.C. at 460, 469 S.E.2d at 52; McDaniel, 275 S.C. at 225, 268 S.E.2d at 586.

The goal of the corrective measures is to insure the defendant's right to a fair trial has not been compromised. State v. Stone, 290 S.C. 380, 382, 350 S.E.2d 517, 518 (1986). Cautionary instructions or substitution of alternate jurors may cure the potential prejudice caused by the publicity. United States v. Hankish, 502 F.2d 71 (4th Cir.1974). The determination of what curative measures are appropriate in a given case rests in the sound discretion of the trial judge. He should exhaust other methods to cure the prejudice before aborting a trial. Id. at 77.

ANALYSIS

Petitioner attempts to rely on State v. Stone to demonstrate that the trial court abused its discretion by removing Juror 226, and such abuse of discretion requires reversal. (Initial Brief of Appellant, p. 15-18). However, this reliance is misplaced. The Stone decision simply recognized a legal error without finding that the error prejudiced the defendant, and went on to reverse the trial court on separate grounds. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002).

In State v. Stone, the Court determined that the trial judge had abused its discretion in removing a juror.[9] In particular, at sentencing, the state called the defendant's aunt as a witness.

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[9] In Stone, the Court relied upon State v. Woods, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001), wherein the Court had stated:

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, 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. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct.App.1991).

When she was placed on the witness stand, Juror Thompson indicated to the court that she knew the aunt. Although the aunt had been announced as a witness at the start of voir dire, Thompson later claimed did not know her name. Thompson had lived down the street from the aunt five or six years earlier, and they were casual acquaintances only. Thompson indicated her acquaintance would not affect her ability to be fair and impartial. The Supreme Court concluded that it is patent here that Juror Thompson's failure to disclose her acquaintance with Perry [during the opening voir dire] was innocent. Moreover, the Court concluded that "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. Thompson clearly indicated her former acquaintance with a witness whose name she did not even know, would not have affected her in any way." Stone, supra. The Court held the trial court abused its discretion in removing her. However, a closer reading of the case reveals that the new sentencing proceeding was not granted based upon this alleged error. The Court, unlike its response to the issues related to the failure to instruct on certain mitigating circumstances and the failure to give a parole ineligibility charge did not include any similar language in its opinion that it " required reversal."[10] The harmless error issue was not addressed or whether it warranted a new trial standing alone.[11]

The Petitioner also relies on State v. Woods, supra. Importantly, in Woods, the Court

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[10] The failure to specify that the juror issue "required reversal" is a difference with a distinction. The Court was not required to address the issue concerning prejudice and harmless error concerning the removal. The absence of this language is telling of the limitation in the holding.

[11] In Stone, the Supreme Court determined that the trial court abused its discretion by failing to apply Woods and removing a juror where that the juror unintentionally failed to disclosure information in voir dire. Id. at 448-49, 247-48. However, the Stone court did not reverse the trial court's decision on those grounds, despite finding an "abuse of discretion." Id. While Stone explicitly stated that two of the appellant's claims "required reversal" (Id. at 450, 248 and 451, 249), the court omitted such language from its holding that the juror's removal constituted an "abuse of discretion." Id. at 449, 248.

defined that "intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances. Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." In Woods, the court found that the juror's failure to reveal the prior relationship with the solicitor's office during the opening voir dire was intentional concealment and would have impacted on the use of the peremptory challenges. Here, there is no concealment, intentional or otherwise, of information by a juror on the initial voir dire as determined by Judge Benjamin. Thus, the language from Stone regarding whether the information would have been a material factor in the use of a peremptory challenge is inapplicable to this case. [12]

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[12] In State v. Guillebreaux, 362 S.C. 270, 607 S.E.2d 99 (S.C. Ct. App. 2004), the Court of Appeals, through Judge, now Justice Beatty, concluded a juror's failure during voir dire to disclose an alleged social relationship with State witness, who was the confidential informant who purchased crack from defendant, was not intentional. The court of appeals found that the juror's knowledge of who was the confidential informant and a rare exchange of greetings with him in her community did not constitute social relationship. The court found that the juror answered questions posed to her honestly, her failure to reveal her knowledge of confidential informant was reasonable response to question posed. In seeking a new trial based upon the juror's retention and alleged failure to disclosed the unfounded social relationship with the witness, the court concluded that a new trial was not warranted. As the Court stated: "[A]s we find no intentional concealment on Juror's part, we need not further determine whether the information would have been a material factor in the exercise of Guillebeaux's peremptory strikes. [State v.] Sparkman, 358 S.C. at 497, 596 S.E.2d at 377-78. Based on this evidence, we find the trial judge did not abuse his discretion in denying the motion for a new trial."

In Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), the Court cited Guillibreaux addressed whether a juror had intentionally concealed a prior relationship with the defendant. The Court found that the juror did not intentionally conceal the existence of his prior relationship with defendant during voir dire. The defendant claimed after the trial that he learned that they had been incarcerated together prior to defendant's murder trial at the detention center and did not recognize the juror due to a change in his appearance by his head being shaved and that he knew him only by a nickname "Rum Gully." He claimed without documentation that he had altercations with him in prison. The Court found that the defendant failed to establish that he suffered a per se violation of his due process right to a fair and impartial jury. It concluded that it was reasonable for juror to remain silent when asked during voir

The Court of Appeals decision in State v. Burgess clarifies Stone's holding that a failure to apply the Woods test constitutes error, but Burgess makes no mention of prejudice, nor any suggestion that such error is per se reversible. State v. Burgess, 391 S.C. 15, 19-20, 703 S.E.2d 512, 514-15 (Ct. App. 2010). Thus, Stone should not be interpreted to permit reversal whenever a trial court improperly removed a juror, if that removal did not prejudice the defendant, particularly as here out of a concern in an abundance of caution concerning future witnesses being identified, as well as the fact that the prosecution may well have used a peremptory challenge.

The facts in this case demonstrate the flexibility and assurance of impartiality alternate jurors are intended to provide. See State v. Stone, 290 S.C. 380, 382, 350 S.E.2d 517, 518 (1986) (Explaining that the goal of curative measures, such as the use of alternate jurors, is to insure the defendant's right to a fair trial has not been compromised, and the use of such curative measures is at the discretion of the trial court). Though Juror 226 may not have intentionally concealed the information, there was more reason to think he was a threat to the trial's fairness and reliability than for the pre-approved alternate who replaced him.[13] The trial judge expressed

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dire whether any member of the jury pool was "related by blood or marriage or a close personal friend of [defendant]." The juror testified that he and defendant were not close friends, juror also testified that he did not have any bias or prejudice against defendant, and he and the other members of the jury held the State to its burden of proof before finding defendant guilty of the two murder charges.

[13] In the instant case, the alternate went through voir dire and approved by both sides (R.p. 53). Appellant's Final Brief of Appellant made no attempt to demonstrate the manner in which Petitioner was prejudiced by the alternate juror. However, in his Petition, claims that he has shown "prejudice." Petition, p. 22-25. because he asserts that this gave the State an additionally strike because it would not have been able to use a strike on juror 50, if it had used the strike on juror 226. Petition, p. 22. However, it is unclear how the non- seating of juror 50 is prejudicial to the Petitioner. He further asserts that juror 226 had a right to sit as a juror under §14-7-360 and by analogy State v. Floyd, 353 S.C. 55,58-59, 577 S.E.2d 215, 216 (2003), but does not explain how the juror's right to sit prejudices the Petitioner. He also relies upon Greer v. Norvill, 21 S.C.L. (3 Hill), 1937 Westlaw 1472 (Ct. App. 1837) to support his position that removal of a juror should be viewed from the perspective of the juror. However, the court of appeals distinguished Greer in the case of Boland v. Greenville and Columbia R.R. Co., 46 S.C.L. (12

this concern that there was a likelihood that future witnesses would cause Juror 226 to again reveal belated recognition from his social contact at the basketball court. Thus, this type of "error" identified by Stone cannot be said to protect the defendant's right to a fair trial. Instead, it must simply protect judicial economy by conserving resources, avoiding delay, and preserving alternates for more severe circumstances. Judicial economy is not the type of competing interest that requires finding reversible error in this case.[14] The trial courts themselves internalize the costs on judicial economy imposed by unnecessary juror removal, and thus, should be allowed to exercise their discretion when determining whether to remove a juror "in abundance of caution," where that juror can be replaced with an alternate posing no risk of prejudice to the defendant.[15]

Rich.) 368 (1859), wherein a juror, who was the local coroner, was dismissed during trial because he was needed to investigate a homicide. The court noted it is within the trial court's discretion to substitute an alternate juror where there is a legal necessity or there is disclosed during trial a disqualifying interest of a juryman. Id. Here, the removal was done based upon the juror's previously undisclosed knowledge "in an abundance of caution" after disclosure suggested there may be further witnesses that the juror may also know who had not been presented and subject the same inquiry and concerns. R. p. 328-331. Therefore, Petitioner has failed to establish prejudice from the trial court's decision.

[14] Prudential concerns also demand this interpretation. If the decision to remove a juror without finding that the juror's nondisclosure meets the factors laid out in Woods constitutes reversible error, then anytime such a removal occurs without any objection from defense counsel the defendant may well have an ineffective assistance claim in post-conviction relief. While Petitioner objected to the juror's removal in the instant case, Petitioner's interpretation of Stone would create inadequate representation claims out of less controversial scenarios. Defense counsel may choose not to object for strategic reasons, or simply to avoid undue delay where an alternate was available. In any conceivable post-conviction relief petition arising from such facts, the State would be able to argue that counsel's errors did not deny the defendant a fair trial. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) ("[D]efendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). Therefore, there is no reason to even create the claim by recognizing the facts in this case and Stone as reversible error.

[15] "The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and [an appellate court] will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way". State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Along these lines, the typical appellate standard of review for the discretionary pre-deliberation removal of a juror and replacement with an alternate, is whether or not the trial court's decision was so unreasonable as to be an abuse of discretion resulting in actual prejudice. State v. Rogers, 263 S.C. 373, 210 S.E.2d 604 (1974); State v. Williams, 321 S.C. 455, 469 S.E.2d 52 (1996). In this case, Petitioner can show no prejudice from the seating of Alternate, nor can he show that the trial court's decision to excuse Juror 226 was so unreasonable as to amount to an abuse of discretion.

This was not an abuse of discretion by Judge Benjamin.

Respondent further submits any error is harmless where the alternate was present throughout the proceeding and the Petitioner had not shown he was prejudiced by the substitution prior to any deliberations. State v. Williams, 469 S.E.2d 49 (1996) (defendant was not prejudiced from seating an alternate juror after juror was dismissed).[16] The Court of Appeals found that the alleged error was harmless. [7] The regular jurors and alternate jurors were treated

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This case is similar to State v. Williams, 321 S.C. 455, 469 S.E.2d 52 (1996). During trial in Williams, a juror spoke to a minister seated at counsel table. The juror testified he had worked with the minister and had heard him preach. The minister was seated at counsel table because he had assisted the defense in contacting witnesses. The trial court excused the juror and replaced him with an alternate to prevent any problems. The Court rejected the defendant's claim that the excusal violated Batson v. Kentucky, 476 U.S. 79 (1986), and Georgia v. McCollum, 505 U.S. 42 (1992), by first noting that the issues were not preserved. However, the Court went on to hold that there was no reversible error, because (1) there is no right to be tried by a jury composed of particular individuals, (2) the alternate juror had been approved by both sides at the inception of trial, and (3) there was no showing of any prejudice from the seating of the alternate juror. Williams, 321 S.C. at 459-60, 469 S.E.2d at 52.

The same result is warranted here as is warranted in Williams. Petitioner has no right to be tried by a particular juror, and the alternate juror in this case was approved by both sides Petitioner has identified no sustainable reason why he was prejudiced by the seating of the Alternate .

[16] As the Court stated in Williams,

> In any event, in State v. McDaniel, 275 S.C. 222, 268 S.E.2d 585 (1980), this Court held there is no right to be tried by a jury composed of particular individuals. In McDaniel, an alternate was seated after a juror was dismissed for making improper gestures. The McDaniel court noted the alternate juror had been approved by both sides at the inception of the trial, and there was no showing in what manner the seating of the alternate prejudiced him. As in McDaniel, we discern no prejudice to Williams from the seating of the alternate juror here.

[17] *See* Ballentine v. State, 390 S.E.2d 887 (Ga. App. 1990) (replacement of regular juror with alternate during deliberations, due to innocent error as to who was regular juror and who was alternate, was harmless error, where correct number of jurors deliberated, extra juror had no influence upon jurors decision, and alternate juror was drawn from same source, in same manner, had same qualifications as other jurors , and listened to same evidence and charge of court); Barker v. State, 487 S.E.2d 494 (Ga. App. 1997) (no harmful error in court replacing juror with alternate where court found that juror's conduct amounted to immaterial irregularity," if any , and court would thus have been entitled to retain juror, while it was claimed that investigator stated to juror "we got one ," and that juror repeated the statement and shook hands with investigator, trial court conducted inquiry , and determined that only greetings were exchanged, but excused juror out of an abundance of caution and seated alternate); Lee v. State, 11 S.W. 3d 553 (Ark. 2000)(a defendant must show prejudice when the trial court removes a juror and seats an alternate in the juror's place); Thornberg v. State, 985 P. 2d 1234 (Okla. Crim App. 1999)(removal of juror on less than clear and convincing evidence of misconduct did not prejudice murder defendant and did not require reversal, where removed juror was replaced by alternate who had been passed upon by both the state and the defense); State v. Pettigrew, 860 P. 2d 777 (N.M. App. 1993) (defendants were not prejudiced by court's excusal of juror following

similarly. Juror 226 was replaced with an alternate who was present throughout the proceeding. The alternate heard all the evidence and was given the juror instructions which were presumably followed. Importantly, the particular alternate was qualified without objection or motion for removal for cause during voir dire. See S.C. Code §§14-7-1340, 14-7-320 (Supp. 2013).

In the case at hand, Petitioner claims the trial judge abused her discretion by removing Juror 226, even though the juror's nondisclosure was unintentional and could not have supported a strike for cause or been a material factor in the prosecution's use of peremptory challenges. (R. p. 329-30). However, Petitioner never demonstrated the manner in which he was prejudiced by Juror 226's removal, or by the seating of the alternate. Moreover, because Juror 226 was replaced by a pre-approved alternate, this is not a case where an error in applying the Woods test would necessarily prejudice the defendant by creating some threat of unfairness or partiality. Therefore, Petitioner has failed to establish prejudice and is not entitled to a new trial. Certiorari should be denied . Petitioner's conviction and the trial court's decision should be affirmed.

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unauthorized contact with public defender intern and replaced with alternate chosen in same manner as excused jurors and defendant had no right to a particular juror on the panel).

II. Petitioner was not entitled to a charge on the elements of Involuntary Manslaughter where there was no evidence that Petitioner was lawfully armed in self-defense when he fired the fatal shot when Petitioner was a convicted felon who was not without fault in bringing on the difficulty at the time of the deadly confrontation.

Certiorari is not warranted where the Court of Appeals reasonably applied the precedent of this Court to conclude that Petitioner was not entitled to an instruction on involuntary manslaughter. Although he now contends that he was lawfully armed in self-defense, the record supports the trial and appellate court's conclusion otherwise where Petitioner, a convicted felon had armed himself after an earlier confrontation with Mr. Thomas and the victim and confronted Thomas after arming himself resulting in the fight which ultimately resulted in the victim's death. The Petitioner seeks to parse facts to suggest that an entitlement to avoid the facts that remove the applicability of involuntary manslaughter. The courts were correct in their assessment that he was not allowed to assert involuntary manslaughter as a potential lesser verdict.

HOW THE ISSUE WAS PRESENTED BELOW

Viewed in the light most favorable to the Petitioner, the record demonstrates that after encountering and exchanging earlier threats with Mr. Thomas and Mr. Salley, Petitioner arranged for transportation to his house, with the intent to obtain his gun. (R. p. 577). By his own testimony, Petitioner wanted to get the gun in response to Richard Thomas' earlier threats on his life, (R. p. 625) and Petitioner did not know Anthony Salley, the murder victim, to carry a weapon. (R. p. 572). After retrieving the gun, Petitioner returned to Vineyards Crossing, where he previously encountered and exchanged threats with both Mr. Thomas and Mr. Salley, and now knew Mr. Salley to be located. (R. p. 624).

After returning to Vineyards Crossing, Petitioner received a call from Devan Bailey instructing Petitioner to come outside and give Bailey a cigar. (R. p. 631). Petitioner then went outside, with his gun in his waistband, and saw Salley "yelling at" Bailey two houses down. (R. pp. 578-79, 630-32). Petitioner chose to advance toward the area of confrontation where Salley and Bailey were standing, at which point , under Petitioner's theory, Salley saw Petitioner and came running towards him. (R. p. 633). Petitioner claimed that he saw nothing to indicate that Salley was armed at the time. (R. p. 633). As Salley approached, Petitioner pulled the gun from his waistband and aimed it directly at Salley in order to scare him, but he was not scared. (R. p. 579, 633).

While Petitioner was armed and pointing the weapon at Salley , Salley then struck Petitioner (in self-defense). (R. p. 579). Petitioner lost the gun, and proceeded to fight Salley, eventually beating him until he no longer resisted. (R. p. 580). After the fight was over, the victorious Petitioner saw that Andina Lee had the gun. (R. pp. 582, 639). Andina Lee then threw the gun to the ground, and Petitioner went to retrieve it. (R. pp. 582, 639). As he reached the gun, Petitioner picked it up with his finger on the trigger. (R. pp. 641-42). Petitioner claims at that point he accidentally fired the gun in the process of retrieving it, shooting Anthony Salley in the stomach. (R. p. 641 - 643). Salley later died as a result of the gunshot wound. (R. pp. 367-78).

During the charge conference, the Defense requested a charge on involuntary manslaughter, claiming that evidence supported the theory that Petitioner was acting lawfully in self-defense, when he recklessly shot Salley.. (R. pp. 716-17, 720-22)

The trial court denied the charge, finding no evidence that Petitioner was acting lawfully.

(R. p. 743 - 746). Particularly, Judge Benjamin found that all the evidence in the case indicated that the Petitioner was acting unlawfully throughout the time of the killing and that as a result he was precluded from an instruction on involuntary manslaughter. R.p. 743, l. 8-22. Judge Benjamin found that from the Petitioner's testimony that he was engaged in selling drugs in the community at the time of the incident and that he was unlawfully in possession of a firearm because he was a felon. R.p. 743 - 744. She found that at the time of the shooting, the victim was on the ground and defeated and the Petitioner even claimed that he had won the fight. R.p. 744. At the time, the Petitioner had no reason to think that the victim was armed at the time he was either pointed at by the weapon he had knocked away or defeated while still on the ground. Judge Benjamin further concluded that at the time of the actual shooting the Petitioner was again unlawfully armed and was clearly pointing and presenting a firearm. She concluded that any claim that he was acting in self-defense under Petitioner's theory was negated by Petitioner's own testimony because he was aware that Salley was not carrying a weapon and had won the altercation. R.p. 744.

Judge Benjamin found that Petitioner was not justified in re-arming himself at the time the gun discharged since he claimed to have won the fight and that the victim was on the ground, where there was no testimony that the victim ever possessed the gun or was with a gun at or near the time of the incident. R.p. 745. Judge Benjamin sought to distinguish State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008) and State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). She found that in Mekler, there was evidence that the victim was armed and acting in a threatening manner at the time of the shooting and in Burris, two men had attacked and knocked down the defendant and continued to attack after he had picked up the gun. Neither situation

occurred in this case. R.p. 745-746.

In denying relief, the Court of Appeals rejected the argument holding:

> Here, Appellant, a convicted felon, acted in violation of the law by carrying a firearm. See S.C.Code Ann. § 16–23–500 (Supp.2013). In addition to being in unlawful possession of a firearm, there is no evidence to suggest Appellant was without fault in bringing on the difficulty. Earlier on the day of the shooting, Appellant exchanged murderous threats with Victim in front of Victim's house. In spite of this contentious history, Appellant approached Victim's driveway while carrying a gun. See State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15–16 (2011) (holding the trial court properly refused to charge the jury on involuntary manslaughter where there was no evidence to indicate that the appellant lawfully armed himself in self-defense given that the appellant engaged in a drug deal, while armed with a loaded gun, knowing the victim owed him money from a previous drug transaction); State v. Cabrera–Pena, 361 S.C. 372, 383–84, 605 S.E.2d 522, 528 (2004) (finding the appellant was not entitled to an involuntary manslaughter charge because his conduct in arming himself with a deadly weapon and waiting to confront the victim was not a lawful activity and, his conduct, in turn, created the volatile circumstances that led to the victim's death). Accordingly, the trial court did not commit error in denying Appellant's request for a charge on involuntary manslaughter.

App.p. 7.

STANDARD OF REVIEW

The law to be charged is determined by the evidence presented at trial. State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). "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). "In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). The negligent handling of a loaded gun may be sufficient to support a charge on involuntary manslaughter. Brayboy, 387 S.C. at 180, 691 S.E.2d at 485. "In order to amount to reversible error, the failure to give a requested charge must be both erroneous and prejudicial." State v. Gibson, 390 S.C. 347, 356,

701 S.E.2d 766, 770-71 (Ct. App. 2010).

Involuntary manslaughter is defined as: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Smith, 391 S.C. 408, 706 S.E.2d 706 S.E.2d 12 (2011);[17] State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010); State v. Cabrera–Pena, 361 S.C. 372, 380–81, 605 S.E.2d 522, 526 (2004). "It is unlawful for a person to present or point at another person a loaded or unloaded firearm." S. C. Code Ann. § 16–23–410 (2003). Presenting a weapon means "to offer to view in a threatening manner, or to show in a threatening manner." In re Spencer R., 387 S.C. 517, 522–23, 692 S.E.2d 569, 572 (Ct.App.2010). A convicted felon is not allowed to be in possession of a weapon. 18 U.S.C. § 922(g) (felon in possession of a weapon). See S.C. Code 16-23-20, 16-23-30, 16-23-460,

Thus Petitioner must have been acting lawfully at the time he shot Salley to be entitled to a charge on involuntary manslaughter.

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[17] In State v. Smith, 391 S.C. 408, 706 S.E.2d 706 S.E.2d 12 (2011), the Supreme Court held that found that he second definition of involuntary manslaughter did not apply in his case. The Court found that 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, the Court found that there was 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. The Petitioner claims that the Court of Appeals misread Smith by its focus that the Petitioner had armed himself after the earlier threats with the victim and approached the victim's house after arming himself. App.p. 7. Petition , p. 29. He claims that in Smith, it could be distinguished because there were additional elements of self-defense that may have existed. However, he fails to recognize that all elements of self-defense do not need to be negated for the situation to be negated where he is not without fault in bringing on the confrontation by his admitted display of the weapon brought into the confrontation that lead to the fight after pointing it directly at the victim to scare him.

ANALYSIS

Petitioner claims that he was engaged in lawful activity and lawfully armed himself in self-defense before the gun actually went off. (*Petition for Writ of Certiorari*, p. 28). There is no doubt 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). A defendant can claim they were lawfully armed in self-defense, despite being in unlawful possession of a weapon, if the unlawful possession was merely incidental to the lawful act of arming themselves in self-defense. State v. Slater, 373 S.C. 66, 70, 644 S.E.2d, 50, 53 (2007). Nevertheless, the unlawful possession of a weapon can render a defendant's actions unlawful, and thus preclude a defense of accident if the weapon was the proximate cause of the killing. State v. Slater, 373 S.C. at 71, 644 S.E.2d at 53. The same reasoning applies equally to an involuntary manslaughter charge premised on the alleged (un)lawful possession of a firearm in self-defense. Therefore, Petitioner's involuntary manslaughter claim rests on the faulty assertion that Petitioner lawfully armed himself in self-defense and was therefore acting lawfully when he recklessly fired the gun.

In State v. Slater, the Supreme Court determined that the appellant was not lawfully armed in self-defense because his unlawful possession of the firearm proximately caused the resulting homicide. Slater, 373 S.C. at 71, 644 S.E.2d at 53. In making this proximate cause determination, the Slater Court analyzed the appellants' actions and the general circumstances surrounding the possession of the gun. Id. at 71, 53. The court noted that the appellant displayed a cocked gun as he approached the scene of an ongoing confrontation he was not involved in. Id. The Court of Appeals' decision in State v. Burriss provided further clarification on when an

appellant can claim to be lawfully armed in self-defense. In Burriss, the court found the appellant lawfully armed himself in self-defense by "snatching" his gun after being attacked by two men who had been smoking crack-cocaine, one man moved threateningly toward him, and appellant had reason to believe one of the men had a gun. Burriss, 334 S.C. at 262-63, 513 S.E.2d at 108.

Slater and Burriss illustrate how Petitioner's actions, including his initial unlawful possession of a weapon and its purpose to scare and intimidate ,proximately caused the homicide of Anthony Salley. Like the appellant in Slater, Petitioner approached what he understood to be an "argument" between Salley and Bailey, with a loaded weapon. (R. p. 579, 633). Whereas the appellant in Burris had reason had already been attacked, in the instant case, the fight did not begin until Petitioner aimed a gun at Salley from point blank range. (R. pp. 579-80). Moreover, Petitioner had no reason to believe Salley had a weapon, unlike the appellant in Burris. (R. pp. 572, 633). Finally, by pointing the gun directly at Salley from point blank range to scare him, Petitioner mirrored the Slater appellant's actions in displaying a loaded handgun as he approached the fray. Both actions unnecessarily escalated an already tense situation and caused other parties to react in a way that eventually led to homicide.[18]

Petitioner argues that despite the preceding events, he was entitled to lawfully arm himself in self-defense when he ended the fight as the victor and saw Andina Lee with the gun.

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[18]In State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), 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, 468469. Petitioner relies upon Light in the petition, Petition, p. 31-32. However, Light is distinguishable because the victim here never possessed any weapon. To the contrary, it was Petitioner who brought upon the difficulty by initially presenting the weapon he brought to the confrontation that the victim had knocked out of his hand, but never possessed. At the time of the shooting, there was no struggle over the weapon, no threatening by its use by the victim as in Light. Hinson was never armed in self-defense, he was armed in intimidation.

(R. p. 751). *See Petition for Writ of Certiorari*, p. 28, 32-34. However, the proximate cause language in Slater prevents the Petitioner from obscuring the factual timeline in this way. By asking whether Petitioner's unlawful possession proximately caused the subsequent homicide, Slater requires the court to look back in time to find the point at which the victim's death was proximately caused. See Slater, 373 S.C. at 73, 644 S.E.2d at 53. If Petitioner's analysis were accepted, appellants could parse the factual timeline down to the point at which they were in danger and claim they lawfully possessed the weapon any time they faced danger, regardless of their role in creating that danger. The so-called re-arming of Petitioner after the fight caused by his pointing and presenting of the firearm improperly in the first place placed this alleged standard for involuntary manslaughter in an improper state. At the time of initially arming himself he was not in imminent fear or death or serious bodily injury. In fact, he stated that he pointed the weapon initially to scare and threaten Salley. R.p. 580, 658. He also claimed that he could have killed Salley had he wanted to when he won the fight. R.p. 662-663.

The Court of Appeals cited to State v. Cabrera Pena, 361 S.C. 372, 605 S.E. 2d 522 (2004) in its order. App.p. 7. In State v. Cabrera Pena, 361 S.C. 372, 605 S.E. 2d 522 (2004), the Court found that Cabrera -Pena was not entitled to an involuntary manslaughter instruction when he took advantage of an unfair and extremely dangerous situation that he created by bringing a loaded deadly weapon into an area of potential dispute as Hinson did in this case. In addition, in Cabrera Pena, the Court found that the negligent handling of a weapon was insufficient to support the involuntary manslaughter charge and it is insufficient here under the second definition of involuntary manslaughter.

In his petition, Hinson asserts that the Court of Appeals misread Cabrera-Pena and can

be distinguished because the court there found that the defendant presented no evidence that he was acting in self-defense and did not receive a self-defense instruction where Hinson received a self-defense instruction that the state consented, citing R. 819. However, like Cabrera-Pena, the Petitioner brought the unlawful weapon in the expectation of a confrontation into the area creating the conflict. This was the common point with the instant case and Cabrera- Pena which is the critical point he cannot avoid or distinguish in his testimony.

The Petitioner's testimony is that he recovered his own weapon that initially caused the fracas after defeating the victim and that he then he flinched when he saw the victim and shot him. R.p. 641-643. His claim is that the shooting was unintentional. However, unlike Burris, there is no suggestion that the victim was armed at the time of the shooting. To the contrary Hinson knew Salley was not armed because Petitioner had recovered his illegally possessed weapon. Unlike Burris, Hinson was not acting lawfully when the gun was fired, he was still acting unlawfully as he had been throughout the confrontation.

In Mekler, the South Carolina Supreme Court found that involuntary manslaughter should have been charged.[8] Here, Hinson's actions are distinguishable from Mekler. Unlike Mekler, where the victim approached the defendant screaming while armed with a knife after an earlier confrontation, Salley was unarmed when the Petitioner pointed and presented the gun to

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[8] The Court in Mekler concluded that the following supported a charge:
(1) the three statements given by Mekler and introduced at trial in which Mekler stated she did not remember pulling the trigger or the shotgun discharging;
(2) Mekler's trial testimony in which she stated she did not remember pulling the trigger and had to be told by Spires that she shot Victim;
(3) Mekler's trial testimony in which she stated the gun was positioned at her hip so she could cock the hammer back and that her finger must have slipped on the trigger, causing the gun to fire suddenly;
(4) testimony by a neighbor who looked out of her window right before the shot was fired and saw one of Mekler's arms down at her side and the other waving when she talked; and
(5) Mekler's insistence at trial that she did not intend to shoot Victim and that she was shocked when the gun fired immediately after she cocked the hammer.

scare Salley who he did not know to be armed. Unlike Mekler, where the defendant testified that the victim had approached him with a knife and stood in the yard threatening to get the defendant, it was the Petitioner who came upon the scene. Unlike Mekler, who claimed that she pulled the hammer back on her shotgun and the gun shot when the victim leaned in, here as a result of the presenting the gun was knocked from his hand and a physical fracas occurred, not over the gun but against each other with Petitioner the victor. The fight was over when he recovered his weapon when he turned and shot the victim. Although he similarly claimed he did not intend to kill, like in Mekler, it was the illegal activity in presenting the gun that caused the fracas which cannot turn it into a later involuntary manslaughter when his initial intent in the display of the weapon was to scare and intimidate.

Plainly, the Court of Appeals understood that the Petitioner brought on the difficulty by pointing and presenting the gun when he aimed it at Salley before the fight began which caused the physical encounter. Petitioner should not be able to claim his actions prior to the fight were justified under the four prongs of self-defense. Therefore aiming the gun at Salley constituted illegal pointing and presenting. This illegal pointing and presenting would form the predicate "unlawful activity" to show that Petitioner brought on the difficulty he encountered after Salley hit him knocking the gun from Hinson's possession.

Petitioner did not act in self-defense by pulling the gun out and aiming it at Salley, therefore those actions constituted illegal pointing and presenting. To be acting in self-defense, a defendant must establish four elements:

> "First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury. Third, if his

> defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger."

State v. Bryant, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999).

When Petitioner pulled the gun on Salley, evidence shows that he did not believe he was in actual or imminent danger of losing his life or sustaining serious bodily injury, if he did believe he was in such danger, his belief was unreasonable, and he had other means of avoiding the danger. In State v. Goodson, evidence showed that the appellant pulled a gun out after another man threatened him with a pool stick. State v. Goodson, 312 S.C. at 279, 440 S.E.2d at 372. After a the victim intervened and took the appellant outside, the gun fired, hitting the victim. The Goodson court rejected the appellant's defense of accident on the grounds that appellant never offered any evidence to suggest he believed he was in imminent danger, nor was he in any actual danger. Petitioner in this case also fails to present such evidence.

The only evidence that Petitioner might point to as suggesting danger would be Petitioner's previous earlier confrontations with Richard Thomas in the fall of 2009 where Salley was not present (R. p, 571-574, 597, 616), a verbal confrontation that he had with Thomas and Salley on the morning of the incident that prompted Petitioner to get his pistol although he told Bailey that it was to get marijuana (R.p. 576 - 577) and his claim that Salley was running towards Petitioner before the fight began when Petitioner returned to the scene after getting his weapon . (R.p. 144-145, 161). However, Petitioner testified that he did not know Salley to carry a weapon before or at the time of the incident. R.p. 572, ll. 9-10.

However, Goodson demonstrates that an appellant does not necessarily believe they are

in danger simply because of some threatening actions made towards them. More importantly, Hinson, just like the appellant in Goodson, did not present any evidence that he believed he was in danger, nor does any independent evidence of such danger exist. Petitioner only stated that he pulled out the gun because he did not want to fight Salley, and that he didn't want to lose a fight in front of his friends. (R. p 579, 633-634). Furthermore, Petitioner stated he did not see anything to indicate Salley had a weapon (R.p. 572, 632-633), and acknowledged he (the Petitioner) was a good fighter after the fight. (R.p. 638-639). Finally, Petitioner consistently stated that he was afraid of what Richard Thomas would do to him, not Anthony Salley. (R.p. 571, 573-574, 576, 598-600, 602). Petitioner failed to demonstrate that he believed he was in imminent danger, or that any real danger existed. [19] Therefore, Petitioner was acting unlawfully when he aimed the gun at Anthony Salley.

The evidence presented at trial also shows Petitioner could have avoided the danger. Petitioner's failure to avoid the danger provides another reason why pulling the gun on Anthony Salley was not justified by self-defense and, therefore, was unlawful pointing and presenting. In State v. Santiago, the Court of Appeals found that an appellant had other probable means of avoiding the danger where the perceived threat was unarmed and the appellant was at the time of the incident. State v. Santiago, 370 S.C. 153, 161, 634 S.E.2d 23, 28 (Ct. App. 2006). Much like the situation in Santiago, the Petitioner here was the only party with a gun and had no reason to

[19] Hinson did testify at trial that he beat up Salley to the point that he stopped defending himself. R.p. 580, l. 20-22. Hinson stated that he felt the fight was over at that point because there was no need to keep fighting him because there was not any fighting back, R.p. 580, l. 20-25. He stated that after he got up and saw Andina had stopped pointing the gun at Devan and thrown it on the ground, he reached down and got the pistol. He stated he did this because he had just beaten Salley up so why would he turn his back on him and leave it for Andina to pick it up or to give the pistol to Salley where he could shoot him. R.p. 582. He claimed that when he picked up the pistol he saw that the victim was off the ground and walking toward him, although he had thought he was still on the ground. Hinson claimed that he flinched and pulled the trigger and the victim was hit. R.p. 582-583.

think any other party had a gun. Though Petitioner testified that Salley ran toward him at the initial confrontation, there was no evidence of any significant physical disparity between Petitioner and Salley (such as a gap in age or a disability) that would have prevented Petitioner from running away.[20] Cf. State v. Dickey, 394 S.C. 491, 502-03, 716 S.E.2d 97, 103 (2011). The Dickey decision is also distinguishable because the appellant in that case had reason to believe that his assailant was armed. Id. at 503, 103. Thus, the evidence shows that Petitioner had other probable means of avoiding the danger, and he cannot claim to have been acting lawfully in self-defense when he pointed and presented the gun at Anthony Salley.

This unlawful pointing and presenting brought on the ultimate difficulty by initiating a fight between Petitioner and Salley, and therefore Petitioner cannot claim he acted in self-defense when he fought and eventually shot Salley after retrieving the gun. **Since Petitioner brought on the difficulty by unlawfully pointing and presenting the gun, he cannot meet the threshold elements of self-defense and therefore was not lawfully armed in self-defense.**[21] Alternatively, one could regard the illegal pointing and presenting unlawful activity that proximately caused the homicide, precluding Petitioner from claiming he acted lawfully in self-defense when he shot Salley. See Slater, 373 S.C. at 71, 644 S.E.2d at 53; State v. Goodson, 312 S.C. at 281, 440 S.E.2d at 372.

His claim that is that he was entitled to lawfully pick up the unlawful weapon that he had brought illegally since it could have been used by someone to shoot him. However, it did not

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[20] In fact, Petitioner claimed that he did not want to fight Salley because he was bigger. He claimed that he pulled the weapon because he thought Salley would leave him alone. R.p. 658. However, at the time of the shooting he had already beaten up the eventual murder victim to the point of his attempted surrender.

[21] Oddly, at trial, Petitioner admitted that he could not legally carry a gun, but claimed that he can carry a gun in self-defense. R.p. 600, l. 10-13. This is the thrust of Petitioner's problem in this case. His illegal actions in drug-dealing, gun possession and intimidation are the ultimate proximate cause to all the confrontations.

establish that he was entitled to pick up the gun. Nevertheless, he claims this should provide a basis for an involuntary manslaughter charge where there was no threat to him at the time. The victim was never armed. His claim that when Andina – a person who he associates with the victim – gave up her possession of the Petitioner's gun and threw the gun to the ground, that this act could have allowed the defeated victim to carry through with his alleged threats from earlier in the morning. [22] However, Petitioner testified that he did not want to shoot him when he initially pulled out the pistol because he wanted to scare him and that he did not want to fight him. Petitioner unequivocally stated that this led to the physical fight where he beat up the victim and that there was no need to fight him further because he was not even fighting back. R.p. 580. Hinson stated that when Andina threw the pistol on the ground that Salley was on the ground and he realized that Andina could have shot him, but did not do so. It was at that point – after the victim was beaten and moving away and that his girlfriend gave up the weapon on the ground – when Petitioner retrieved his gun. Although he claimed that he did not leave the pistol on the ground because Andina could have picked it up and given the pistol to the victim or shot him, this assertion is also defeated by the facts that she had just dropped the weapon to the ground rather than shoot him. Nevertheless, this retrospective hindsight cannot defeat the fact that it was Petitioner who initially and illegally brought the gun on the scene and was not arming himself in self-defense. He had armed himself and initially used the weapon in intimidation as a response to coming into the area where Thomas and potentially Salley might be. His suggestion otherwise does not provide entitlement to this instruction. Had Petitioner been unlawfully pointing the

[22] Jamaal Hinson testified that he had gotten into a verbal altercation with Richard and Anthony but that he did not recall the words but did state that "we were threatening each other." R.p. 576, l. 17-19. He claimed that he armed himself against Richard after that, but made no similar claim concerning Salley. Id.

firearm at Salley and then dropped it and then picked it up and the gun fired prior to the fist-fight, Hinson would not be entitled to an involuntary manslaughter instruction. The brief time lapse which occurred in this setting should not provide a different result.

The evidence at trial shows that Petitioner's unlawful actions proximately caused Anthony Salley's death. Since Petitioner did not lawfully possess the gun in self-defense, he was acting unlawfully when Salley was shot during the continuing confrontation. Therefore, the evidence cannot support an involuntary manslaughter charge, which requires Petitioner to have been acting lawfully, but with reckless disregard. The Court of Appeals affirmance of the trial court's decision should be affirmed. Certiorari is not warranted.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

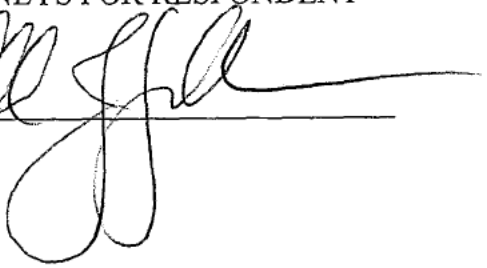
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Columbia, South Carolina
August 29, 2014

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Return to the Petition for Writ of Certiorari in the foregoing action by depositing copies in the United States mail, postage prepaid, to Reid T. Sherard, Esquire, Nelson Mullins Riley & Scarborough, LLP, P.O. Box 11070, Columbia SC 29211-1070 and by Inter Agency Mail to Robert M. Dudek, Chief Attorney, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 29th day of August, 2014.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

DeAndrea G. Benjamin, Circuit Court Judge

State of South Carolina,..... Respondent,

v.

Jamaal Hinson,..... Petitioner.

APPELLATE CASE NO. 2014-001368

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

NELSON MULLINS RILEY & SCARBOROUGH LLP
Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE
Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343

Attorneys for Petitioner

INDEX

INDEX 1

ARGUMENTS

ARGUMENT 1

A. The State Admits Juror 226 Did Not Conceal Information. 2

B. The State Improperly Attempts To Impugn Juror 226 For Being Honest And Impartial. 2

C. The State Admits The Trial Court Committed An Error Of Law By Dismissing Juror 226. 3

D. The State Improperly Attempts to Require A Showing Of Prejudice In Addition To Legal Error. 3

E. Even If A Showing Of Prejudice Is Required, Petitioner Has Shown Prejudice. 5

ARGUMENT 2

A. The State's Reliance on *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) Is Misplaced. 7

B. The State Improperly Attempts to Equate Being Armed In Self-Defense With Acting In Self-Defense. 9

C. The State Improperly Ignores Evidence Regarding A Third Party's Conduct. 10

CONCLUSION 12

ARGUMENT I

A. The State Admits Juror 226 Did Not Conceal Information.

The State acknowledges "[h]ere, there is no concealment, intentional or otherwise." (Return to Petition for Writ of Certiorari to the Court of Appeals ("Return") p. 16).

B. The State Improperly Attempts To Impugn Juror 226 For Being Honest And Impartial.

Since there was no concealment, the State acknowledges "the language from *Stone*[1] regarding whether the [concealed] information would have been a material factor in the use of a preemptory challenge is inapplicable to this case." (Return p. 16).[2] Curiously, the State then posits "[t]hough Juror 226 may not have intentionally concealed the information, there was more reason to think he was a threat to the trial's fairness and reliability than for the pre-approved alternate who replaced him." (Return p. 17). This naked statement is utterly without any supporting evidence,[3] and is a continuation of the prosecutor's attempt to somehow make the situation the fault of the juror even though it is uncontested Juror 226 did not intentionally conceal any information and in fact affirmatively brought the matter to the attention of the trial judge. The trial judge improperly at least somewhat relied on this argument when defense trial counsel argued "[Juror 226] certainly couldn't be struck for cause because he played basketball with somebody" and the judge responded by saying "[y]es, but if [the prosecutor] had known it [the prosecutor] said she would have struck [Juror 226]." (R. p. 328, ll. 11-14).

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[1]*State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002).

[2]This is different than the position taken at trial by the prosecuting attorney. (R. p. 326, ll. 6-18).

[3]There is no citation to the transcript as anticipated by Rule 208(b)(4), SCACR.

The State points out that the trial judge also based her decision on her speculation that Juror 226 might know another witness to be called – "I just don't want him standing up again saying, oh, I know that person too." (Return pp. 17-18; R. p. 329, ll. 8-9). This is yet another example of the trial judge failing to properly apply the law, and is nothing more than speculation. The State slants this as saying the trial judge thought the problem with Juror 226 was serious enough to remove him because doing so potentially effects "internalized costs" to the trial court such as use of resources and delay. (Return p. 18). That argument is better left to one surrounding the funding of the judicial branch than to whether a man convicted of murder should get a new trial when a fair and unbiased juror was improperly removed.

C. The State Admits The Trial Court Committed An Error Of Law By Dismissing Juror 226.

The State concedes Judge Benjamin made an error of law in recognizing this Court's "decision in *State v. Burgess*[4] clarifies *Stone's* holding that a failure to apply the *Woods*[5] test constitutes error." (Return p. 17). There is no evidence Judge Benjamin applied the *Woods* test, and the State does make that argument.

D. The State Improperly Attempts To Require A Showing Of Prejudice In Addition to Legal Error.

Having admitted there was no concealment by the juror and the trial judge made an error of law, the State is left to frame the decision on appeal around the issue of prejudice.

As recently as last year, this Court reaffirmed that "a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a

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[4]*State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010).

[5]*State v. Woods,* 345 S.C. 583, 550 S.E.2d 282 (2001).

material factor in the use of the party's peremptory challenges. *McCoy v. State*, 737 S.E.2d 623, 627-628 (2013) (citing *Woods* for the proposition that a juror's intentional failure to disclose a relationship gives rise to an inference of bias and rejecting the State's argument that a new trial should be warranted only where an individual shows he was prejudiced by the juror's failure to disclose information). Noting such a circumstance "necessarily threatens the defendant's right to a fair and impartial jury," the State agrees "it is sensible to reverse the trial court and grant a new trial solely upon a finding of legal error . . ." (Return p. 13).

However, according to the State, "[r]eplacing a juror with an alternate, even where removal was in error, does not result in prejudice or jeopardize the defendant's right to a trial by a fair and impartial jury." (Return p. 13, citing *State v. McDaniel*, 275 S.C. 222, 268 S.E.2d 585 (S.C. 1980)[6]). In that situation, the State argues the defendant must prove prejudice in addition to legal error. (Return pp. 13-14).

Stated another way, the State's position, based at least partially on "prudential" policy concerns,[7] is that mistakenly keeping a biased juror in the box is reversible just because of legal

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[6] The language relied upon by the State in *McDaniel*, to the extent relevant, is dicta, as the Supreme Court affirmed in that case after it concluded "petitioner waived the right to raise this [juror removal] issue on appeal." *Id.* at 224, 586. In its 1996 opinion in *State v. Williams*, the Supreme Court stated "in *State v. McDaniel*, this Court held there is no right to be tried by a jury composed of particular individuals." 321 S.C. 455, 469 S.E.2d 49. That was not the holding in *McDaniel*, as described above. *Williams* is also a case where the holding was that the issue was "not preserved for review." *Id.* at 459, 52. Thus, the two cases cited by the State 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.

[7] The State argues that reversing and remanding in this case may promote increased post-conviction relief filings. (Return p. 19). This bogeyman argument should be ignored as it is not relevant to this appeal and there is no evidence to support it. Petitioner seeks certiorari review of his specific case, which should not be confused with the system as a whole.

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 cases, and each time the respective appellate courts have avoided such a statement.[8] The State recognizes "*Burgess* makes no mention of prejudice. . ." (Return p. 17).

The State is silent as to why prejudice should not be presumed when a fair and unbiased juror is improperly removed. Under the State's position, improper removal of a fair and unbiased juror is held to a higher standard than keeping a biased juror; that is, it would be perfectly acceptable at any time during any trial to remove a fair and unbiased juror from service and that removal would only require reversal if the petitioner could prove prejudice (in addition to the legal error). That is not the law in South Carolina, and if it were, it would significantly undercut the ability of either the State or a defendant to receive a constitutionally adequate trial.

E. Even If A Showing Of Prejudice Is Required, Petitioner Has Shown Prejudice.

Petitioner does not agree that a showing of prejudice is required, but even if it is, he has shown prejudice. Petitioner will not regurgitate the extensive prejudice argument made in his petition (p. 22-25), but notes that the State's response to this argument is to state in conclusory fashion that prejudice has not been shown. (Return p. 17, n. 13). In that footnote, the State cites to *Boland v. Greenville and Columbia R.R. Co.*, 46 S.C.L. 368 (12 Rich.), 1859 WL 4365 (Ct.

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[8] Oddly, the State notes this Court (in *Woods* at 592, 286) and the Court of Appeals (in *Burgess* at 18, 514 and *State v. Bell*, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007)) in recent years have described the standard as "abuse of discretion" as opposed to a specific requirement of a prejudicial showing, (Return p. 12, n. 6), but then dispenses with those opinions as "simply masking" the alleged required showing of prejudice. (*Id.*). In doing so, the State solely cites to State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69-70 (Ct. App. 2000). *Covington* was decided prior to the decisions in *Woods*, *Bell*, and *Burgess*.

App. 1859) as distinguishing *Greer v. Norvill*[9], a case relied upon by petitioner. In *Boland*, the coroner (an elected official) was on the jury and was required by statute to perform a homicide inquest. *Id.* at 375. Neither party objected to the coroner being substituted with an alternate juror, and the coroner willingly left the jury to perform his statutory duty. *Id.* Here, petitioner strenuously objected, and Juror 226 did not willingly leave – the judge "remove[d] [him] from service." (R. p. 331, l. 25 – p. 332, l. 1).

The State now admits Juror 226 was not properly removed, and Petitioner's conviction should be reversed and the matter remanded for a new trial.

[9] 21 S.C.L. (3 Hill), 1837 WL 1472, 1 (Ct. App. 1837).

ARGUMENT II

A. The State's Reliance On *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) Is Misplaced.

The State begins its analysis of the second issue on appeal with *Slater*. (Return p. 26). In *Slater*, "the court included a manslaughter option in the jury charge." 373 S.C. at 69, 644 S.E.2d at 52.

The State argues "unlawful possession of a weapon can render a defendant's actions unlawful, and thus preclude a defense of accident if the weapon was the proximate cause of the killing." (Return p. 26, citing *Slater* at 71, 53). The State then claims "[t]his reasoning applies equally to an involuntary manslaughter charge premised on the lawful possession of a firearm in self-defense." (*Id.*). In fact, that is an improper statement of *Slater*, as the Supreme Court actually said "the analysis is equally applicable in determining if a defendant in unlawful possession of a weapon is entitled to a charge on self-defense." *Slater*, 373 S.C. at 71, 644 S.E.2d at 53. *Slater* equated the analysis between accident and self-defense, not between accident and involuntary manslaughter.

The State further misapprehends *Slater* by claiming the Supreme Court "determined that the petitioner was not lawfully armed in self-defense because his unlawful possession of the firearm proximately caused the resulting homicide." (Return p. 26, citing *Slater* at 71, 53). Again, this is not a correct recapitulation of *Slater*. In fact, the Supreme Court merely noted unlawful possession of a firearm can, under some circumstances, constitute an unlawful activity *so as to preclude an accident defense* if the weapon is the proximate cause of the killing." *Id.* at 71, 53 (citing *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (emphasis added). Receiving an accident charge is not the same thing as being lawfully armed in self-defense;

"[t]here is a difference between being lawfully *armed* in self-defense and *acting* in self-defense." *Burriss*, 334 S.C. at 265, 513 S.E.2d at 109 n.10 (1999) (emphasis in original).

In any event, this appeal is not about a charge of self-defense, a charge to which the prosecution consented. This appeal is about being lawfully armed in self-defense.

The State argues that could not happen in the instant case because Petitioner approached what he understood to be an argument and "the fight did not begin until Petitioner aimed a gun at Salley from point blank range" and "Petitioner had no reason to believe Salley had a weapon." (Return p. 27). This recitation of the facts ignores evidence in the record that:

- Earlier in the day, petitioner saw Salley with Richard Thomas on that very street. (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 Thomas. (R. p. 571, l. 24 – p. 572, l. 1; p. 592, ll. 10-14);
- 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);
- At the time of the incident, when Salley saw petitioner walking, 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); and
- Petitioner was afraid. (R. p. 579, ll. 7-11 and 21-25; p. 635, ll. 17-20).

Each and every one of the above facts occurred before petitioner ever displayed his firearm.

The State then moves to the second possibility of petitioner lawfully being armed in self-defense, when the fistfight between petitioner and Salley was over and petitioner retrieved the weapon that Salley had earlier knocked from his hand. The State again resorts to its misconstrued *Slater* language to argue petitioner is "obscuring the factual timeline" and more alarmingly "[i]f petitioner's analysis were accepted, petitioners could parse the factual timeline down to the point at which they were in danger and claim they lawfully possessed the weapon at any time they faced danger, regardless of their role in creating the danger." (Return p. 28).

The facts of this case stand alone. Petitioner is not arguing all future appeals, just as he is not arguing post-conviction relief policy or the funding of the judicial branch. He is arguing his own appeal based on controlling law, and that law mandates his receipt of a charge of involuntary manslaughter.

B. The State Improperly Attempts To Equate Being Armed In Self-Defense With Acting In Self-Defense.

The State spends considerable effort attempting to show that petitioner was not acting in self-defense (Return pp. 30-34) and therefore "since Petitioner brought on the difficulty by unlawfully pointing and presenting the gun, he cannot meet the threshold elements of self-defense and therefore was not lawfully armed in self-defense." (*Id.* at p. 33). Acting in self-defense and being lawfully armed in self-defense are two separate things, and the State does not cite any authority for the requirement that one can only be lawfully armed in self-defense if one is acting in self-defense/is entitled to a charge of self-defense.[10] *State v. Brayboy*, 387 S.C. 174,

[10] Again, in this case, the prosecution consented to a self-defense charge for Petitioner.

182, 691 S.E.2d 482, 487 (Ct. App. 2010) (citing *State v. Light*, 378 S.C. 641, 647-648, 664 S.E.2d 465, 468 (2008), which "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") (emphasis in original).

C. The State Improperly Ignores Evidence Regarding A Third Party's Conduct.

Perhaps most surprisingly, the State attempts to force the analysis to be solely in the context of petitioner and Salley, arguing "unlike *Burris*, there is no suggestion that the victim was armed at the time of the shooting – to the contrary Hinson knew he was not armed because he had recovered his illegally possessed weapon." (Return p. 29). In so arguing, the State waits until the penultimate page of its Return to address the conduct by Salley's girlfriend Andina Lee.

During the fistfight between petitioner and Salley, 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). The pistol was on the ground in an area 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 it up. (R. p. 101, ll. 21-22; p. 103, ll. 10-11; p. 121, ll. 21-23; p. 417, ll. 17-19).

She did not pick it up for safekeeping. Lee affirmatively pointed the gun at Devan Bailey, a witness, demanding the fight stop. (R. p. 101, ll. 21-24; p. 146, ll. 6-8). She admitted her intent in grabbing the gun was "just really to scare [petitioner] . . ." (R. p. 103, ll. 15-16). To make sure petitioner knew how serious she was,[11] she yelled "get the fuck back" three times and

[11] Petitioner "heard some commotion going on the whole time." (R. p. 581, ll. 8-9). Presumably Bailey was aware of the seriousness of the situation due to the pointing of a pistol at his person.

told Bailey if he moved she was going to shoot him. (R. p. 123, l. 17 – p. 124, l. 11; p. 147, ll. 14-22). Bailey was afraid and ran away. (R. p. 422, ll. 21-24; p. 423, ll. 7-8; p. 424, ll. 7-8).

As the fight ended, petitioner saw Lee pointing the pistol, which she then threw on the ground. (R. p. 581, ll. 7-14). Petitioner then realized (a) Salley knew where he was, having seen petitioner come from his girlfriend's house, and could act on that information including telling his friend Thomas (known to carry a gun and with whom petitioner had exchanged threats that day); (b) Lee had the wherewithal to pick up the pistol the first time and use it in a threatening manner, and she could pick up the pistol a second time and take further action; (c) Salley – fresh off a loss in a fistfight but already up and moving – could pick up the pistol and take revenge. (R. p. 581, l. 9 – p. 583, l. 7).

Petitioner was lawfully armed in self-defense when he negligently handled the firearm, and he was entitled to a charge of involuntary manslaughter.

CONCLUSION

For the reasons argued in the petition for writ of certiorari and this reply to return to petition for writ of certiorari, certiorari should be granted.

NELSON MULLINS RILEY & SCARBOROUGH LLP
Reid T. Sherard, SC Bar No. 72536
E-Mail Address: reid.sherard@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE, DIVISION OF APPELLATE DEFENSE

By: _____
Robert M. Dudek
E-mail: rdudek@sccid.sc.gov
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1343

Attorneys for Petitioner

Columbia, South Carolina

Dated: 9/08/14

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

DeAndrea G. Benjamin, Circuit Court Judge

State of South Carolina,..... Respondent,

v.

Jamaal Hinson,..... Petitioner.

APPELLATE CASE NO. 2014-001368

CERTIFICATE OF SERVICE

I certify that a true copy of the reply to the return to the petition for writ of certiorari in this case has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of September, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of September, 2014.

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

The Supreme Court of South Carolina

The State, Respondent,

v.

Jamaal Hinson, Petitioner.

Appellate Case No. 2014-001368
Lower Court Case No. 2010-GS-40-0829

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Hinson*, Op. No. 2014-UP-113 (S.C. Ct. App. filed March 19, 2014). We deny the petition.

C.J.

FOR THE COURT

Columbia, South Carolina

November 20, 2014

cc:
The Honorable Jenny Abbott Kitchings
The Honorable Jeanette W. McBride
Robert Michael Dudek, Esquire
Reid T. Sherard, Esquire
Donald J. Zelenka, Esquire
Alan McCrory Wilson, Esquire

NOV 20 2014

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 02, 2015

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Jamaal Hinson
Lower Court Case No. 2010GS4000829
Appellate Case No. 2011-203569

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Robert Michael Dudek, Esquire
Reid T. Sherard, Esquire
Donald J. Zelenka, Esquire

FORM 5

STATE OF SOUTH CAROLINA	)	2015CP4003946
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
JAMAAL HINSON, #325190,	)	
Full name and prison number (if any) of Applicant.	)	
	)	
v.	)	**APPLICATION FOR**
	)	
State of South Carolina	)	**POST-CONVICTION RELIEF**
	)	

RICHLAND COUNTY FILED
2015 JUN 29 PM 1:05
JEANETTE W. McBRIDE C.C.P. & G.S.

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899

2. Name and location of Court which imposed sentence Richland County Court of General Sessions, 2020 Hampton Street, Columbia, SC 29201

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2010-GS-40-0829 (murder)

   (b) _____

   (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) November 18, 2011: 40 years.

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty X

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals.

ii. South Carolina Supreme Court.

iii. _____

(b) the result in each such Court to which you appealed:

i. Convictions affirmed.

ii. Certiorari denied.

iii. _____

(c) the date of each such result:

i. March 19, 2014

ii. November 20, 2014

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpub. Op. No. 2014-UP-113

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully:

(a) Ineffective assistance of trial counsel.

(b) Ineffective assistance of appellate counsel.

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Failure to properly prepare Applicant prior to trial.

(b) Failure to call witnesses and utilize evidence.

(c) Failure to raise all meritorious issues on appeal.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.

(d) any other petitions, motions or applications in this or any other Court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) PCR is the proper forum.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Eleanor Duffy Cleary, 1116 Blanding Street, Suite 2B, Columbia, SC, 29201

ii. Reid T. Sherard, 104 S. Main Street, Suite 900, Greenville, SC 29601

iii. Robert M. Dudek, P.O. Box 11589, Columbia, SC 29211

(b) the proceedings at which each such attorney represented you:

i. Trial & sentencing.

ii. Direct appeal.

iii. Direct appeal.

19. State clearly the relief you seek in filing this application:

A new trial.

20. Are you now under sentence from any other court that you have not challenged?

No.

1240

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of McCormick)

I, Jamaal Hinson, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Jamaal Hinson

SWORN to and subscribed before me this 14th day of June, 2015.

Penny G. Morton (L.S.)
Notary Public

My Commission Expires: Feb 25, 2018

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Jamaal Hinson, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Jamaal Hinson
Applicant

SWORN or affirmed to and subscribed before me this 19th day of June, 2015.

Penny F. Morton
Notary Public

My Commission Expires: Feb 28, 2018

RICHLAND COUNTY
FILED
2015 JUN 29 PM 1:04
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Jamaal Hinson, #325190, Applicant, v. State of South Carolina, Respondent.	2015-CP-40-3946 **RETURN**

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed June 29, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the April 2010 term of the Court of General Sessions for Richland County for murder (2010-GS-40-0829). Applicant was represented by Eleanor D. Cleary, Esq. On November 14, 2011, Applicant proceeded to trial before the Honorable Deandrea G. Benjamin. The jury found Applicant guilty as indicted. Judge Benjamin sentenced Applicant to forty (40) years' imprisonment.

Applicant filed a timely notice of appeal. Robert Dudek, Esq., of the Office of Appellate Defense and Reid Sherard, Esq., represented applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on March 19, 2014. State v. Hinson, Op. No. 2014-UP-113 (S.C. Ct. App. filed March 19, 2014). The South Carolina Court of Appeals denied Applicant's petition for rehearing on May 20, 2014. The Supreme Court of South Carolina

denied petition for writ of certiorari on November 20, 2014. The remittitur was returned to the lower court on June 02, 2015.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
    a. "Failure to properly prepare Applicant prior to trial"
    b. "Failure to call witnesses and utilize evidence"
2. "Ineffective Assistance of Appellate Counsel
    a. "Failure to raise all meritorious issues on appeal"

III.

Applicant's claims are essentially allegations of ineffective assistance of trial counsel. Respondent contends that Applicant's plea counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is also without merit. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S.

387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Respondent therefore requests that this Court convene an evidentiary hearing on the issue of ineffective assistance of trial and appellate counsels. As to all other allegations, Respondent

moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not either expressly admitted, qualified or explained is hereby denied.

[SIGNATURE BLOCK ON NEXT PAGE]

VIII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Jan. 11, 2016

STATE OF SOUTH CAROLINA COUNT OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
	)	2015-CP-40-03946
JAMAAL HINSON, #325190 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	)	AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jonathan D. Waller, Esquire
Giese Law Firm
1315 Blanding Street
Columbia, SC 29201

DATED this 11th day of January, 2016.

Jenna C. Brown, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Jamaal Hinson, 325190,) Applicant,) v.) State of South Carolina,) Respondent.)	2015-CP-40-3946 AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF

RICHLAND COUNTY FILED
2017 JUL 26 AM 8:53
JEANNETTE W. MCBRIDE C.C.P. & G.S.

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on June 29, 2015. By and through his undersigned counsel, Applicant would move to amend his Application for Post Conviction Relief. In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failing to properly represent Applicant in the handling of the State's witnesses. Specifically, but not limited to the following:

    a. Devan Bailey: Failing to conduct cross-examination.

    b. Derrick Diamond: Failing to object to leading and reading of statement on re-direct examination. Transcript p. 202.

    c. Matthew Ellis: Failing to object to opinion testimony regarding murder being the appropriate charge and eliciting testimony regarding the intentional nature of the shooting. Transcript pp. 524-5, 538. Ineffective assistance for opening the door to prejudicial testimony regarding Applicant. Transcript p. 540.

2. Ineffective assistance of trial counsel for failing to be attentive and object to line of questioning that resulted in Applicant being questioned about a prior bad act (shooting). Transcript pp. 671-684.

3. Ineffective assistance of trial counsel for failing to properly present the defense of self-defense, which was demonstrated by the following:

   a. Failing to properly address prior difficulties.

   b. Failing to properly address Applicant's knowledge that victim had a gun and for being "thrown for a loop" by the Court's ruling(s) on character. Trial Transcript pp. 165-168, 370-391, 580-81, 641.

   c. Giving the State a complete preview of the defense and arguments, thus allowing the State to argue successfully against it throughout trial and allowing the Court to conclude that the defense conceded self-defense. Trial Transcript pp. 153-155, 579-581, 816, lns. 13-14.

4. Ineffective assistance of trial and appellate counsel for failing to argue applicable and favorable cases regarding involuntary manslaughter. Ineffective assistance of trial counsel for "anticipating" and not obtaining a charge on involuntary manslaughter. Transcript pp. 778-790, 792-4, 813-824.

Respectfully submitted,

Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

July 20, 2017

CERTIFIED TRUE COPY
OF ORIGINAL FILED.
Jeanette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Jamaal Hinson, 325190,)	2015-CP-40-3946
Applicant,)	
v.)	CERTIFICATE OF SERVICE
)	
State of South Carolina,)	
Respondent.)	
)	

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I that I hand delivered this 26th day of July 2017, a copy of an Amendment to Application for Post Conviction Relief to Jessica Kinard, Assistant Attorney General, at the Richland County Courthouse.

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

July 26 2017

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

JEANNETTE W. McBRIDE
C.C.P. & G.S.

2017 JUL 26 AM 8:53
RICHLAND COUNTY
FILED

STATE OF SOUTH CAROLINA) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Jamaal Hinson, 325190,) Applicant,) v.) State of South Carolina,) Respondent.)	2015-CP-40-3946 AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF

RICHLAND COUNTY FILED
2018 JAN -9 AM 11:34
JEANETTE W. MCBRIDE
C.C.C.P. & G.S.

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on June 29, 2015. By and through his undersigned counsel, Applicant would move to amend his Application for Post Conviction Relief by adding the following specific allegation of ineffective assistance of trial counsel:

1. Ineffective assistance of trial counsel for failing to object and/or enter an exception to the inferred malice instruction. Trial Transcript p. 811-2, 949. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009); See State v. Mattison, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it"), overruled on other grounds by Belcher;
Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016) (A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct).

Respectfully submitted,

Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jeanette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

January 8, 2018

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Jamaal Hinson, 325190,)	2015-CP-40-3946
Applicant,)	
v.)	CERTIFICATE OF SERVICE
)	
State of South Carolina,)	
Respondent.)	

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I place in the United States mail this 8th day of January 2018 a Motion for Discovery to Jessica Kinard of the Attorney General's Office, at:

Office of the Attorney General
Att: Jessica Kinard, Ast. AG
P.O. Box 11549
Columbia, SC 29211-1549

RICHLAND COUNTY FILED
2018 JAN -9 AM 11:34
JEANNETTE W. McBRIDE C.C.P. & G.S.

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

January 8, 2018

CERTIFIED TRUE COPY OF ORIGINAL FILED
Jeanette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

State of South Carolina)
)
County of Richland)

In the Court of Common Pleas
Fifth Judicial Circuit
2015-CP-40-03946

Jamaal Hinson,

Plaintiff,

Vs.

State of South Carolina,

Defendant.

Transcript of Record

January 24, 2018
Columbia, South Carolina

B e f o r e:

The Honorable Jocelyn Newman, Judge

A p p e a r a n c e s:

Tricia A. Blanchette, Esquire
Attorney for the Plaintiff

Jessica E. Kinard, Esquire
Attorney for the Defendant

Bonnie H. Kelly, CVR
Circuit Court Reporter

I N D E X

WITNESS/DESCRIPTION				PAGE NUMBER
Case Called/Ms. Kinard				4
Opening Statement/Ms. Blanchette				5
	DIRECT	CROSS	REDIRECT	RE-CROSS
ELEANOR CLEARY				
Ms. Blanchette	11		58	
Ms. Kinard		47		
JAMAAL HINSON				
Ms. Blanchette	62		93	
Ms. Kinard		85		
Decision by the Court				95
Certificate Page				100

E X H I B I T S

NO.	DESCRIPTION	I.D.	EVID

-- NO EXHIBITS ENTERED --

(On the record at 2:06 p.m.)

THE COURT: I'm ready when you are.

MS. KINARD: Thank you, Your Honor. May it please the Court.

This is the matter of *Jamaal Hinson vs. the State of South Carolina*. It's case No. 2015-CP-40-3946. We're before the Court on an application for post conviction relief that was filed June 29, 2014 -- that is incorrect -- I apologize.

THE COURT: 2015?

MS. KINARD: 2015, yes, ma'am. Thank you.

Applicant is presently confined in the South Carolina Department of Corrections, pursuant to orders of commitment from the Richland County Clerk of Court.

He was indicted at the April 2010 term of the Court of General Sessions -- excuse me -- of the Richland County Grand Jury for murder.

He was represented at trial by Eleanor D. Cleary.

On November 14, 2011, he proceeded to trial before the Honorable DeAndrea G. Benjamin and a jury, at which time he was found guilty as indicted. Judge Benjamin sentenced him to 40 years imprisonment. That case was prosecuted by Luck Campbell and Nicole Simpson.

Mr. Hinson filed a timely notice of the appeal which was perfected by -- by Robert Dudeck of the Office of

Appellate Defense, as well as Reid Sherard on a pro bono basis. They had a contract program for a little while at that time.

The South Carolina Court of Appeals affirmed his conviction on March 19, 2014, in an unpublished opinion. They also denied his petition for rehearing on May 20, 2014.

The Supreme Court held -- excuse me -- South Carolina denied petition for writ of certiorai on November 20, 2014, and remittitur was returned to the lower court on June 2, 2015.

Just to clarify the record, Reid Sherard is R-e-i-d S-h-e-r-a-r-d. He is on standby-by phone should his testimony be necessary, but we do not anticipate that at this time.

The State is present and ready to proceed. Applicant is present and represented by Tricia Blanchette, and the State yields to her.

THE COURT: Ms. Blanchette.

MS. BLANCHETTE: Thank you, Your Honor. May it please the Court.

THE COURT: Yes, ma'am.

MS. BLANCHETTE: Tricia Blanchette here on behalf of Mr. Hinson. By way of introduction, we have filed two amendments. I just wanted to make sure Your Honor had a

copy of both of those in the packet. If not, I do have copies here.

THE COURT: July 26, 2017, and January 8, 2018?

MS. BLANCHETTE: Yes.

THE COURT: Got it.

MS. BLANCHETTE: That's correct, Your Honor.

And also, Your Honor, this will be referencing the January 8, 2018 amendment. I did prepare a memorandum that just briefly addresses the record and the law as to that allegation.

THE COURT: Wonderful.

MS. BLANCHETTE: Your Honor, may I approach?

THE COURT: Yes, ma'am.

(Ms. Blanchette hands a document to the Court.)

THE COURT: Thank you.

MS. BLANCHETTE: And I provided copy to the State as well, Your Honor.

Your Honor, could I give a brief introduction at this time before calling my first witness?

THE COURT: Absolutely.

MS. BLANCHETTE: Okay. First, as to the memorandum, I just wanted to give you my explanation as to why that allegation was filed separately and just give you a little bit more information than is in the memorandum.

But I was involved in a case that had a similar malice

instruction, and that case was heard this summer by Judge Henderson. In that case they did omit the back -- the *Belcher* form of the malice instruction so that malice can be inferred from the deadly weapon. But the -- but the Court failed to give the permissive inference language required by *Elmore*, and that's more fully addressed in this memo here.

I handled that case jointly with Jeremy Thompson. Judge Henderson has granted relief, and that has survived a post-trial motion at this point and now it's up on appeal.

But I was essentially waiting to see how that issue played out in that case before making this allegation, seeing how the Court would rule. So that's the reason for the delay in filing this separately is because it was almost verbatim this same malice instruction in that case. And previously I'd handled cases where *Belcher* had not been handed down, so there was also the deadly weapon instruction along with the omission of permissive inference instruction.

And Your Honor, that's probably where I should go back to. I have the privilege of representing Jacques Gibson on his PCR here in Richland County. He and his brother, Adams Gibson -- which may be familiar names to Your Honor -- were both found guilty of murder and then subsequently had PCRs. Jeremy Thompson handled Adams Gibson's; I handed -- handled

Jacques Gibson's.

In both those cases we raised that counsel was ineffective for not objecting when the Court failed to give the permissive inference portion of malice instruction as required by *Elmore*, which is discussed in the memorandum.

In the Circuit Court, in front of Judge Goodstein, I actually lost the PCR and -- for Jacques Gibson, and Jeremy Thompson won the PCR for Adams in front of Judge Barber.

Appeals were filed in both cases: One by the State, one I filed. And in handling the appeal for Mr. Jacques Gibson after filing a petition for writ of certiorai, the Court granted without further briefing or oral arguments. And that's the case that is cited in this memorandum. I also have a copy of that case for Your Honor.

(Hands a document to the Court.)

MS. BLANCHETTE: As well as I pulled a copy of the underlying appellate case for the Gibson brothers.

I'm sorry if this gets confusing, but in the PCR actions, the written published opinion was for Jacques's case. In the direct appeals, the written published opinion for Adams's case. So I'm providing the appellate decision from Adams Gibson's direct appeal because it goes through the facts more so than it does in the PCR opinion.

So just to give Your Honor some background as to what the facts were at the trial that led to the Court finding

in both cases, the failure to give the permissive inference malice -- malice instruction was ineffective assistance of counsel and prejudicial.

THE COURT: Okay.

MS. BLANCHETTE: Your Honor, I have the privilege of representing them and being involved. So please let me know if that did not make sense.

THE COURT: I think I'm following so far.

MS. BLANCHETTE: Okay.

THE COURT: Okay.

MS. BLANCHETTE: And this can all be a little confusing and a bit of a tongue twister.

I also have a copy of the *Belcher* decision for Your Honor because that's also relied upon heavily in reaching the decision in those cases and I cite to it in the memo. And I apologize, I have that to hand up separately.

(Hands a document to the Court.

THE COURT: Thank you.

MS. BLANCHETTE: Now, Your Honor, to put this into context and kind of touch on some of the other issues in the amendment, this was a case where he was obviously charged with murder and proceeded to trial.

There was a charge conference at the end of the case that went over two days, and during that charge conference, what Ms. Cleary was arguing for was involuntary

manslaughter.

The State had conceded or agreed to giving a accident and self-defense charge, but there was lengthy argument about whether or not involuntary manslaughter should be charged. And ultimately, Judge Benjamin decided involuntary manslaughter would not be charged, and that was the issue that went up on appeal.

But this would be a self-defense, accident, and involuntary manslaughter case. Today we will mostly be speaking and all our allegations go to whether counsel -- counsel was reasonable in how she handled presenting that defense, whether she made all necessary objections, and then Your Honor, whether or not she should have objected to the malice instruction and whether that was prejudicial to my client.

That is my brief summary. If you'd also like a summary of the facts, I'm happy to do that, but in the memorandum, I do summarize Mr. Hinson's testimony from the trial. So unless Your Honor would like me to go over that, I did put our version of the facts and a summary of his testimony in the memorandum.

THE COURT: Yeah. That's not necessary.

MS. BLANCHETTE: Okay. Your Honor, I'm prepared to call my first witness at this time.

THE COURT: Yes, ma'am.

MS. BLANCHETTE: Your Honor, I would call Attorney Eleanor Cleary to the stand.

THE BAILIFF: State your full name for the record, and spell it for the clerk, please, ma'am.

THE WITNESS: Eleanor Duffy Cleary, E-l-e-a-n-o-r D-u-f-f-y C-l-e-a-r-y.

ELEANOR CLEARY, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q And Ms. Cleary, what is your current occupation?

A I'm a lawyer and a part-time magistrate for Richland County.

Q And with that said, is there a different title I should call you by or is it just Ms. Cleary?

A Just Ms. Cleary.

Q Okay. I want to make sure it wasn't The Honorable or anything of that nature.

A Uh-huh.

Q How long have you been practicing law?

A Since 1994.

Q Okay. And since 1994, can you kind of take us through what your primary areas or practices have been?

A All right. After I graduated from law school, I worked for the State Senate for five years. Then I went to

work for Appellate Defense for eight years, and then after that, I went into private practice as a sole practitioner here in Columbia. And I'm -- I still have a sole practice, but I focus on parole hearings and pardon hearings now. I don't -- don't do so many trials because I'm not allowed to practice law in Richland County.

Q Okay.

A And I -- and then I work bond court at night.

Q And at the time that you represented Mr. Hinson, I would say from 2010 to 2011; would that be correct?

A Yes.

Q Were you handling criminal cases at that time?

A Yes.

Q Okay. And do you recall being retained on this case?

A Yes.

Q How was it that you became retained on this case?

A I had another client who sent Jamaal's mother to me, and she came and talked to me and then I was retained.

Q Okay. And after being retained, did you meet with him?

A Yes, I did.

Q And did you have the opportunity to receive and review the discovery from the State?

A Yes, I did.

Q And what was kind of your general take away from the

case after you had reviewed everything?

A All right. After reading the statements from all the parties involved, it was my impression that this was a plea case, that this was not a murder case. Both -- well, the -- the victim -- there was certainly evidence that he had carried -- that he was known to carry a gun, and that he had been involved in some unsavory activities, just like there was the same evidence about Jamaal.

But based on the fact that there was this -- there was this fight where the victim came up on -- on Jamaal and -- and hit him and then Jamaal ended up shooting him, that this was not -- this was not your classic murder case.

And I mistakenly -- and -- and even my investigator did as well, thought that this was a case that was gonna end up to be a plea of some sort. And that's my mistake.

Q And when you say that was your mistake, kind of take us through the progression of the case then, how it went from you feeling confident it was a plea case to all of a sudden you're in trial then on this case -- or over time you're -- I mean, there was time that it took to get to trial. But how did you get from believing it was a plea to being in a trial?

A Well, I -- I met Luck Campbell and realized that there wasn't going to be a lot of concern about seeking justice. Okay. There was gonna be -- she was gonna win. And that

she was gonna ignore all the bad facts about Anthony Salley, the victim, and she was going to do her best to be able to get anything she could in about Jamaal, even if it was inadmissible.

She wanted to win, and she probably figured that I was going to be a good target because I had never tried a case in General Sessions before. I had only started private practice in 2000 -- in the end of 2008.

So there were no deals forthcoming whatsoever. So when I realized that we were going to trial, I put all my -- my all into it; but we had problems from the beginning because we had an investigator, Elizabeth Cook with Stillinger; and the case was set for trial before Judge Newman, and I couldn't find my investigator and I can't tell you what a horrible feeling that is.

And then it turned out that she had a very serious nerve disorder, and to this day she's on permanent disability for it. But I -- I wasn't able to get a hold of her.

And so we go before Judge Newman, and Luck Campbell basically asserts that I'm just trying to postpone the trial and playing games when I don't have my investigator. And mercifully, Judge Newman granted the continuance, but not after a huge fight over something that should be a no-brainer.

So that was the setting that we were faced with, and it was that way throughout the trial. My integrity was impugned.

And -- and then, once we went to trial before Judge Benjamin, I had an oral argument before the Court of Appeals. I asked for a continuance because when you do an oral argument, you have to turn -- you have to stop what you're doing and turn around and focus on reviewing, you know, a multitude of case law in order to be prepared to answer questions before the Court of Appeals.

So I asked for a continuance, and the Supreme Court -- I mean, the Court of Appeals said no.

So in the middle of the -- this murder trial, I had to do a Court of Appeals argument, and -- and Luck Campbell managed to make it look like I was once again trying to delay the trial by telling the judge that, "Well, we've already lost a lot of days because Ms. Cleary had to do this oral argument."

So whenever I would ask for more time to regroup, that would be her argument and said I had already wasted their time because I had this oral argument.

And the reason I'm mentioning this is that I learned after this case that no one should ever try a murder case by themselves. You have this team from the Solicitor's Office -- Luck Campbell, Nicole Simpson, host of law clerks

and investigators and police officers -- and I just -- it was just me on the other side. And I found that, you know, I couldn't keep up with the bombardment of -- of, you know, tricks and traps and -- and also I'm sure that there are many things that I missed because of that. And I believe that it was -- you know, obviously, I had no choice. Once I went to trial, I had to go to trial. But I would never do that again, and I don't think anybody should ever do that.

Q Now, Ms. Cleary, what was your primary defense, you know, once it was determined there was not going to be a plea on the table, what became your focus as the primary defense in this case or the primary defense strategy?

A Involuntary manslaughter.

Q And what was your plan as far as being able to get or arguing -- making a viable argument to get an involuntary manslaughter charge in this case?

A Well, essentially, I had to -- and -- and it's hard for me to remember all this, but -- I mean, at the time, I -- I knew it well, but luckily I haven't had to deal with it lately.

But I had to basically show the elements of self-defense and accident in order to get the involuntary charge.

Q And I will go through it in detail further with some

of the allegations as far as your strategy in doing that, but am I correct, and if the transcript reflects, that you were arguing self-defense and accident to ultimately get to involuntary manslaughter?

A Correct.

Q Now, you had mentioned that you had this oral argument and you were just being bombarded by a number of things. I want to first direct your attention to our allegation No. 2. And just so that we're on the same page, there we have alleged that you were ineffective for failing to be attentive and object to a line of questioning that resulted in the applicant being questioned about a prior bad act, which in this instance was a shooting.

And you have a copy of the transcript there in front of you. I can direct your attention beginning on page 671 is where this issue is addressed in the transcript. Page 671, beginning on line 17, I believe.

There your client, the applicant, is being questioned by the State as to why he was so scared. And the reason was being that he had -- and I'm quoting -- "never shot at anyone before."

A Yes.

Q And then shortly thereafter it's -- it's entered that there's a matter of law and the jury retires to the jury room.

A Yes.
Q Now, on pages 672 through 677 that follow, there's argument regarding that testimony, whether Ms. Campbell should be allowed to ask those questions and whether or not you opened the door to that testimony. Do you recall that argument back and forth?
A Yes.
Q Okay. And that's properly reflected in the transcript, correct?
A Yes.
Q On page 677 specifically, they read back a portion of the testimony and there you make an argument essentially that the State was goading Mr. Hinson. Do you recall making that argument?
A Yes.
Q Then on pages 678 through 680, the State goes into the specific testimony they're trying to elicit regarding a prior shooting with a Cory Fulton.
A Yes.
Q And the State indicates that they have reply witnesses if he intends to deny it.
A Yes.
Q Were you made aware of by the State prior to trial of their intention to go into this testimony and that there potentially could be reply witnesses?

A No. I mean, I -- I think I had a copy of the arrest warrant.
Q Okay.
A Right. But ...
Q Did you discuss the incident with Cory Fulton with Mr. Hinson before this is all kind of unfolding at the trial?
A I don't remember.
Q Okay. And then, if you could turn to page 681, is where the judge actually begins making her ruling.
A Yes.
Q Lines 12 through 18, she gives some of her reasoning about when it would have been the proper time for you to make an objection.
A Yes.
Q And then page 682, if you'll look at lines 8 through 22, again it is the judge discussing her position.
A I'm sorry. Say that again, which page?
Q Page 682, if you'll look at lines 8 through 22, is the judge again being on the record about when the objection should have been made.
A Yes.
Q And then, on page 683 through 684, she gives her full ruling, which I will just summarize. It's essentially that the objection was not made, and throughout this I even -- there's even one point where you admit you were not being

attentive. Can you just take us through what happened and why you did not make the objection at the time that the Court was saying you should have.

A All right. So there was -- there was the evidence that Jamaal had shot at somebody. And so we -- we were careful on -- when he testified to make sure that he didn't say anything that was gonna open the door to that. But when Ms. Campbell cross-examined him, she said, "You said you never shot at anybody." Well, that wasn't what his testimony was. Okay. So she mischaracterized the testimony.

But the way she said it was she said, "You never -- you said you never shot anybody," which is true. He did testify to that. And then she said "shot at anybody."

Okay. Well, once he said that, I obviously missed it, I mean, and I have no excuse for that except for that, again, as I would say you should never try one of these cases by yourself.

And when we went back and played the -- the -- the judge actually got the court reporter to -- to go back and look to see, yeah, she did say you -- so you said you never shot at anybody. So then she got her door opened and was able to go into this prior bad act against -- with -- with this Cory Felton, which was extremely damaging to his case and something that she had wanted to do for a long time.

And she finally got it and -- and it was because I didn't object when she said, "So you say you never shot at anybody."

Q So on page -- the bottom of page 671 where she asked that question and then he -- beginning on line 17, you don't enter an objection, that's where Ms. Campbell actually asked to take up a matter in front of the Court; is that correct?

A Right. At that point, I should have said, "No. He did not testify to that. That's a mischaracterization," and stopped it.

Q Okay. And you didn't -- you didn't object when she actually asked the question ---

A Right.

Q --- in front of the jury.

A Right.

Q Okay. And it appears from her reasoning, as a result, Judge Benjamin then allowed the State to fully go into the facts of that incident.

A The prior bad act, right.

Q And Ms. Cleary, at that point in your perception of the trial, was that damaging to your case?

A Yes, it was very damaging.

Q Can you please explain?

A Well, we had worked very hard to keep any kind of

prior bad acts out because obviously, you know, there's a reason those things aren't admissible. He had not been convicted of that crime. We hadn't even gone into discuss, you know, much about it. So I wasn't prepared to deal with it.

So, I mean, I think itgoes without saying when the jury hears about prior bad acts, they're gonna -- you know, they're gonna hold that against a defendant.

Q And one of your claims as the defense was that Mr. Hinson had accidentally shot the gun in this case.

A Correct.

Q So was it damaging to your case that he accidentally shot a gun that he had shot a gun at someone before?

A Yes.

Q Okay. And did it also impact your self-defense case where he's saying he was scared for his life and those type of things, the elements of self-defense that he had shot at someone before?

A Yes.

Q Ms. Cleary, unless there's anything else regarding allegation No. 2 and -- of the opening door -- the door to that prior shooting testimony that you'd like to add, I have no further questions on that. But I didn't want to cut you off if there was anything further you'd like to add.

A No, ma'am.

Q Okay. I will move on then. Gonna actually jump back to what is issue No. 1 on the first amendment: Ineffective assistance for failing to properly represent applicant -- in the State's witnesses.

First like to ask you about Devon Bailey. He was one of the State's witnesses who was actually present with Mr. Hinson that day throughout the course of the events that day. The State put him up on direct, asked him a number of questions. He had given several statements in this case.

On -- at the end of his direct examination, you chose not to cross-examine him. What were your reasonings for not cross-examining Mr. Bailey?

A Right. My reason for that was that Devon could have been a potentially harmful witness because he had had multiple conflicting statements. But he did a good job when he testified, you know, of holding his own against the prosecution, and his testimony was -- on direct by the State was quite favorable to us.

So I decided not to cross-examine him because I did not want the Solicitor to get another shot at him and have him -- because he was a young fellow -- have him twisted and turned and saying things that, you know, he didn't mean to say.

Q Now, let me ask you about another one of the State's

witnesses, Derek Diamond. Throughout his direct examination I would characterize it as the State leading him. Is there any reason why you didn't enter an objection to leading when Derek Diamond was testifying?

A Oh. I went back and looked at that, and I cannot tell you a reason why I didn't object.

Q And then I finally want to ask you about when Matthew Ellis, one of the law enforcement witnesses, was on the stand. And this comes up on page 524 of the transcript.

A Yes.

Q Okay. And on page 524 through 525, he's asked a series of questions about whether or not the charges that were given in this case were appropriate charges.

A Wait a minute. Are you sure that's the right page?

Q And I apologize. I'm looking from the record on appeal ---

A Oh.

Q --- and the original trial transcript. But it appears on here as 524 of the original trial transcript.

MS. KINARD: Line 23.

A I'm sorry. What is it?

MS. KINARD: Line 23.

A Okay. Okay.

Q And so beginning on 19 it says (as read): "Once you all concluded your investigation, Defendant was charged and

has been charged with murder." And then he's asked, "Is that the appropriate charge in this case?" Are you seeing that?

A Uh-huh.

MS. BLANCHETTE: Your Honor, do you mind if I approach the witness ---

THE COURT: No, not at all.

MS. BLANCHETTE: --- just to make sure we're looking at the same ...

(Brief pause.)

Q And then if you'd flip over to 525, he goes on to be asked questions about the charge that Devon Bailey received and whether or not that was the appropriate charge in this case.

A Yes.

Q Do you find that testimony objectionable?

A Yes.

Q Why?

A Well, I mean, that's the decision for the -- for the jury, you know, whether murder's the appropriate ...

Q And you didn't object at trial; is that correct?

A Yeah, that's correct, but ---

Q Do you have any specific reasoning or strategy why you didn't object?

A No, I don't. And it seemed like, when I was looking

at it, that there were a couple of other places that he talked about murder that I probably should have objected to.

Q Well, I'll direct your attention to page 538, and there on line 4, he's asked about whether or not he had information about whether or not the shooting was intentional.

A Yeah. Yes.

Q Is that another reference you were thinking of, Ms. Cleary?

A Yes, I think so.

Q Those are the two cited to in the amendment.

A Okay.

Q Where there any other references you'd like to point out for this testimony?

A No. Uh-huh.

Q Okay. And those two references -- one where he's asked about the appropriate charges, one where he's asked about the intentional nature of the shooting -- do you have reason why you didn't object to either of those?

A No.

Q And I asked you about the first, but as to the second with the intentional nature of the shooting, do you find that objectionable? And if you need a minute, please take it.

A All right. Well, I think that -- that was my question of him, right, on 538?
Q Yes, it does appear that's correct.
A Right. I mean, and I was trying to elicit that he had, you know, information that wasn't favorable to -- to the victim, but ---
Q And I apologize.
A Right.
Q Two separate questions. The first one, the first citation, 524 through 525, when he's speaking about the appropriate charges, you already explained that you didn't object there and why and your reasoning for doing so.

The second incident on 538, I apologize. My question should have been: What was your reasoning for eliciting that testimony? And if you'd like to explain that, please.
A I mean, I -- I can't remember it specifically, but, I mean, I guess I was just trying to get in that there was, you know -- well, I mean, that -- okay. Yeah.

I think this must have been what it was, that Jamaal had told them that it was an accident. Okay. And then we weren't really able to get into that because that was a self-serving statement. Right. So then that was the way that I was trying to get into that, to ask him did he have some information that this was not intentional.
Q But you elicited that testimony, but you weren't able

to further ---
A Right. Because then ---
Q --- develop that testimony?
A Right. And then you see Luck objects. So I'm sure we had a bench conference about the self-serving statement of my client. So ...
Q Okay. So you were -- you're questioning was limited as a result of the State's objection.
A Yes.
Q All right. Thank you for clarifying that because with ---
A Right. You can't tell ---
Q --- the transcript, it's always hard to see what happened afterwards, what happens in the bench conference.

Let me then direct your attention to page 540, and this is during the redirect of Mr. Ellis.

A Yes.
Q And in there, beginning on page 540, about line 7, he's asked a question about the statement of Devon Bailey, to which you object and the State responds that you've opened the door. You further object saying it's inadmissible hearsay.

Can you just take us through that and explain kind of what transpired there?

(Brief pause.)

A You know, I mean, I -- I can't really remember exactly.

MS. BLANCHETTE: And Your Honor, I'll ask -- I'll ask a better question.

Q Ultimately, on page 541, the Court finds that you opened the door to this officer being able to read in the testimony of Devon Bailey that he didn't testify to. Did you have a strategy or were you aware that you could have potentially opened the door to that as you were cross-examining Mr. Ellis?

A I didn't intend to open the door. No. That was not a strategy.

Q And in opening the door and this inadmissible, as you say, hearsay testimony coming in, do you think that was damaging to the defense?

A And this was the statement that Devon could tell his eyes ...

Q Right. It's on page 540, lines 10 and 11 is where ---

A (As read) "So I could tell his eyes -- I could tell by his eyes, and by the way he was walking, something was up."

Yeah. I'd say that was pretty damaging.

Q Can you please explain?

A Well, I mean, I guess that that's a way to show malice, and our -- our theory was that there was no malice.

Q And just as a follow up to that, were you primarily

arguing this was a no malice murder?
A Yes.
Q And that was your purpose in behind -- in behind asking for a self-defense, accident, and involuntary manslaughter in this case.
A Correct.
Q And what did you see as -- or did you have any concerns of there being evidence of express malice in this case?
A No.
Q And is that why you deemed your primary defense that this was a no malice murder?
A Yes.
Q All right. Now, let's kind of go into -- the remaining of the allegations deal a lot with these defenses: self-defense, accident, involuntary manslaughter. And so I'll be turning here to allegation 3 on the original amendment.

And essentially, in allegation 3 and allegation 4, Mr. Hinson is alleging that the way that you handled the defense and the strategy of the defense was unreasonable. So I just want to kind of take you through some of the components of the defense. If you could bare with me, I'll give you the transcript cites.

The first portion is the issue with prior

difficulties. What did you do as far as preparing to present evidence of prior difficulties and your strategy in getting in information regarding prior difficulties in this case?

A All right. I mean, if I recall, the -- the prior difficulty was actually with the victim's best friend; though we also had statements that the victim was known to carry a gun and to threaten to kill people and had bad blood with Jamaal.

But essentially, Judge Benjamin ruled that if I -- if I brought up things about the character of the victim, that I was going to open it up to everything about the character of Jamaal. And I think she sort of backed down on that some the following day after doing some research.

But that was what the State had argued was that if I say anything about the victim's character, then I'm opening it up to Jamaal's character, which is, of course, not the law.

But the other problem we had is that without Jamaal testifying, we really didn't have evidence that he knew these things about Mr. Salley. Okay.

Is there something specific ...

Q No. That's okay. At that point I can direct your attention to the transcript.

A Okay.

Q The first place it comes up is on page 165 through 168. You have a brief discussion with the Court, and there she explains that she wants to know the specific instances in which -- which you've already stated that it would open the door to testimony regarding the victim's reputation.

I apologize. I'll just give you some transcript cites which may be kind of lengthy, and then ask a question at the end. So please let me know if I've gone too quickly.

Then if you turn to pages 370 through 391 as cited on the amendment, on page 376, you go into detail about what you plan to introduce regarding the victim. And specifically on 383, you talk about a specific instance where the victim had held a gun to a girl named Shanika.

A Yes.

Q And then on page 383, the Court gives a ruling that if the Defense goes into any of that information, it will open the door for the State.

A Yes.

Q The issue comes up again on pages 580 through 581. And there you discuss -- which I'll get back into a minute -- the defense of whether it was self-defense or accident.

But on page 581, you tell the Court that you've been thrown for a loop by her rulings on character and you ask for more time to prepare with your client before he takes the stand.

A Yes.
Q My question to you after all of this is -- is much briefer. It is: How was it that you were thrown for a loop? How did that affect your ability to represent or defend Mr. Hinson in this case?
A Well, I mean, I thought that I was going to be able to bring in evidence of Mr. Salley -- about Mr. Salley and whether -- whether to -- in order to show whether Jamaal's fear was reasonable. And once I couldn't do that it -- well, it meant that Jamaal was going to have to testify certainly, but also it kind of -- you know, it -- you can't -- you can't do involuntary manslaughter unless you're able to get into those -- those matters in the self-defense and accident.
Q Now, if you could look back on page 580 was one of the pages that I gave you.
MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence while I get there myself.
THE COURT: Yes, ma'am.
(Brief pause.)
MS. BLANCHETTE: Your Honor, I apologize. I have this transcript in electronic format and having a little trouble here.
(Brief pause.)
Q All right. Ms. Cleary, on page 580, you're discussing

your defense in this case.

A Yes.

Q And specifically, on line 17, you say (as read): "Clearly our defense is accident."

Now, you worked in appellate defense for a number of years. You're familiar with having to argue the case law in the area of self-defense, accident, involuntary manslaughter, murder.

A Yes.

Q You mentioned before that you were arguing -- and please correct me if I'm wrong -- accident and self-defense to get to involuntary manslaughter. Could you explain that a little better for us?

A All right. So in order to get the involuntary charge, I have to show that he was lawfully armed. And so in order to be lawfully armed, we have to basically show the elements of self-defense. Am I remembering that correctly? It's been a long time since I've had to look ----

Q Well, your argument essentially is there on 580 through 581, I believe.

A Right. Because I have to show that he lawfully armed himself in self-defense. So then -- and then for the involuntary, I have to show that he acted negligently, right, but without malice, okay, for an involuntary. And so that's where the accident comes in.

Q And so the accident, was that being argued to show the unintentional nature of the shooting?

A Yes.

Q And on page 580 through 581, the best place where I believe I see you summarizing that, my question to this -- to you is this -- and there's some other examples I've given in the amendment -- page 153 through 155, 579 through 581 -- where you continue to make the same argument as -- essentially that self-defense plus accident should equal involuntary manslaughter.

A Yes.

Q As early as page 153 you're arguing this and explaining that's why you're asking and, you know, presenting the defense in this way. Do you feel like you gave the State an unfair preview of your ultimate goal in this case which led to involuntary manslaughter not being instructed?

A I'm sorry. Just one second.

(Brief pause.)

A Yeah. I -- I don't really know what to say to that.

Q I can ---

A Because I'm not -- I'm not entirely sure whether I could have avoided it. But -- so I'm not sure what to say on that.

Q Let me ask you this question then: Did you ever

anticipate not getting an involuntary manslaughter instruction in this case?

A No, I didn't. I -- I believed -- and the Court of Appeals disagrees with me on this -- that you're entitled to arm yourself in self-defense even if you are an unlawful -- you know, even if you're a felon who's not allowed to possess a gun.

It's my position, you know, under *Burris* and some other cases, that a felon is not required to be a sitting duck, that when he needs to arm himself in self-defense, he's entitled to do so; and that does not preclude an involuntary charge.

Q And ---

A But I was wrong about that, and that -- that was a big mistake on my part.

Q And in the appellate decision the -- it appears there's two portions of involuntary manslaughter that the Court of Appeals seems to hang their hat on. But one is whether or not he was lawfully armed.

A Right.

Q And did you properly focus on that being a fundamental problem in this case? That's also the reason cited to ultimately by Judge Benjamin that she would not give the charge.

A I don't -- I'd have to rely on the record as to

whether I properly focused. I'm not sure.

Q Okay. Do you have any recollection in your preparation if that element of involuntary manslaughter was a concern for you?

A Yeah, it was a concern, but I thought that it was -- could be overcome by *Burris*.

Q And you argued *Burris* and *Crosby* at length throughout the transcript.

A Yes.

Q Okay.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment.

THE COURT: Yes, ma'am.

(Brief pause.)

Q Now, when -- we talked a little bit about character, we jumped into the whole self-defense, accident, involuntary; but the Court's ruling on character you say in the transcript -- we talked about it threw you for a loop as far as the testimony of Mr. Hinson.

And specifically on page 60 -- 641, he testifies that he didn't know if the victim carried a gun. Had you anticipated that he was going to be able to testify that he did know that the victim carried a gun?

A Yes.

Q Then if you could jump with me to page 816 of the

transcript, specifically looking at line 13 once you get there. And here this is Judge Benjamin making a lengthy ruling, and she indicates that you have indicated that your defense is not self-defense, but rather accident. Then she says (as read): "My ruling is that at the time of the actual shooting, the defendant was unlawfully armed, and at the time of shooting, clearly pointing and presenting a firearm are unlawfully possessing a firearm. Moreover, any claim that he was acting lawfully in self-defense is clearly negated by the defendant's own testimony because he indicated that he was not aware that Anthony, who'd be the victim, carried a weapon."

My question to you is: Does that demonstrate how much it hurt your case that Mr. Hinson could not testify about his knowledge that the victim carried a gun?

A Yes.

Q Would you agree that the judge's determination that your defense was not self-defense but rather accident, do you agree with that?

A Yeah. I'm -- I'm -- I would have to go back and look at this. I mean, I -- I think this is the point where she said no involuntary manslaughter; is that right?

Q She ultimately rules that there was a concession of self-defense. Were you trying to concede self-defense at any point in this trial?

A Concede it?
Q Abandon --
A No, no, no.
Q -- the argument of self-defense.
A No, no, no, no.
Q So was it integral to you that you were going forward on the defense as a self-defense ---
A Right.
Q --- accident, and trying for involuntary manslaughter charge?
A Yes.
Q But here the Court says that (as read): "Ms. Cleary's indicated their defense is not self-defense, but rather accident." Was it your intention to ever indicate that to the Court?
A No.
Q And then, as a result, she does not give the involuntary manslaughter instruction; is that correct?
A Correct.
Q So if you did at any point concede or tell the Court your defense was not self-defense, was that error on your part?
A Yeah. If I did that, yes.
MS. KINARD: Your Honor, I'm not sure if this is entirely appropriate, but I'd like to object to this as a

mischaracterization of the record. I can certainly question her more on cross about that if that would be more appropriate.

THE COURT: Yeah. Go through that on cross.

MS. KINARD: Thank you, Your Honor.

A Yeah. Let me -- let me just say, too, I mean, it does look like after she says that, that I go through and make clear, you know, that we are arguing self-defense and say -- and you know, remember at this point, the prosecutor had already said, yeah, she can have a self-defense charge. So we hadn't even argued it. Okay.

So I said, "Let me put on the record why I think that we have met self-defense."

Q And that's what I was gonna ask you next and I'm sorry because maybe spent too much time on that without moving onto the other portions. There's just so many moving parts and this issue comes up over and over again, and you guys have such a long charge conference.

But you do ask on several occasions -- I've given the cites in the amendment -- to be heard as to what your exact argument is, is that correct, on each of those?

A Yes.

Q Okay. And as you stated, the prosecution had agreed to self-defense and accident, and it appears -- and I'm not trying to mischaracterize the record, but it appears once

it is realized that you're using those two defenses to get to involuntary manslaughter, that is when the State begins objecting.

A Correct.

Q And at that point, it becomes a full fledged argument to try to get all three of those charges.

A Yes.

Q Okay. And ultimately, Judge Benjamin rules -- and it will be properly reflected in the record -- that she will give the self-defense and accident because the State originally agreed to them, but she's not ruling on them.

A Right.

Q And then she rules only on the involuntary; is that correct?

A Yes.

Q Okay. Do you -- looking at the record and having, you know, the experience of being the trial attorney, do you think you hurt the -- the opportunity or the chance to get the involuntary by the judge thinking that you had somehow conceded the self-defense and was focusing more on accident?

A Yeah. Honestly, I don't know. I --

Q Okay.

A I don't know.

Q Looking at pages 793 through 794 is where you're

making some of your extensive argument for these charges. And at the bottom of page 793, line 24, arguing again, I believe -- and correct me if I'm wrong -- for the involuntary manslaughter charge, you say (as read): "It is an integral part of our defense, and it's going to kind of eviscerate it."

A Yes.

Q Did that properly summarize the result of not getting the involuntary manslaughter charge in this case?

A Yes.

Q Can you explain why it eviscerated your defense or if you already have, that's fine.

A All right. I mean -- I mean, I think the record probably speaks for itself on it, but -- you know, I mean, we -- he obviously was holding the gun, but we needed to be able to show that his actions were -- were negligent, but without malice. I mean, that -- that was what our whole defense was. I don't know. I'm not ...

Q So that's fine. I think we -- so if it was your whole defense, I understand why it would have been eviscerated.

Let me now turn to the malice instruction because this comes up throughout the lengthy charging conference. Do you remember your argument back and forth regarding the *Mouzon* charge and whether or not that would be included?

A Yes.

Q And do you remember the concession by everyone involved that the *Belcher* language or the inference of a deadly weapon charge would not be given in the case?

A Yes.

Q Okay. Then I'll direct your attention to page 811. It appears from the record you all were given a clean copy of the judge's charge to review over the course of the evening after the first portion of the charging conference. On page 811, beginning on line 12, that is where Ms. Campbell says that she's reviewed the instruction and would like an addition with some language regarding inferred malice. Do you recall that?

A Yes.

Q And specifically on line 18 she says (as read): "If you can just say malice can be inferred from the facts or circumstances surrounding the case, I think that will cover it."

A Yes.

Q Then, on 812, the judge has her clarify exactly the language she wants included, line 7.

A Yes.

Q And then on -- then you're asked if you have any objection, and on line 12 you don't have any objection to that.

A Right.

Q Were you anticipating the State to ask for an inclusion of an inferred malice instruction the next day?
A No.
Q And when it was asked for, just that one sentence, you all had been arguing *State vs. Elmore* -- I'm sorry -- *Elmore* in conjunction with the *Mouzon* charge, but ...
MS. BLANCHETTE: Your Honor, I withdraw that question.
Q I'll just ask it real simply, Ms. Cleary: Is there any reason why you didn't ask for a more complete malice instruction, including the permissive inference language, or enter an objection here?
A No, there's no reason I did not.
Q Now, were you aware of the case law that said permissive -- if you're gonna give a inference -- a malice inference instruction, a permissive instruction must follow.
A I probably was. I mean, I think I had read every case in preparation for the trial.
Q Okay.
MS. BLANCHETTE: Your Honor, if I can beg the Court's indulgence just one moment.
THE COURT: Yes, ma'am.
(Brief pause.)
Q You were obviously aware of the *Belcher* decision because you all had argued that, and that instruction was

not included, correct?
A Correct.
Q And in that case, where they discussed permissive inferences in *Elmore*, were you aware of those sections of *Belcher*?
A Yes.
Q Do you have any reason you didn't object when the State asked for the instruction and then when the instruction was specifically given to the jury?
A No, I don't have any reason. And all I can say is I think that at that point I was overwhelmed and looked like I was kind of still focused on accident because I asked about that immediately afterwards, and you know, I think I was just worn down mentally and missed it.
Q And having reviewed the memorandum that I provided to the Court -- I provided that to you as well yesterday. And having reviewed the transcript, should you have entered an objection when asked here by the Court and when she gave -- and entered an exception to her charge?
A Yes, I believe I should have.
Q And why do you think you should have entered an objection or an exception?
A Because our whole theory of the case was that he didn't have any malice. He had no motive. You know, they'd had a fight that Jamaal had won. So why is he going

to turn around and shoot him when he's already gotten the best of him in a fist fight?

There -- there was just -- you know, there was just -- to me there was no evidence of malice, that this was a mistake, a mistake that happens, you know, when -- you know, that -- that shouldn't -- should never have happened and it's a terrible thing for the victim, but that it was a mistake.

And so that being said, then any instruction on malice would be crucial to the jury -- to the jury's decision.

Q And so your primary argument in this case was this was a no express or no malice murder; is that correct?

A Correct.

Q But by giving this instruction, it allowed the jury to infer malice from the facts and circumstances surrounding the case.

A Well, I mean, it sort of encouraged them to, yeah. Right.

Q And specifically, the language that was not included, but *Elmore* and *Belcher* both say should be included, is that (as read): "The facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to take into consideration by you, the jury, along with all other evidence in this case and you may give it

such weight as you determine it to be," which is essentially giving them permission to infer or not infer. And that was not done in this case; would you agree?

A Correct.

MS. BLANCHETTE: Your Honor, if I could just beg the Court's indulgence again.

THE COURT: Yes, ma'am.

(Brief pause.)

Q And just as a follow up to that, did you discuss with Mr. Hinson express and inferred malice?

A I do not remember.

Q Ms. Cleary, I know I, you know, asked you about your representation. I've asked you about what is a complex legal issue involving accident, self-defense, and involuntary manslaughter. Is there anything further that you'd like to add if I cut you off or failed to properly ask you a question?

A No.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Ms. Kinard.

MS. KINARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. KINARD:

Q Thank you, Ms. Cleary. Instead of starting at the

beginning, I'll jump right into the questions I have about the -- the malice issue.

I objected before about mischaracterization of the testimony when Ms. Blanchette was questioning you around page 816 about whether the judge mischaracterized your defense and whether you dropped the self-defense charge. If we keep looking there, and you mentioned it a little bit, did you actually ask that you be allowed to re-argue self-defense?

A Yes.

Q And did you get to do that?

A Yes.

Q Do you believe you did that thoroughly and clearly?

A Yes.

Q And do you believe you satisfied -- or spoke about all four elements of self-defense that are required to -- to use that defense?

A I believe so.

Q Do you recall if the State had any response or -- or further argument after that?

A I -- I don't recall.

Q If I could refer you to page 824, line 13 through 15.

A Oh. Right. No response.

Q So no response. So basically you were allowed to make this full lengthy argument of several pages without any

response from the State in order to bolster your point that self-defense is a proper defense, and therefore, an involuntary manslaughter charge should be given. Is that an accurate description of what happened?

A Yes.

Q Okay. And as a result of that -- or actually with -- kind of within that, if we jump back up to page 812, this is what Ms. Blanchette was just questioning you on. This is after the second day, or into the second day, charges conference, and y'all are looking at the clean version. And Ms. Blanchette specifically asked you why you didn't request a more complete instruction or enter an objection.

On page 812, on line 13, you say (as read): "No, I don't have any objection, but in terms of the additional accident, I think your accident charge covers it sufficiently and that would just be over-emphasizing one part of accident."

The Court asks, "Your objection again, I'm sorry, for the record?"

And you say, "I believe your accident charge covers the fact that he actually acted lawfully."

And then Ms. Campbell actually says, "I agree."

So do you believe that issue was -- was being resolved then and you had entered an objection into -- as to the fact that that charge was improper or unnecessary?

A Yeah. It's -- it's hard to say from the transcript, but I think that -- I think the accident discussion was unrelated to the inference of malice discussion. You know, that I was jumping onto the malice -- I mean, to the accident issue, but I could be wrong. I mean, I just can't --

Q Okay.

A I can't remember exactly what my thoughts were.

Q I suppose that could be possible because later, on page 813, you do start talking about *Burris* and whether he's lawfully armed at the time.

A Right.

Q But to the extent that all of those were together and in your request for the involuntary malice charge, is it fair to say that all of those arguments were working together for -- in your request for involuntary manslaughter charge and that was the ultimate goal?

A You know, I -- I don't know. All I can say is that I -- I don't have a strategic reason or any kind of reason why I would have not asked for the correct inferred malice charge. And I mean, I think that this is probably a matter of law. If the record shows that I didn't object when I should have to, you know, the proper charge, I -- I certainly can't say that I had some brilliant plan and reason behind doing that. And so I think it would -- you

know, it would really be determined by what's in the record.

Q And going along with that, if -- if the record shows that you repeatedly asked to re-argue the finer points of your case, whether it be the elements of self-defense or the lack of malice and different ways it was shown, those would all be in attempts to -- to rehabilitate your defenses and to have proper charges brought; is that a fair statement?

A Yes.

Q So similarly on page 793, you were talking about the involuntary manslaughter argument. This is where Ms. Blanchette questioned you about the evisceration of your defense. I hate to bring that back up, but you do speak about -- in there why there is negligence without malice. Is that an accurate description of the testimony -- or the argument you made on that page?

A All right. 793?

Q Yes.

Q So for example, line 5, you say, "Reckless dis -- disregard for the safety of others is one of the elements, means you're not interested in the consequences of your acts."

Then page -- or line 11 specifically, she specifically asked him on cross-examination, "Why are you holding the

gun by the pistol?" Assuming -- I'm assuming the ---

A Trigger.

Q --- not by the grip.

A Yeah.

Q And she talked about negligently holding it. Not having this, combined with the *Mouzon* charge, if they find he's negligent, then he's going to be guilty of murder. And that seems to be -- correct me if I'm wrong -- the impetus behind your defenses and the necessity for the involuntary manslaughter charge. Is that correct, that you needed to be able to have something else to point to other than murder?

A Yes.

Q And that would be the -- the reason for you continuing to argue all of these is to give the jury the lesser included, something other than murder.

A Yes.

Q Now, I'd also like to look to -- actually beg the Court's indulgence briefly.

(Brief pause.)

Q Your closing argument, specifically page 894. And if you wouldn't mind just reviewing that page. You gave a lengthy closing argument, going through everybody's statements and testimony. But the middle two paragraphs of that page, about lines 6 and on into the next page, you --

you argue that it's not the Defense's job to prove it was an accident and (as read): "You might say that he doesn't fit in some of these elements, but it doesn't mean they've proven their case."

Is this an attempt to -- to reassert the self-defense and the accident defenses to the jury?

A I suppose, yeah.

Q And you go on there. Your assertion is that (as read): "Even if you're in -- in unlawful possession of a gun, that doesn't mean you have to let people shoot you."

A Right.

Q And ultimately, unfortunately, for this case, in your perspective, the Court of Appeals disagreed with that as did Judge Benjamin; however, you did make that argument.

To step back a little bit -- actually, let's step back to the very beginning. Partially out of curiosity, you said you're not allowed to practice in Richland County. Is that because of your position as a -- as a judge?

A Yes.

Q Okay.

A I didn't mean to imply that I had been banned.

Q I saw some eyebrows raised when you said that, so I wanted to clarify.

A No. Actually I'm not allowed to do criminal law in -- in Richland County because I set bonds. So ...

Q Thank you for that clarification.

You also testified this was your first murder trial or General Sessions trial. In your preparation, did you seek any guidance or mentorship from other attorneys?

A I did. I did. I ---

Q Could you elaborate on that, please?

A Right. I talked to Jack Swerling who I -- who I rented office space from, and I also relied on my colleagues at the South Carolina Association of Criminal Defense Attorneys. They have a -- they have a list serve that -- I got advice from them.

Q I think -- at least the attorneys in this room know how helpful a list serve can be.

A Yeah.

Q Moving into -- I'd like to try to do these in order. Allegation 1, you provided competent and thorough testimony on -- on your strategy for those, including that Mr. Bailey actually provided testimony that was helpful to your client --

A Yes.

Q -- and no need to subject him to any further examination.

Derek Diamond, there was a potential leading objection. You saw no reason not to object. And I don't have that page number, but from your recollection of that,

do you believe that was harmful to Mr. Hinson's case?
A I -- I would -- I would need to look at that again.
Q I'm sorry. I'm trying to find the page number.
A Okay.
THE COURT: 202.
MS. KINARD: Thank you, Your Honor.
(Brief pause.)
THE COURT: Line 7.
MS. KINARD: Thank you, Your Honor.
A I'm sorry. What page was it again?
THE COURT: 202. And the quoted portion of the statement begins on line 7.
THE WITNESS: Okay.
Q I was just thinking about some leading questions --
THE COURT: Or the question for it.
MS. KINARD: Yeah.
THE COURT: Sorry.
Q If you read the highlighted portion, that is it. So do you believe that this quotation that ended up was ultimately judgmental, especially given the fact that nobody denied there was a fight.
A No. I -- I don't think that statement was particularly harmful.
Q You also testified regarding Mr. Ellis or Investigator Ellis, I believe. He testified regarding appropriate

charges, and the -- the intentionality of the shooting. At that point you were able to testify about self-serving statements. No. I'll -- I'll just withdraw that. I think that was -- that was clarified on direct examination.

You reiterated that your theory was no malice because this was a fight he already won, he had no reason to come back and shoot the victim; is that correct?

A Right. And it was broad daylight and there were witnesses. I just don't think he planned on killing him that day.

Q At the time of this trial, do you believe that -- that you did everything you could within your power to argue this case to the best of your ability? Forgetting that hindsight is 20/20, when you were in the moment, you were zealously representing ---

A No, no. I mean, I -- I gave it my best, but I don't think that -- I mean, I -- my best wasn't good enough because I wasn't equipped to do it. I shouldn't have done it by myself. I mean, I should have done whatever I had to do to incorporate co-counsel or I should have told him to go with the public defender.

I mean, I'm not saying -- it's very hard to get up and admit that you made mistakes and I'm not saying that I didn't give it my all, but if -- if your all's not effective, then you're ineffective.

Q And I appreciate your candor for that, and the -- the case law that we are bound by in PCRs requires us not to look back with the distorting affects of hindsight and requires us to think about and try to put ourselves in the shoes of an attorney as they tried this situation -- as they tried this case.

I believe you provided credible testimony regarding the -- the tenor of the trial, what it was like in the courtroom, what your opponents were throwing at you in this adversarial situation. Did all of those play a part into how you believed this trial came about and the end result was formed?

A I'm not sure I entirely understand the question.

Q Is it fair to state that based on your testimony there are things in the transcript that we could not realize when we reading it?

A Yeah. Of course.

Q And some of that you testified to was the -- the force behind the Solicitor's Office; is that a fair statement?

A Yes.

Q And that certainly affected how you were able to try this case.

A Yes.

Q And so you used all the resources you had at your hand to put up the best fight you could on behalf of your

client.
A Yes. But -- but I think if I had been more effective, I would have anticipated the -- the way that the tenor was going to be, the way that the game was going to be played. And because I didn't have the experience, I didn't know that that was the way that the game was going to be played.
Q Thank you for your candor and being here today. Appreciate it.
A All right. Thank you.
THE COURT: Ms. Blanchette.
MS. BLANCHETTE: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. BLANCHETTE:
Q Ms. Cleary, we've been having you go all around in the transcript. I'm gonna take you back to page 810. The bottom of 810 is the second day of the charging conference. At that point -- were you pretty worn down at that point in the trial, November 18, 2011, that starts at the bottom of page 810?
A Yes.
Q In the charging conference -- and I just want to ask you about this to make sure we have it in the right context -- begins with a discussion about the accident charge that rolls into page 811. Would you agree with that that you begin that day by talking about an additional request

regarding accident?
A Yes.
Q Then the State brings up later, on page 811, the request for the inferred malice instruction; is that correct?
A Yes.
Q On page 812, where you're given the opportunity to respond, which is what the State asked you about, you say (as read): "No. I don't have any objection to that, but in terms of the additional accident ..." when you say "but in terms of the additional accident, are you going back to what you all were originally discussing, the accident charge?
A Right. That's my interpretation of it. It's like there should be a paragraph mark there because I'm moving to something else.
Q Okay. And I just wanted to be clear with your testimony today regarding your interpretation of what you're saying there, that you were moving back or jumping back to accident, which is what you all were originally discussing that morning.
A Yes.
Q Now, the State asked you about hindsight. Does hindsight play any part in your failure to request inferred malice instruction or your failure to object to the State's

request?
A No.
Q And I'll put it this way, is it the same that you should have objected on that day as it is now, has there been any change? You -- do you agree you should have objected?
A Yes.
Q Okay.
A You know, and may I say as well -- I mean, I think on the issue of an improper charge that there really can be no strategic reason for an improper charge, unless I'm mistaken. I mean, that's sort of a matter of law.

If the record shows that it's an improper charge, then, you know -- then -- then the issue becomes whether it's prejudicial. But -- but there's really nothing I can say to excuse not asking for the proper charge.
Q And so hindsight doesn't play into ---
A Correct.
Q --- whether or not you asked for that, correct?
A Correct.
Q Okay. And in a case where we've talked about your defense was no malice and you didn't get the integral charge of involuntary manslaughter, was the inferred malice instruction highly important then in this case?
A Yes.

Q Can you please explain? And if you have already, that's fine, but do you have anything further to add to that?

A Well, I mean, involuntary manslaughter would have given the jury the opportunity to find, okay, he acted negligently; but it's still -- you know, it's not murder. All right. So without that, then the jury's -- and -- and then with the ability to -- and the instruction that -- to infer malice, then they basically can find that his negligent action is malice.

Q And if you were in the position where you were as worn down as you were, if you had been more aware of *Belcher* and *Elmore*, whatever it may be, would you have objected and asked for the permissive inference instruction?

A I certainly hope so. Yes.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Okay. Thank you, Ms. Cleary.

THE WITNESS: Thank you.

(The witness exits the stand.)

MS. BLANCHETTE: Your Honor, it's my understanding she's here under State's subpoena. I have no objection to her being released.

MS. KINARD: I was about to make the same request, Your Honor. No objection.

THE COURT: All right. Thank you for coming.

THE WITNESS: Thank you.

THE COURT: You're free to go.

MS. BLANCHETTE: Your Honor, I call Jamaal Hinson to the stand.

JAMAAL HINSON, having been first duly sworn, testifies as follows:

THE BAILIFF: State your full name for the record and spell it for me, please.

THE WITNESS: Jamaal Hinson, J-a-m-a-a-l.

THE BAILIFF: You need to talk loud enough for the judge to hear you.

THE WITNESS: Hinson, H-i-n-s-o-n.

THE COURT: I don't think that microphone really works. So you need to ---

THE WITNESS: Jamaal ---

THE COURT: Just make sure you speak kind of loudly.

DIRECT EXAMINATION

BY MS. BLANCHETTE:

Q Mr. Hinson, you're currently incarcerated; is that correct?

A Yes, ma'am.

Q Okay. And you're incarcerated as a result of receiving a murder conviction here in Richland County; is that correct?

A That's correct.
Q And you filed a PCR application here in Richland County following your conviction?
A Yes, ma'am.
Q And by way of that application and amendments I have filed on your behalf, you've made allegations of ineffective assistance of trial counsel; is that correct?
A I have.
Q And what is the relief that you're asking the judge to give you as a result of those allegations?
A What I'm asking for is a new trial.
Q Okay. And we have met a number of times, and I've explained to you that there is some risk involved in that. By asking for a new trial, you're essentially asking the judge to set aside your current conviction, to put you back in the place you were before you were convicted, and essentially allow you to proceed to trial all over again. Do you understand that?
A Yes, ma'am.
Q And your risk in that is that in so doing, you currently have a 40-year sentence for murder; is that correct?
A Yes, ma'am.
Q And if you went back to trial, you could risk getting up to the maximum sentence for murder.

A Yes, ma'am.
Q And knowing that, do you still want to go forward and ask the Court for a new trial today?
A Yes, ma'am, I do.
Q Okay. Now, Ms. Cleary's already been on the stand. You retained Ms. Cleary to represent you once you received a murder charge; is that correct?
A Yes, ma'am.
Q Okay. And do you recall meeting with her in preparing for your case?
A Yes, ma'am. We met a few times.
Q Okay. And did she go over with you the State's evidence in the case?
A We went over the fact of the route that she thought it was gonna take, and being that -- being that I was new to the situation, I just ran with it. I just took it at face value.
Q Okay. And what was the strategy or what was the defense that she shared with you?
A She told me that I was gonna get involuntary manslaughter, and -- which is 0 to 5; but she also told me if that didn't play out, then she would -- then I would end up with, like, maybe 10 years. But at the time, you know, I didn't realize that if I would have got the 10 years, then that would have meant that I didn't get involuntary

manslaughter.
Q At the beginning of her representation at the time before you proceeded to trial, did she seem optimistic that you would either be able to plea out or have some type of resolution where it was involuntary manslaughter?
A She was optimistic that it was only going to be involuntary manslaughter.
Q Okay. And at some point did the preparation shift and you all had to start preparing for a trial?
A I -- I think we was always preparing for trial. It was never no plea, like, they didn't ask me if I wanted to plea or anything. So I mean, I would say that the whole strategy would be preparing for trial. I was just under the assumption that I would end up with involuntary manslaughter.
Q Okay. And did she explain to you that in pursuing the strategy of involuntary manslaughter she also would be presenting the defenses of accident and self-defense?
A Yes, ma'am.
Q Okay. And did you all go over those defenses?
A Yes, ma'am, we did.
Q And as kind of part and parcel or integral to that, did she explain to you that you were likely going to have to take the stand?
A Yes, ma'am, she did.

Q Okay. And did she prepare you to take the stand?
A On certain things, yes, ma'am.
Q Okay. I want to talk about one of things that came up while you were on the stand, and there's a copy of the transcript there in front of you.

But specifically, on pages 671 through 684, the issue comes up -- you're being questioned by the State and you're asked if you ever shot at anyone before. And you answer and then there's a break taken where they have a -- they have a conference with the judge about it.
A Right.
Q Did Ms. Cleary test -- or prepare you to testify about this prior incident involving Cory Fulton?
A No, ma'am.
Q And when you were asked that question, had she prepared you on how to answer that question?
A No, ma'am.
Q When she failed to object and the Court ruled that she had opened the door and the State was allowed to question you in front of the jury about it, were you prepared to answer those questions?
A No, ma'am, I wasn't.
Q How did that factor into your defense at that point? Do -- did you feel that that hurt your defense that you were having to testify about that?

A I feel like it did hurt my defense. I felt like -- I felt like that gave them something to judge me off of.
Q Okay. And did that throw you off as you're up there being cross-examined that you were asked about this and had to address it?
A Yes, ma'am.
Q Is there anything else regarding that prior incident and the testimony that was elicited regarding it that you'd like to testify about?
A No, ma'am.
Q Now, the State does indicate -- I'm going to ask you one more question about it -- that if you deny the shooting incident, that the State has reply witnesses prepared to testify. Again, was that something you and Ms. Cleary had ever discussed that the State had witnesses lined up regarding this prior incident?
A No, ma'am. It wasn't like that -- we spoke about -- I -- I honestly think that that was a scare tactic from the Solicitor.
Q And if you would have known that, were there witnesses that you could have potentially had to testify about that incident?
A I mean, yes, ma'am, of course because, you know, the charge pertaining to that situation was ABHAN. It wasn't even like he shot at this person. It wasn't even nothing

like that in the warrant or nothing about that said. That was just something that she said to -- made it believe that that was the situation. But the -- the charge was an ABHAN charge. It wasn't nothing what she said it [sic].

Q And since you essentially had to testify about that, that information was put in front of the jury, would you have preferred if Ms. Cleary would have addressed that with you and prepared you on how you needed to address that?

A Yes, ma'am, I would have.

Q Okay. Instead you were kind of caught by surprise on cross-examination; is that correct?

A Yes, ma'am. I didn't even know that situation was gonna come up.

Q Let me ask you about some of the other witnesses that testified. These are witnesses that testified for the State.

Devon Bailey, who is Mr. Bailey? How did you know him?

A He played basketball real good. He played for the high school. I -- I had took a liking to him 'cause he played ball real good and I liked it.

Q Okay. And you -- you talk about him during your trial testimony about the relationship you had with him, and he was with you throughout the course of that day; is that right?

A Yes, ma'am.
Q Okay. And one of the allegations in your amendment is that Ms. Cleary should have cross-examined Mr. Bailey. Can you explain what you would have wanted him questioned on further?
A I would have wanted her to cross-examine him and I would want her to ask him -- I wanted her -- her to get him to go more in detail of what actually happened.
Q And when you say "detail," what details? Did you feel there were details that were favorable to you that she failed to ask about?
A I feel like it -- I feel like everything was unfavorable to me that she didn't ask about it.
Q Can you explain that?
A Okay. For example, like, it -- it was never -- it was -- it was never said -- it was never said to the jury, or to anybody for that matter, that -- you know, that I was the one approached, you know, like, I -- I was -- I -- I was -- I was there at somebody else [sic] house at the time, and that was my reason for being over there. And the situation actually happened after he approached me aggressively and that's how we ultimately ended up in a fight.

But it was only said that, you know, I had a gun and every -- it -- it was just only said things pertaining to

my character.

Q And you felt there were more -- more favorable facts that Mr. Bailey could have offered that your attorney didn't ask him about?

A Yes, ma'am.

Q And was he in the truck that had actually pulled in the driveway where the victim was located?

A The truck? He was in the truck, but the truck never went in the driveway. It was in the middle of the street.

Q Okay. And you testified to this and I've had you review your testimony, but essentially, did you go over to where the victim was because you were trying to communicate with Mr. Bailey?

A Devon, Mr. Bailey, he didn't know where I was at. He knew what street I was on. So when he told me he was on the way, I just went outside to meet him in -- in the middle of the street. And when Anthony Salley seen him, he knew that that was my friend. So it -- it's just -- I -- I guess it -- it gave him, like, a bad interpretation of -- of something and it made him react how he reacted. And then it led to how it led to.

But no, ma'am. He wasn't -- he wasn't in the driveway and -- and I -- and I was -- and I was on the way to him for the reason that he was calling me to come over for.

Q But your reason for heading in the direction of the

victim was not to have an altercation with the victim ---
A No, ma'am.
Q --- but it was to catch up with Mr. Bailey ---
A Yes, ma'am.
Q --- is that correct?
A Yes, ma'am.
Q Okay. Now, I asked Ms. Cleary at length about the Court's ruling regarding the victim's character, and there is [sic] three or four large sections of the transcript where it's argued back and forth what evidence could be presented about the victim.

Going into trial, was it your understanding that you were going to be able to testify about your knowledge that the victim was known to carry a gun?
A It was under my impression that I could not have.
Q Okay. And so when you testified that you didn't know -- on page 641 -- if the victim carried a gun, did you know if he carried a gun?
A I did. I just -- I was told not to speak on any -- on any character ---
Q Okay.
A --- about him.
Q And did your attorney advise you that the Court had ruled that you could not go into anything about his character?

A Yes, ma'am, she did.
Q Okay. But to be clear, you did know that he was known -- you had knowledge that he was known to carry a gun.
A Yes, ma'am.
Q Okay. And was that a factor in your actions that day?
A Can you re-ask the question?
Q Yes. Your knowledge that he carried a gun, was that a factor in how you acted that day?
A I would say yeah because his approach was so aggressive, I didn't really know what to think. And me and him never really had a altercation like that before, you know, and my -- my aggression was really towards somebody else and I didn't know that -- how connected that they were. You know, his baby mama is his sister. I didn't know none of that. So ---
Q Okay.
A --- so, like, when he transgressed [sic] towards me, and you know, at the time, he was the age that I am now. I was -- I wasn't even 20 years old at the time. So I didn't -- I didn't know how to -- I didn't know why or how -- I didn't know what was going on.
Q Now, you addressed a couple of things and I'm gonna try to take them a part just so we're really clear.

First, you testified you didn't know that the victim carried a weapon, but you did; and would it have been

important to tell the jury that? Was that an important part of your story?

A It would have been very important.

Q Okay.

A It would have been very important.

Q Now, you used the word "his," and I think you're referring to a couple of different people. So let me break that down a little bit.

The testimony reflects that -- both yours and other people in the trial -- that you had had some prior difficulties and issues with Richard Thomas; is that correct?

A Yes, ma'am.

Q Okay. And you testified that you knew that Richard Thomas and the victim were friends; is that correct?

A Yes, ma'am. I knew they was friends.

Q Now, at the time this incident took place, were you aware of how they were exactly connected, how deep that friendship was?

A No, ma'am. I just thought they were friends.

Q Okay. Did you know why they both would be at the house where they were at?

A I didn't know. I -- I didn't even know.

Q Okay. And you said you discovered some things after. What is it that you discovered? How they were connected

through some relationships? Can you explain that?

A Okay. The house that I was at was somebody who I was dealing with at the time. And you know, I -- from time to time I used to see Richard over there. That -- that was -- that was his -- his -- his baby -- his -- his baby mama's house. So you know, from time to time I see him over there, but I never knew -- and I knew Anthony was his friend, but I never knew that he stayed there, that that was his sister. I didn't know the relationship towards them. I didn't know anything.

So when he acted the way that he acted towards me, I -- I didn't know what was going on.

Q Okay. And again, just because you know this but we all don't, you're saying Richard Thomas had a baby mama. Who was that?

A Elasis [phonetic] Salley, which is Anthony's sister.

Q Okay. And so Richard Thomas was staying -- that was the Salley residence?

A Yes, ma'am.

Q Okay. And you came to learn after the fact that Richard Thomas was dating the victim's sister or had a child with the victim's sister.

A Right.

Q Okay. Now, you go into a trial and it's discussed about these prior difficulties you had with Richard, but

you didn't have the understanding of the connection -- the complete connection between the victim and Mr. Richard Thomas on the day of this incident.

A Yes, ma'am.

Q Okay. Is that something, do you think, should have been better explained at your trial?

A Yes, ma'am.

Q Okay. Is there anything further you want to explain on that point?

A I just -- I believe -- I believe that I should have been able to speak my mind about the situation versus saying you can't do this and you can't do that because it kind of limit -- it kind of limited me to, like, really explain what was going on or how I felt. So other than that, then I -- I wouldn't really have anything else I would say about that situation, about that.

Q Now, when your attorney was on the stand, we talked a lot about her anticipating an involuntary manslaughter charge, which she states on the record. She also states that not getting it eviscerated your defense.

Do you recall having discussions with her before the trial that, hey, there's a likelihood we may not get an involuntary manslaughter charge? Was that a reality for you?

A It was never that. Like -- like, throughout the whole

trial I just -- I just knew I was gonna get involuntary manslaughter because that's what she told me. And then it was like -- I think it was the -- the second to the last day of my trial when -- when they called -- when they called a recess and -- and we had to come back the next day.

When we came back the next day and then they re-heard Andina's testimony --

THE COURT REPORTER: I'm sorry. Who's testimony?

THE WITNESS: Andina Lee.

A They had re-heard her testimony, but it was over the recording. They had played the recording over.

And that's when I realized something was wrong. So when I asked her, she was, like, "Oh. I'm still gonna try to get you at least 10 years."

So I was like okay. I just -- I just ran with it 'cause that was my first time going in -- being in a situation like that.

But you know, now that I'm kind of more educated on my case and what was going on, if I would have end up getting 10 years, then that mean I wouldn't have got involuntary manslaughter. But I didn't know that, so I didn't really -- I wouldn't -- I wouldn't -- I ain't able to put two and two together.

Q I'm going to talk with you a little bit about the

self-defense that was raised in this case. Did Ms. Cleary ever speak with you about the unlawful possession or pointing of the pistol and whether or not that would be a issue in getting involuntary and how that tied back into self-defense? Did she ever explain the dynamic, the workings in between of self-defense and involuntary manslaughter?

A No, ma'am. I just -- she just told me that we had needed to -- needed both of the two in order to get the involuntary manslaughter.

Q Okay.

A That -- no, ma'am. She didn't really go in detail.

Q So was it kind of explained to you like "one plus one equals two," self-defense plus accident equals involuntary manslaughter?

A I just -- I just knew if I can prove the fact that -- that -- that -- that he opposed me, then that would -- that would, like, show the self-defense. And then being that we actually did fight and -- and -- and that the pistol went off by accident, that that would be accident. And ultimately, I -- I just knew because of that I would get involuntary manslaughter.

I didn't know that it was other things or other things that we should speak about. I didn't know that. I was just -- I just knew what I was told I was -- and then, when

I got on the stand, I was just -- I was prep -- how I was prepped and that's why I testified the way that I testified.

Q Did she ever explain to you the difference between express and inferred malice?

A No, ma'am.

Q Did she talk with you about your actions and talk with you about these could be considered expressions of malice or direct evidence of malice?

A No, ma'am.

Q Anything of that nature?

A No, ma'am.

Q Okay. Was it explained to you that primarily your defense was there was no malice in the killing of the victim in this case?

A I mean, yes, ma'am. I -- I knew it -- it wasn't any malice. We -- we was -- we was together on -- on that level right there.

Q So you -- when you say "we," that's you and Ms. Cleary were ---

A Yes, ma'am.

Q --- in agreement ---

A Yes, ma'am.

Q --- that that's -- was your defense, that this was a no malice ---

A Yes, ma'am.
Q --- killing. Okay.
I didn't specifically go over each allegation in the amendment, but you are standing by both amendments and you are making those allegations; is that correct?
A Can you rephrase that question?
Q Let me -- let me phrase it this way: Would you have wanted your attorney to make all the objections set forth in your amendment ---
A Yes, ma'am.
Q --- and enter the exceptions set forth in your amendment?
A Yes, ma'am.
Q Okay. Specifically, would you have wanted her -- her to object during the testimony of Derek Diamond?
A Object?
Q Object to leading?
A Oh. Yes, ma'am.
Q Would you have wanted her to object on several instances to the testimony of Matthew Ellis where he offered opinion testimony regarding the appropriate charges in this case?
A Most definitely.
Q Would you -- she elicited testimony regarding the intentional nature of the shooting. Would you have wanted

that testimony elicited now that you read it in the transcript?

A Elicited, meaning removed?

Q Your attorney asked Mr. Ellis if he thought the shooting was intentional or if there was evidence of it, to which he responded "yes," which could be characterized as damaging to you. Would you have wanted her to ask that question of him if you all had discussed that?

A No, ma'am.

Q All right. There were several instances where the Court found that she opened the door and then allowed the State to either offer evidence or test -- testimony that she had argued was damaging to you, whether it was hearsay or just prejudicial. Would you have wanted her to be more attentive and careful in trying to not open the door to the State being able to do those things?

A Yes, ma'am.

Q I just want to ask you -- I understand you're not a lawyer -- but the -- the allegation in your second amendment deals with your counsel's failure to object to the inferred malice instruction, and specifically that the Court didn't give the full malice instruction including the permissive inference part. I provided you the case law, I provided you the memo. Do you have a basic understanding of what that means?

A Of the rest of the statement that was supposed to go with the malice ---

Q Yeah. Do you have a basic understanding ---

A Yes, ma'am.

Q --- of that allegation?

A Yes, ma'am.

Q Okay. And would you have wanted your attorney to object and ask for the full instruction?

A Yes, ma'am.

Q Okay. Would you have also wanted her to -- after the judge gave the instruction -- say, "Your Honor, actually, I want the jury brought back in and make sure they get this full instruction"?

A Yes, ma'am. 'Cause it would have -- it would have -- I believe I would have changed their decision.

Q Because the way it was it almost seemed like it was mandatory, they didn't have an option about inferring malice.

A I believe they looked at it as if it was either murder or go home. That's -- that's how they looked at it -- that's how I believe they looked at it. So they didn't look at it, like, "Okay. He can get a lesser included offense. This is not malice."

They didn't look at it like that because of the fact that the whole malice instruction wasn't -- wasn't --

wasn't given. I just felt like they looked at it either it's either murder or go home. Either all or nothing.

And so, you know, I wasn't saying, like, I didn't do it or -- you know, I was saying, like, this was a accident and I -- I apologize. That's what I was saying. So -- so being that I felt like they was looking at it as either all or nothing, murder or go home, I admitted that I did it. So it's like now they like, okay, well, yeah. He guilty.

So I just felt like it -- I just felt like it outweighed the judgement of my case.

Q The inferred malice gave them a way to reach the murder, is that what -- is that what you think?

A Yes, ma'am.

Q Okay. And your attorney said she had two opportunities to make sure that the jury got the correct instruction, and she didn't take either of those opportunities; is that correct?

A Yes, ma'am.

Q Okay. And you're alleging today that that affected the outcome of your case and the jury's verdict.

A Yes, ma'am. That's what I'm saying.

Q Okay. And you understand that's a decision that the Court makes by looking at all the evidence and looking at the transcripts.

A Yes, ma'am.

Q But I -- what I want to ask you is that day, did you have -- and I'm -- I'm gonna read right from the instruction, okay? It says (as read): "Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act that was later accomplished."

Did you have ill will or hatred towards the victim that day?

A No, ma'am. I didn't have no hatred or ill will towards him at all. Like I say, I just knew he was friends with Richard. I didn't know him outside of that. I just knew I knew who he was, but I didn't know him. He didn't even know who I was.

I just assumed that, you know, me and Richard had bad blood or whatever between each other, you know, but that been going on for years. It wasn't nothing really, you know, like that.

So I mean, I -- I guess -- I guess from -- from them being friends, I guess he didn't like me because he didn't like me or whatever he done told him or whatever the case may be. I didn't know that. I didn't even know him like that. I just knew who he was.

Q And you testified that you went back to your home, obtained your pistol -- and the record will reflect -- but essentially to arm yourself in self-defense against

Richard.
A Right.
Q Because Richard was the person that you had prior encounters with; is that correct?
A Yes, ma'am, that's true.
Q Okay. Did you have any intentions towards the victim when you obtained your weapon?
A No, ma'am.
Q Okay.
A Richard was the one who threatened, and it was normal that he did threaten. He always do. And that's why I made a decision that I made. You know, it wasn't towards Anthony. Like, we didn't even -- never had a conversation, so it wasn't even me have a argument, wasn't even a civilized conversation or heated -- we didn't have nothing. I just knew who he was.
Q And did you testify that essentially the fight had ended and you retrieved your weapon that his girlfriend had been holding.
A Yes, ma'am.
Q And as he came towards you, you accidentally fired your weapon; is that ---
A Yes, ma'am.
Q --- correct?
A Yes, ma'am. When I turned around.

Q All right.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence just one moment, please.

THE COURT: Yes, ma'am.

(Brief pause.)

MS. BLANCHETTE: Your Honor, I have no further questions of this witness.

THE COURT: Ms. Kinard.

MS. KINARD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. KINARD:

Q Mr. Hinson, you just testified that you had no ill will toward the victim in this case.

A Yes, ma'am.

Q Were you not exchanging threats with him earlier in the day before this incident?

A No, ma'am. That was with Richard Thomas.

Q He was there at the house?

A Yeah. Yes, ma'am.

Q Okay. And you went and armed yourself because of Richard Thomas.

A Yes, ma'am.

Q And you knew that the victim was involved with Richard Thomas. They were friends.

A I did.

Q Is -- is "friends" an appropriate way to characterize it? Did they have a different connection?

A They -- they were friends.

Q Okay. So you felt the need to arm yourself because of this whole situation.

A Because of the situation that me and Richard been having basically for -- sense I been living -- on this all the time. Yes, ma'am.

Q Okay.

MS. KINARD: Your Honor, I'd -- I'd ask you to take judicial notice of the Court of Appeals opinion in here where they find that -- to quote (as read): "Appellate approached victim's driveway while carrying a gun. Earlier on the day of the shooting Appellate exchanged murderous threats with victim in front of victim's house."

Q So did -- you had no independent history with the victim.

A No, ma'am.

Q That's your testimony. Okay.

So when you headed over to that house, you had your gun because you thought Richard might be there?

A I never headed over there. I was -- I headed over -- I was at the house that I was at. I was at somebody totally different house. I never went to their house.

Q Is that not where the incident happened, at the house

where the Salley's stayed.
A They stay right next door.
Q Correct. So you were at that house two doors down.
A I was at -- yes, ma'am. I was at the house down -- not their house.
Q Right. But at some point you did to ---
A I was never at their house.
Q Okay. So where did the incident occur?
A It happened in the house between them.
Q Between. Okay. Thank you. That was -- that was where I was messing up my words. I appreciate that.
So you testified earlier that there was never a plea offer from the State in this case.
A Yes, ma'am. There was ---
Q So you were always preparing for trial with Ms. Cleary.
A I mean, yes, ma'am.
Q And did you go over all the discovery with her?
A I seen a little bit of discovery that she sent me through the mail, but I mean, it wasn't the full discovery. I never seen the full discovery, even up to today.
Q Okay. Did you give her your version of events of that day?
A Yes, ma'am.
Q And with that, did y'all start talking about possible

defenses that led to this self-defense case?
A Yes, ma'am.
Q And did you do that together?
A Yes, ma'am.
Q You testified a little bit regarding preparation to plea -- excuse me -- to take the stand and your testimony. Y'all talked generally about what your testimony would be; is that correct?
A She told me basically the -- the questions that would have been asked to me. Yes, ma'am. And then she also told me if I was asked about, you know, Anthony, then I shouldn't speak on his character because it will -- it will open up, you know, this -- the situation that happened that we didn't want the -- the jury to hear. So yes, ma'am.
Q Okay. And that's why you testified you weren't sure if he had a gun or not or was in the habit of carrying a gun?
A Yes, ma'am.
Q And you testified -- I just want to clarify that -- that -- Devon Bailey, you wished he would have testified because you felt like he was the only one who could have testified more in your favor about the situation that day?
A Nah. That wasn't my words at all. I just felt that -- that she should have cross-examined him because I felt like he could have went in more detail of the situation. I

mean, everybody could've went in more detail who was out there, not just him because it was favorable towards me.

I mean, Derek Diamond was out there, Devon Bailey, and Quinn [phonetic] Emerson, you know. Any -- any of them could have got on the stand and if they would've said what happened, it would have been favorable towards me. So no, I -- not just because it was favorable towards me because it was what happened.

Q As part of your testimony on that topic, you -- you testified that you went toward Mr. Salley to catch up with Devon, not to start a fight with Mr. Salley.

A I went towards Devon to catch up with Devon.

Q Were they in the same direction though?

A Anthony was at Devon car trying to figure out what's going on. Then when I came out the house, he -- he -- he -- I never even had a chance to go to there. I never even had a chance. Soon as he -- soon as he seen me, that's when it happened. He seen me, took off his jacket, and then he -- he just ran towards me. I never went towards him.

Q Okay. You testified that you thought the jury saw their options were either convict you of murder or send you home?

A I mean, all or nothing is, you know, basically what I meant.

Q Did you understand Ms. Cleary's arguments at trial regarding self-defense?

A I mean, I didn't understand. I just -- I felt like -- I really -- I really felt like, you know, once -- once they heard the case, I really felt like they would see it. You know, I -- I didn't -- I didn't -- I had no intentions that, you know, I could have got 20 or 30 or 40 or anything for that matter. I didn't know that, you see, like I just -- I just knew. Like, she made me feel so comfortable that once she told the Court my case that they would see that because it was evident.

Q And -- but you understood you were facing murder and that carried 30 to life?

A I knew that I was charged with murder.

Q And you understood the sentence that that carried were you convicted.

A I thought I was gonna get involuntary manslaughter. I thought after the trial I thought that I -- I'd gotten charged with murder. I didn't think I was gonna get convicted or murder. I thought I was gonna get convicted of involuntary manslaughter.

Q Yes, sir, I understand. Regardless, you under -- you knew at the time that the charge you were charged with carried 30 to life.

A I -- I went to court -- I -- I don't understand what

you're asking 'cause I'm saying the same thing. Like, I just -- I just thought, you know, she says, "You were either gonna get involuntary, 5 or 10."

So, like, you saying did I know I was gonna get 20 or 30 to life, I didn't know that 'cause I didn't know that that was an option.

Q The question I'm trying to ask is what we call "exposure." Just the fact, separate from your case, regardless of the facts of your case, anybody charged with murder faces 30 to life in prison. Were you aware of that?

A Honestly, before anything, I thought if you get in a situation like that, you ain't coming home. That's just how I thought. So to answer your question, yeah. But -- yes, ma'am.

But after I spoke to her, when it was time for, you know, us -- us to be -- us to be preparating [sic} for what was going on, when she -- when she was telling me about involuntary and stuff like that, I never heard of that before. So that changed -- that changed the way I thought about things and -- and that's what made me certain in, you know, what she said was true.

Q Did you give her witnesses to interview?

A Did I give her witnesses?

Q Uh-huh. Names of witnesses to interview.

A The State -- the State already had the witnesses and

we -- they had -- she just followed up on it, I guess.
Q You didn't provide anybody else that the State hadn't already contacted?
A Yes, Shanika [phonetic] Lee, which is Anthony Salley's -- his girlfriend sister. I knew Anthony -- I know Anthony Salley's girlfriend. I knew her and I knew her sister. And both of them could kind of tell -- could kind of give an understanding of what type of person that was, but Shanika was never called because we -- we wasn't speaking on -- we wasn't speaking on -- you know, on -- on -- on prior acts or anything of anybody's -- of -- of anybody's demeanor. So she was never called.
Q Okay. Regardless, Shanika was the only name that you gave Ms. Cleary as someone to investigate?
A Yes. Shanika, Raymond Asbury. I mean, it was a few other.
Q So you helped her in the preparation of your defense?
A As much as I could.
Q So ultimately, just to make sure I understand your testimony, you wish overall she had discussed things a little more with you so you understood where -- where your case was?
A I wish that and I wish a few other things as well.
Q And -- and you spoke about all those on -- on direct examination.

A Right.

MS. KINARD: I have no further questions. Thank you.

THE COURT: Ms. Blanchette?

MS. BLANCHETTE: Yes, Your Honor. Just very briefly.

REDIRECT EXAMINATION

BY MS. BLANCHETTE:

Q To clarify, Mr. Hinson, we're not here today about your wishes. You're making allegations that your attorney was ineffective; is that correct?

A Yes, ma'am.

Q And as a result of that, the outcome of your trial was affected.

A Yes, ma'am.

Q And as a result, you're asking the Court then for a new trial today?

A Yes, ma'am.

MS. BLANCHETTE: Your Honor, I have no further questions.

THE COURT: Okay. Thank you. You can go sit back next to your lawyer.

THE WITNESS: Yes, ma'am.

(The witness complies.)

MS. BLANCHETTE: Your Honor, I have no further witnesses. I would ask, just to make sure we have a complete record, especially since I've referenced it

several times, if it'd appropriate if I marked the memorandum for the record that I provided to Your Honor.

I didn't know if you'd like this to be a Court's exhibit, an Applicant's exhibit, but I just want to make sure we have a complete record.

MS. KINARD: Because it has been referenced, I think that would be helpful for ease of -- of -- of reference. I just wanted to state for the record I did receive this yesterday and have not time or attempts to be able to prepare a rebuttal should the Court wish to do that, and I can argue more about that -- I don't know if it would be proper to maybe take time to, not necessarily prepare for post arguments, but a closing or brief in support, if that's possible, since Ms. Blanchette did have the benefit of the memorandum I received yesterday.

But as far as marking it, I have no objection.

MS. BLANCHETTE: And Your Honor, I made very clear in here that this was written before the testimony and just to kind of further set forth the allegation more so, too, so the State could see fully the cases I was relying on instead of arguing all of this at the beginning of the case today into the record.

THE COURT: Do you want to just file it with the Clerk's Office?

MS. BLANCHETTE: I can do that, Your Honor, just as a

pleading on behalf, yeah. 'Cause that's all it was meant to do was be a further explanation of the allegation for everybody's benefit.

THE COURT: Okay. And Ms. Kinard, you'll have an opportunity to respond in writing. I don't know whether either or both of you want to do that as proposed orders.

I know I've ruled on other matters from the bench today, but since this is a trial and -- and a lengthy transcript, of course, I have not had the opportunity to read it and digest it during the testimony here today.

So I am going to take this one under advisement. I don't want to keep it for too long because then, you know, it gets away from everybody. But in a short, reasonable period of time, if you want to get me something in writing in response.

And Ms. Blanchette, if you want the opportunity to do the same once you see what the State is ---

MS. BLANCHETTE: That would be great ---

THE COURT: --- providing ---

MS. BLANCHETTE: --- because this doesn't incorporate any of the testimony that was offered today. It was just strictly meant to more of like a legal memorandum to address the issue based upon the record that we already have.

THE COURT: Okay. And I'm not going to put firm

deadlines on it, but let's try to keep the time line pretty short.

MS. KINARD: Would you prefer me to keep mine to a legal memorandum format to keep it fair and then not duplicate efforts by doing that and then a proposed order or ...

THE COURT: I almost wonder though if the proposed order is the easier way to not duplicate efforts because if I get proposed orders from both of you, I mean, you're -- you're arguments are essentially incorporated into those, right, rather than a memorandum and another memo and then someone still has to do a proposed order.

I think if you send proposed orders in Word format, that makes it easier for me to read your arguments, but also be able to cut out things that I don't think are appropriate in my ruling and to neutralize the tone of it a little bit because, you know, lawyers tend to be argumentative sort of and -- I mean, as you should be in -- given your positions.

So whichever you think is easiest, but something in writing from you and something in writing from you probably in Word format, unless you want to file them with the Clerk's Office.

MS. KINARD: The only reason I ask is I -- I feel it's fairer to both parties to present proposed orders

simultaneously rather than to present ---

THE COURT: Well, that ---

MS. KINARD: --- and reply ---

THE COURT: --- does make sense actually. I didn't think about that.

MS. BLANCHETTE: But I apologize. I wasn't trying to complicate matters by doing a memo.

THE COURT: No.

MS. BLANCHETTE: This was just a complicated legal issue ---

MS. KINARD: It ---

MS. BLANCHETTE: I just ---

MS. KINARD: I appreciate it, I just hadn't had the opportunity to present the same thing to the Court.

THE COURT: You're right, and that's fine. So we'll do memoranda and once I have made a decision, I will probably ask for those memoranda in Word format so that I can easily translate one of them into a proposed order.

MS. BLANCHETTE: And then, Your Honor, I'm going to make it further complicated.

THE COURT: Sure.

MS. BLANCHETTE: This memoranda was just a further explanation of that one issue.

THE COURT: Right. That I understood.

MS. BLANCHETTE: I assume maybe the State will address

all the issues, and then would you like me to do a further memorandum on the issues I have not addressed?

THE COURT: Yes.

MS. BLANCHETTE: So essentially a proposed order.

THE COURT: Essentially.

MS. BLANCHETTE: Okay.

THE COURT: Yes.

MS. BLANCHETTE: Your Honor, do you mind if I take time to obtain the evidentiary hearing transcript just to make sure all the witnesses are properly quoted in those proposed orders?

THE COURT: That's fine.

MS. KINARD: It -- it lengthens the time line, but if you and your client are okay with that, I'm fine with it. I would -- I would like the benefit of that as well.

THE COURT: I think that would help me, too. Let's go off the record briefly.

(Off the record briefly.)

MS. BLANCHETTE: Your Honor, I can write a lot of the proposed order in a way ---

MS. KINARD: Yes.

MS. BLANCHETTE: --- you know, plug in the testimony. I can begin working on that immediately while we're waiting on the transcript. I just wanted to have it kind of as a safeguard or a check before I submitted something to Your

Honor.

THE COURT: Absolutely. We'll still do it that way. We'll allow for time to get the transcript. Ms. Kelly said it might be closer to 60 days on the transcript because she's got so much going on.

In reality -- I mean, I know that sounds like a long time now, but in reality, time will fly and that 60 days will pass before any of us realizes it. So -- so I think that's fine. Okay. Thank you.

MS. KINARD: Thank you, Your Honor.

MS. BLANCHETTE: Thank you, Your Honor.

-- END OF TRANSCRIPT OF RECORD --

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fifth Circuit Court for Richland County, South Carolina, on the 24th day of January, 2018.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

e/Bonnie H. Kelly

Bonnie H. Kelly, CVR

Official Court Reporter

Columbia, South Carolina

May 4, 2018

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Jamaal Hinson, 325190, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-40-3946 MEMORANDUM

RICHLAND COUNTY
FILED
2018 JAN 25 AM 9:38
JEANNETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on June 29, 2015. Applicant, through counsel filed an Amendment on July 26, 2017.

On January 9, 2018, Applicant, through counsel, filed an additional Amendment, which added the following specific allegation of ineffective assistance of trial counsel:

> 1. Ineffective assistance of trial counsel for failing to object and/or enter an exception to the inferred malice instruction. Trial Transcript p. 811-2, 949. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009); See State v. Mattison, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it"), overruled on other grounds by Belcher; Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016) (A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct).

Prior to the offering of testimony at the evidentiary hearing, this Memorandum serves to further address this allegation in relation to the trial record and applicable cases.

DISCUSSION

While opening at trial, the State argued that Applicant acted as a "cold blooded murder" when he started a fight with victim, pointed a gun at him that was knocked away by the victim while defending himself, retrieved the gun and shot the victim. Trial Transcript pp. 81-2. During her opening argument, defense counsel explained that Applicant was acting in self-defense and accidentally fired the gun killing the victim. Trial Transcript p. 96.

When the State called the victim's girlfriend, she provided a version of the facts in line with the State's opening argument. Trial Transcript pp. 121-133. Nevertheless, her testimony did not establish express malice. As instructed by the trial court, "Express malice is shown when a person speaks words which express hatred or ill-will for another or when the person prepared beforehand to do the act which was later accomplished." Trial Transcript p. 948, lns. 19-22. Furthermore, the testimony of the State's witnesses that were with Applicant, Derrick Diamond and Devan Bailey, failed to establish express malice on the part of Applicant. Trial Transcript pp. 169, 468.

In his own defense, Applicant took the stand and explained his knowledge of Richard Thomas ("Richard") dating back to 2004 and his prior difficulties with Richard over the last year. Trial Transcript pp. 639-644. He indicated that he did not know the victim in the same capacity, but he knew the victim was best friends with Richard. Trial Transcript p. 641.

The night prior to January16, 2010, Applicant had stayed at his girlfriend's house. Trial Transcript p. 644. He was unaware that Richard and victim stayed in a house in close vicinity until that morning, when they had "words." Trial Transcript p. 644, 646. After borrowing his girlfriend's truck, he had trouble with it, pulled into a gas station and ran into Devan Bailey. Trial Transcript p. 644. Devan wanted some "weed," and Applicant told him to meet him back at his girlfriend's house. Trial Transcript pp. 644-5. He walked up the street and met up with Devan, who was in Quinton's truck. Trial Transcript pp. 645-6.

While out with them, he went by the gas station to get some cigars, and he went to his house where he got his pistol, for self-defense, due to his concerns over his last physical altercation with Richard. Trial Transcript p. 646. He returned to his girlfriend's house, and Devan called wanting a cigar. Trial Transcript pp. 646-7. He told Devan to call since he had them pick him up

earlier on the road. Trial Transcript pp. 647-8. When Devan called, he discovered that he was parked in the wrong driveway and saw him speaking to the victim. Trial Transcript pp. 647-8.

Applicant walked over, and the victim took his jacket off and ran towards him "talking about do I have a problem." Trial Transcript p. 648, lns. 4-6. Applicant explained that victim was "bigger" than him, so he recalled: "I pulled the pistol to scare him, but he wasn't scared. He walked up on the pistol closer and he told me to shoot him." Trial Transcript p. 648, lns. 7-11. He explained that he did not shoot the victim because he did not even "dislike" him. Trial Transcript p. 648, lns. 15-20. Then, victim approached him, called his "bluff," punched him in the face, and the pistol dropped to the ground. Trial Transcript p. 649.

A fist fight ensued, Applicant got the better of the victim, and noticed victim's girlfriend had his gun. Trial Transcript pp. 649-50. After she dropped it to the ground, Applicant retrieved the pistol since he was in fear of his life and not wanting to get shot in his back with his own gun while leaving the scene. Trial Transcript pp. 651-2. He then detailed the fatal events as follows:

> When I picked up the pistol and I turned around and Anthony was walking towards me, and I left him on the ground, I thought he was still on the ground, so when I turned around and seen him walking towards me, it kind of scared me and I flinched. And I accidentally pulled the trigger. And then he was hit. I got scared and I ran.

Trial Transcript p. 651, ln. 25 – 652, ln. 7.

After the defense rested, a lengthy charge conference was placed on the record. Transcript pp. 746-826. A majority of the discussion and rulings were centered on whether self-defense, accident and involuntary manslaughter would be charged. Ultimately, the court found that she would give self-defense and accident charges since the State agreed to the charges. Transcript pp. 814-15. The court denied Applicant's request to charge involuntary manslaughter, which defense counsel conceded eviscerated Applicant's defense. Transcript pp. 793-94, 815, 18, 950-55.

During the charge conference, both parties agreed that the instruction involving inferred malice derived from the use of a deadly weapon was properly omitted from the jury instruction pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Transcript p. 750. At the conclusion of the first day of the charge conference, the court provided both parties a complete copy of her intended jury charge to review. Transcript pp. 770, 790. At the beginning of the second day of the charge conference, the State made the following request:

> Judge, the only other thing I did notice last night late, because we took out all the language about the inference of malice from the use of a gun, and then so your inference, you talk about express malice in a whole paragraph and then you don't really -- in your charge you don't really talk about inferred malice. If you can just say malice can be inferred from the facts and circumstances surrounding the case. I think that would cover it.

Transcript p. 811, lns. 13-21. After hearing the State's request, the following took place:

> COURT: And what is the additional language?
>
> STATE: Just malice may be inferred 8 from the facts and circumstances surrounding the case.
>
> COURT: Ms. Cleary, any response regarding adding that, malice may be inferred from the facts and circumstances surrounding the case?
>
> DEFENSE: No, I don't have any objection to that.

Transcript p. 812, lns. 5-14.

Thereafter, the trial court gave the following instruction on murder:

> The Defendant is charged with murder. The State must prove beyond a reasonable doubt that the Defendant killed another person with malice aforethought.
>
> Malice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it. It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief. Malice may be express or implied.

> Malice is hatred, ill-will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law would infer an evil intent.
>
> Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the Defendant just before and at the time of the act at the time the act is committed. Malice may be conceived at the very moment the fatal blow is given. Therefore, there must be a combination of the previous evil intent and the act.
>
> Malice aforethought may be express or inferred. These terms, "express" and "inferred," do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill-will for another or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other act of preparation going to show that the deed was within the Defendant's mind would be express malice.
>
> **Malice may be inferred from conduct showing a total disregard for human life. Malice may be inferred from the facts and circumstances surrounding the case.**
>
> Malice does not necessarily impart ill-will towards the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.

Transcript p. 947, ln. 12 – p. 949, ln. 10 (emphasis added). No exception was entered by defense counsel to the inferred malice instruction.

The record establishes that the trial court's charge lacks the general permissive inference instruction that is required when a judge charges the jury on inferred malice: "If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (footnote 9). While Belcher deals specifically with a charge that permits the inference of malice from the use of a

deadly weapon, the Supreme Court has stated that all inferences should be accompanied by the general permissive inference instruction. See State v. Mattison, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it"), overruled on other grounds by Belcher.

A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). Applicant submits that the general permissive inference instruction should have been given when the trial court instructed the jury that "malice may also be inferred from conduct that shows a total disregard for human life." Trial Transcript p. 949, lns. 1-2.

Turning to the question of prejudice, this Court "must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." Id. at 265, 786 S.E.2d at 265. "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." Id. Clearly, the State was concerned with the lack of evidence of express malice, which was evidenced by the request to include the erroneous inferred malice instruction. If found credible by the jury, Applicant's trial testimony was completely void of expressed malice towards the victim.

Furthermore, Applicant raised and the court instructed the jury on the defenses of accident and self-defense. As noted in Belcher, additional context for an inference charge is required because an inferred malice instruction can lead a jury to disregard defenses raised by a criminal defendant:

> Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be

> intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because if one intentionally kills another with a deadly weapon, the implication of malice may arise. … That highlights the "half-truth" of the charge.

386 S.C. at 610, 685 S.E.2d at 809 (internal quotation marks omitted). Similarly, the jury was instructed in this case that they could infer malice from conduct showing a total disregard for human life. That charge is just as much as a "half-truth" as the deadly weapon charge because killing another in self-defense is unmistakably an activity that shows total disregard for human life. The jury needs context in which to evaluate an inferred malice charge and the general permissive inference instruction provides that context. Since the jury did not receive that context due to defense counsel's deficient performance, it is highly likely that the jury followed the trial judge's instructions and inferred malice, which amounts to a showing of prejudice.

Finally, defense counsel made it clear that Applicant's defense strategy was to establish involuntary manslaughter, which in the simplest terminology is no malice murder. The trial court refused to charge involuntary manslaughter due to the unlawful possession of a weapon, which was upheld by the South Carolina Court of Appeals. Absent this element, Applicant submits that his entire case hinged on his lack of express malice towards the victim, thus, the erroneous inferred malice instruction contributed to the jury's verdict in light of the evidence presented.

Respectfully submitted,

Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

January 23, 2018

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jeanette W. Gridine
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Jamaal Hinson (SCDC #325190), Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2015CP4003926 **ORDER OF DISMISSAL**

RICHLAND COUNTY
FILED
2020 JUN -1 AM 10:45
JEANETTE W. WALKER
C.C.P., G.S., & F.C.

This matter comes before the Court by way of Application for Post-Conviction Relief ("PCR Application") filed on June 29, 2015, and amended on July 26, 2017 and January 9, 2018. Respondent filed its Return on January 15, 2016. An evidentiary hearing was conducted on January 24, 2018 at the Richland County Judicial Center. Applicant was present along with his attorney, Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General Jessica E. Kinard, Esquire.

For the reasons set forth below, the Application for Post-Conviction Relief is DENIED; and this matter is DISMISSED WITH PREJUDICE.

PROCEDURAL HISTORY

Applicant is currently incarcerated at the South Carolina Department of Corrections ("SCDC") pursuant to orders of commitment from the Richland County Clerk of Court. During its April 2010 term, the Richland County Grand Jury indicted Applicant for murder (2010-GS-40-00829). Applicant retained Eleanor Cleary, Esquire ("Trial Counsel") to represent him on this charge.

On November 14, 2011, Applicant proceeded to jury trial before the Honorable

DeAndrea G. Benjamin. On November 18, 2011, following deliberations, the jury convicted Applicant as indicted. Judge Benjamin sentenced him to serve forty years' imprisonment at SCDC.

Applicant timely filed a notice of appeal, and Reid T. Sherard, Esquire ("Appellate Counsel"), perfected the appeal on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. *See State v. Hinson*, Op. No. 2014-UP-113 (S.C. Ct. App., filed March 19, 2014). Applicant filed a petition for rehearing, which was denied on May 20, 2014. He then filed a petition for a writ of certiorari, asking the Supreme Court of South Carolina to review the decision of the Court of Appeals. His petition was denied by Order dated November 20, 2014. The Remittitur was issued on June 2, 2015.

On June 29, 2015, Applicant filed the instant PCR Application. In it, he alleges that both Trial Counsel and Appellate Counsel rendered ineffective assistance in their representation of him. Specifically, Applicant contends that Trial Counsel was deficient in her failure "to properly prepare Applicant prior to trial" and failure "to call witnesses and utilize evidence." He alleges that Appellate Counsel failed "to raise all meritorious issues on appeal." In an amendment filed on July 26, 2017, Applicant expounded on his original allegations as follows:

> 1. Ineffective assistance of trial counsel for failing to properly represent Applicant in the handling of the State's witnesses. Specifically, but not limited to the following:
> (a) Devan Bailey: Failing to conduct cross-examination.
> (b) Derrick Diamond: Failing to object to leading and reading of a statement on re-direct examination.
> (c) Matthew Ellis: Failure to object to opinion testimony regarding murder being the appropriate charge and eliciting testimony regarding the intentional nature of the shooting. Ineffective assistance for opening the door to prejudicial testimony regarding Applicant.
>
> 2. Ineffective assistance of trial counsel for failing to be attentive and object to line of questioning that resulted in Applicant

being questioned about a prior bad act (shooting).

3. Ineffective assistance of trial counsel for failing to properly present the defense of self-defense, which was demonstrated by the following:
(a) Failing to properly address prior difficulties.
(b) Failing to properly address Applicant's knowledge that victim had a gun and for being "thrown for a loop" by the Court's ruling(s) on character.
(c) Giving the State a complete preview of the defense and arguments, thus allowing the State to argue successfully against it throughout trial and allowing the Court to conclude that the defense conceded self-defense.

4. Ineffective assistance of trial and appellate counsel for failing to argue applicable and favorable cases regarding involuntary manslaughter. Ineffective assistance of trial counsel for "anticipating" and not obtaining a charge on involuntary manslaughter.

In a final amendment filed on January 9, 2018, Applicant cited *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), *State v. Mattison*, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981), and *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016), in adding the allegation that Trial Counsel was ineffective "for failing to object and/or enter an exception to the inferred malice instruction." Applicant also filed a Memorandum on January 25, 2018, further explaining his final amendment to the PCR Application.

The Court has had the opportunity to review the record in its entirety (including the trial transcript, records from the Richland County Clerk of Court, and records from the South Carolina Department of Corrections) and analyze the pleadings (including the PCR Application, its amendments, its supporting memorandum, and the State's Return) and has heard the testimony and arguments presented at the evidentiary hearing. The Court has also had the opportunity to observe each witness who testified at the evidentiary hearing, to closely pass upon

their credibility, and to weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. §17-27-80 (2003).

FINDINGS OF FACT: TRIAL TESTIMONY

At the time of the incident Applicant was dating Lauren Banks ("Banks"), who, unbeknownst to Applicant, lived on the same street as Anthony Salley ("Victim") in the Blythewood area of Richland County. Applicant slept at Banks' home on the evening of January 15, 2010, and, the following morning, borrowed Banks' car to sell and deliver marijuana around town. While leaving the neighborhood, Applicant saw Victim nearby with Richard Thomas ("Thomas"), a man with whom Applicant had a contentious relationship. He and Thomas exchanged verbal threats, then Applicant left to drive around town.

During his route, Applicant encountered Devan Bailey ("Bailey"), Derrick Diamond ("Diamond") and Quinton Emerson ("Emerson") at a gas station. Bailey asked Applicant for some marijuana and was told to meet Applicant at Banks' house instead of conducting the transaction at the gas station. Applicant testified that he went back to Banks' home and returned the car to her because "the brakes went out" on it.

When Bailey arrived at Banks' house, Applicant asked for a ride to his home, saying that he needed to go there to retrieve the marijuana (although he testified that he was actually going there to retrieve his gun). The trio – with Emerson driving – took Applicant to his home; Applicant gave Bailey the marijuana; and the trio took Applicant back to Banks' home.

Immediately after leaving Banks' home, Bailey made a phone call to Applicant asking for a cigar to use for smoking the marijuana. The trio returned to the area, but instead of driving back to Banks' house, Emerson stopped his vehicle in front the driveway of Victim's home. At the time, Victim was sitting in a car in the driveway with his girlfriend, Andina Lee ("Lee"), and

Emerson's car blocked them in. Bailey exited Emerson's vehicle, phoned Applicant to tell him where he was, and struck up a conversation with Victim. Applicant, armed with his gun, emerged from Banks' house and walked towards Bailey and Victim.

Applicant testified that as he approached Bailey and Victim, Victim began walking towards him. According to Applicant, as Victim neared, he pulled out his gun and aimed it at Victim to scare him away. Applicant claims that Victim verbally egged him on and eventually punched him, causing him to drop the gun. As they began fighting, Lee grabbed the gun but later threw it down. After the fight ended, Applicant grabbed the gun again and began to walk away; however, he noticed that Victim was again walking towards him, which scared him and caused him to flinch. Applicant testified that the "flinch" caused him to accidentally pull the gun's trigger and shoot Victim. He also admitted that he didn't know Victim to carry a gun.

Applicant's testimony was contradicted by other witnesses, who stated that as Applicant approached Victim and Bailey, it was Applicant who was egging on the trouble, saying things like, "Yes, you bitch... This is exactly what I want." Applicant had his gun pointed at Victim and "racked the gun" while pointing it at Victim's head. The State's witnesses testified that Victim hit Applicant first, knocking the gun from his hand, and the two began to fight. Lee did pick up the gun but then threw it away. The witnesses stated that the fight ended when Victim, after having been punched in the head, face and chest, stopped fighting back. Applicant then instructed Bailey, who has still standing nearby, to "Bust him!" When Bailey didn't, Applicant grabbed the gun from the ground and shot Victim in the abdomen.

It is undisputed that Victim died of the gunshot wound inflicted by Applicant. It is also undisputed that Applicant ran from the scene of the incident, eventually left town, and was

ultimately arrested in Georgia. Bailey testified that while Applicant was still in South Carolina, they met in person and Applicant wanted them to "get their story straight."

In addition to Applicant testifying at trial, Trial Counsel argued to the jury that Victim's death was an accident. Trial Counsel also argued the lack of malice aforethought in Applicant's actions, meaning that he was not guilty of murder, and that Applicant acted in self-defense. Ultimately, the jury found Applicant guilty of murder – the only charge submitted to them for consideration.

CONCLUSIONS OF LAW AND EVIDENTIARY HEARING TESTIMONY

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for PCR alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland,* 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State,* 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing

professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18. In the absence of sufficient proof, the PCR Application must be denied.

I. Failure to Call Witnesses

Applicant's first argument is that Trial Counsel was ineffective for failing to call witnesses and to utilize evidence at trial. Specifically, Applicant contends that Trial Counsel should have called his girlfriend, his girlfriend's sister, and his friend Raymond Asbury, to testify at trial about Applicant's character. The Court disagrees that this amounts to ineffective assistance of counsel.

The law is well settled on this issue.

> [The South Carolina Supreme] Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); *see also Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records).

Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540.

Here, only Applicant and Trial Counsel testified at the evidentiary hearing. Applicant did not offer the testimony of any other witnesses, any affidavits from them, or any other evidence of what their trial testimony might have been. In addition, Applicant admitted during the evidentiary hearing that he only provided Trial Counsel with the name of a single witness, Shanequa Lee. Because the Court cannot be left to speculate as to what the witnesses' testimony might have been; therefore, this portion of the PCR Application must be denied. Similarly, because Applicant failed to specify which evidence he believes Trial Counsel should have introduced at trial, that portion of the PCR Application must also be denied.

II. Trial Counsel's Handling of Witnesses

Next, Applicant contends that Trial Counsel was ineffective in her treatment of the State's witnesses at trial. He argues that Trial Counsel failed to properly ask questions of, or object to questions posed to, three witnesses. Again, the Court disagrees.

A. Cross-Examination of Devan Bailey

With respect to Bailey, Applicant argues that Trial Counsel was ineffective for failing to cross-examine him at trial. However, at the evidentiary hearing, Trial Counsel testified that she made the decision not to ask questions of this witness because his testimony could have been harmful to Applicant's defense. According to Trial Counsel, Bailey had given multiple conflicting statements to law enforcement, which could have been detrimental to the case. In addition, she believed that Bailey's testimony had been favorable to Applicant; so she didn't

want to cross-examine him and, thus, give the State the opportunity (in re-direct examination) to undo the benefits of his initial testimony.

The law is clear that counsel must be given leeway to make strategic decisions in representing their clients' interests without being scrutinized for doing do. *See, e.g., Strickland*, 466 U.S. 668, 89 ("[j]udicial scrutiny of counsel's performance must be highly deferential"). "Where trial counsel articulates a valid reason for employing certain trial strategy, counsel will not be deemed ineffective." *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Here, the Court finds that Trial Counsel's strategy was absolutely reasonable under the circumstances. Where there appears to be nothing to gain – and only a potential loss – in the questioning of a witness, it is reasonable not to engage the witness.

Based on the foregoing, Applicant has failed to demonstrate that Trial Counsel was ineffective in this regard. In addition, Applicant put forth no evidence whatsoever to demonstrate any prejudice he may have suffered as a result of Trial Counsel's strategic decision. Therefore, this portion of the PCR Application must be denied and dismissed with prejudice.

B. Derrick Diamond

Next, Applicant contends that Trial Counsel was ineffective for failing to object during the Diamond's testimony. He argues that the State posed many leading questions to Diamond and inappropriately published portions of Diamond's written statement to the jury, all of which was objectionable. Trial Counsel testified that although, in hindsight, she cannot recall why she did not object to these actions, she also does not believe that her failure to do so was harmful to Applicant's case.

In order to prevail in a PCR action, the applicant must not only demonstrate that his counsel was deficient, but also must prove that the deficiency resulted in prejudice. *See, e.g.,*

Strickland, 466 U.S. 668. In this case, while Trial Counsel acknowledged no specific reason – strategic or otherwise – for failing to object, the Court cannot make a *res ipsa loquitor*-style conclusion that the failure amounts to a deficiency. However, even assuming error in the failure to object, there is no evidence that Applicant suffered resulting prejudice. In fact, the Court agrees with Trial Counsel's assessment that the statement and testimony were not particularly detrimental to Applicant's case. In fact, the testimony corroborates portions of Applicant's trial testimony. Without proof of deficiency and prejudice, this allegation must be denied and dismissed with prejudice.

C. Matthew Ellis

Applicant's next complaint is that Trial Counsel should have objected to opinion testimony given by Sergeant Matthew Ellis ("Sgt. Ellis") of the Richland County Sheriff's Department, who was involved in the investigation of this case. Sgt. Ellis testified that "murder ... is the appropriate charge for this case," and later recounted a conversation between himself and Bailey, testifying that Bailey said that he "could tell by [Applicant's] eyes ... something was up." Trial Counsel conceded that the opinion testimony was inappropriate, but she explained the second portion by explaining her strategy leading up to the testimony.

The Court finds Sgt. Ellis's opinion about the "appropriate charge" to have been harmless, and Applicant has provided no evidence to the contrary. Trial Counsel is correct that it is within the jury's province to determine whether the accused is *guilty* of the crime charged, but the determination of *which crime, if any, to charge* is within the province of law enforcement.[1] Next, as to the testimony about Applicant's appearance, Trial Counsel agrees with Applicant that it was harmful to his defense because it suggests that he acted with malice. However, Trial

Counsel also explained that she "opened the door" to this testimony in her attempt to elicit testimony helpful to Applicant – that the incident was an accident. Thus, it was an inadvertent side effect of a valid trial strategy articulated by Trial Counsel. Moreover, there has been no showing of prejudice. Therefore, these allegations must be denied and dismissed with prejudice.

III. Prior Bad Act Testimony

Applicant alleges that Trial Counsel was ineffective for failing to be attentive at trial, resulting in her failure to object to the State questioning Applicant about prior bad acts. Specifically, Applicant contends that Trial Counsel should have objected when, on cross-examination, the State asked Applicant whether he had ever shot at anyone. The Court disagrees.

Under normal circumstances, such a question would be objectionable. It was not under these circumstances. "Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except ... [e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same..." Rule 404(a), SCRE. In this case, during his direct examination Applicant volunteered testimony that he had never shot anyone before. That testimony "opened the door" for the State's questions. In fact, this issue was raised and ruled on by the trial court, even in the absence of a contemporaneous objection by Trial Counsel. Therefore, any failure to object was harmless.

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[1] *See also* Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions of inferences which (a) are rationally based on the perception of the witness...")

Applicant has failed to demonstrate any deficiency in the actions of Trial Counsel. He has also failed to put forth evidence of any resulting prejudice.[2] In fact, the trial court curtailed the State's questioning to protect Applicant, which effectively ended that line of questioning. Without evidence of Trial Counsel's deficiency or any resulting prejudice, this allegation must be denied and dismissed with prejudice.

IV. Self-Defense

Next, Applicant argues that Trial Counsel was ineffective for failing to properly present the defense of self-defense at trial. Specifically, he contends that Trial Counsel failed to address the prior difficulties between Applicant and Richard Thomas, failed to properly address Applicant's knowledge that Victim had a gun, was improperly "thrown for a loop" by the trial court's ruling on character evidence, and inappropriately gave the State a preview of Applicant's defense. The Court disagrees that any of this amounts to ineffective assistance of counsel.

Both Trial Counsel and Applicant testified at the evidentiary hearing that Applicant had prior difficulties with Victim's friend Thomas, not with Victim himself. Applicant also testified at trial that he and Thomas did not get along, that he knew Thomas to carry a gun and brag about killing people, and that he had previously exchanged threats with Thomas. Furthermore, Applicant testified at trial in detail regarding a previous fight he had with Thomas, during which Applicant pistol-whipped Thomas. Applicant did not make any similar claims about Victim. Instead, Applicant testified at trial that he didn't really know Victim and had little prior involvement with him. He buttressed this testimony during the evidentiary hearing when he testified that he had no ill will towards Victim and that he armed himself because of difficulties with Thomas, not Victim. Therefore, Applicant's claims that Trial Counsel (1) failed to address

[2] To the extent that Applicant suffered any detriment, it appears owing to his own testimony and not to the actions or inactions of Trial Counsel.

prior difficulties with Victim, and (2) failed to address Applicant's knowledge that Victim had a gun, are meritless.

With respect to the trial court's rulings on character evidence, Trial Counsel repeatedly argued to the trial court that she should be permitted to introduce evidence of Victim's character, specifically that Victim was known to carry a gun. Those arguments were denied by the trial court, finding if she did introduce such evidence that would consequently open the door for the State to introduce evidence of Applicant's character. Whether Trial Counsel was "thrown for a loop" by the ruling is immaterial. She repeatedly raised and argued the issue, only to be rebuffed by the trial judge. Based on the foregoing, the Court finds that Trial Counsel's conduct was reasonable under the circumstances, and Applicant has failed to establish any deficiency.

With respect to Applicant's allegation that Trial Counsel was ineffective for giving the State a complete preview Applicant's defense and arguments, Applicant has, once again, failed to establish any deficiency. Trial Counsel made arguments in favor of self-defense and accident at every stage of the trial in an effort to show the need for evidence of Victim's character. Without those arguments, her arguments about character evidence would have been baseless. It is evident that Trial Counsel made a reasonable strategic decision on this issue, and Applicant has shown no deficiency.

Not only has Applicant failed to show any deficiency in any of the three issues, but he has also failed to demonstrate that he suffered any resulting prejudice. As to Victim's propensity for carrying a weapon, Applicant testified at trial that he didn't have any such knowledge. So even when given the opportunity to introduce the evidence (despite Trial Counsel's alleged failures), Applicant didn't do so. And as to Applicant's defenses, the trial jury was instructed on both self-defense and accident, thereby allowing them to consider both theories during their

deliberations. Given that the jurors were presented with instructions with respect to both of these defenses, there is no indication the result of the proceeding would have been different but for Trial Counsel's alleged errors. Based on the foregoing, these allegations must be denied and dismissed with prejudice.

V. Involuntary Manslaughter

Applicant's fourth argument is that both Trial Counsel and Appellate Counsel were ineffective for failing to argue "applicable and favorable cases" regarding involuntary manslaughter. Specifically, he argues that Trial Counsel should not have anticipated that the trial court would charge the jury on the law of involuntary manslaughter but should have ensured that the trial court did so. No specific allegations are made as to Appellate Counsel.[3] Nevertheless, the Court disagrees with Applicant's contentions.

The record reflect that Trial Counsel did, in fact, request that the jury be permitted to consider involuntary manslaughter as an alternative to murder. In fact, there was a detailed discussion at trial, outside of the jury's presence, regarding the applicability of involuntary manslaughter to the facts presented in this case. Case law was presented both by the State and by Trial Counsel.[4] Armed with that information and the arguments of counsel, the trial court ruled that involuntary manslaughter would not be presented to the jury.

There is no evidence that the ruling of the trial court resulted from any deficiency on the part of Trial Counsel. In addition, Applicant has failed to indicate which "applicable and favorable cases" he believes Trial Counsel overlooked. Based on the record – and without any specificity in Applicant's allegations – the Court finds that neither Trial Counsel nor Appellate

[3] In fact, no evidence or testimony were offered as to any allegations against Appellate Counsel regarding any issue.
[4] These cases include, but are not limited to, *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006), *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994), and *State v. Burris*, 334 S.C. 256, 513 S.E.2d 104 (1999).

Counsel was deficient in this regard. Moreover, without evidence of any resulting prejudice, this allegation must be denied and dismissed with prejudice.

VI. Inferred Malice

Applicant's final argument is that Trial Counsel was ineffective for failing to object to the trial court's jury instruction on inferred malice. Specifically, Applicant contends Trial Counsel should have objected when she discovered that the trial court's proposed jury charge lacked any discussion of permissive inference of malice, as discussed in *State v. Mattison*, 276 S.C. 235, 277 S.E.2d 598 (1981). The Court disagrees.

Applicant correctly relies on *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016), in support of his argument. In *Gibson*, a PCR action following the petitioner's murder conviction, the appellate court reaffirmed the necessity of the "permissive inference" language in charging a jury on malice. *Id.* In that case, trial counsel was found to be deficient for failing to object to the "complete omission" of language regarding permissive inference because "slight deviation" is permitted from the language suggested in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), but complete omission is not. *Id.* at 265, 786 S.E.2d at 124. In addition, because there was "little [other] evidence of malice aside from the use of a gun," the appellate court found that the petitioner must have been prejudiced by the error. *Id.* at 266, 786 S.E.2d at 124.

However, while Applicant relies on correct law, his application to the facts of this case is misguided. Here, there was no "complete omission" of permissive inference in the jury charge; rather, it was included. The trial court charged that malice may be express or inferred, that malice may be inferred from the facts and circumstances, that malice may be inferred from conduct showing a total disregard for human life – most of the language suggested by *Elmore* and no more than a slight deviation therefrom. Therefore, Trial Counsel was not deficient for

failing to object. *See, e.g., State v. Adkins*, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003) ("the substance of the law is what must be charged to the jury, not any particular verbiage").

In addition, Applicant has not demonstrated that he suffered prejudice as a result of this slight deviation from *Elmore*. Unlike the facts in *Gibson*, there was substantial other evidence of Applicant's malice presented at trial. At trial, witnesses testified that Applicant had referred to Victim as "a pussy," that Applicant disliked Victim, that as Applicant approached Victim he called him "a bitch ass n****r," that immediately before the fight Applicant said "this is exactly what I want," that Applicant instructed Bailey to shoot Victim, and that Applicant "racked the gun" before firing it at Victim to intimidate him. It is also uncontradicted that Applicant and Victim engaged in a fist fight immediately prior to the shooting, with Applicant being the "winner" of the fight. Here, there is overwhelming evidence of malice such that, even if Trial Counsel erred in failing to object, there is no evidence that her error "contributed to the verdict based on all the evidence presented to the jury." *Gibson*, 416 S.C. at 265, 786 S.E.2d at 124 (citations omitted). Therefore, this allegation must be denied and dismissed with prejudice.

CONCLUSION

The Court finds that Applicant has not established any constitutional violations or deprivations that would require that his PCR Application be granted. Therefore, this PCR Application is denied and dismissed with prejudice in its entirety.

Applicant must file and serve a notice of appeal, if any, within thirty (30) days from the receipt by counsel of written notice of entry of this judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an applicant has a right to the assistance of appellate counsel in seeking review of the denial of post-

conviction relief. Rule 71.1(g) of the South Carolina Rules of Civil Procedure provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant is directed to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS, THERFORE, ORDERED that the Application for Post-Conviction Relief is DENIED and DISMISSED with prejudice.

IT IS FURTHER ORDERED that Applicant shall be remanded to the custody of the South Carolina Department of Corrections to complete the service of his sentence.

AND IT IS SO ORDERED.

Jocelyn Newman
Circuit Court Judge

May 28, 2020
Columbia, South Carolina.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-40-03946

JAMAAL HINSON (SCDC #325190)

PLAINTIFF(S)

STATE OF SOUTH CAROLINA

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** *(CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** *(CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award: ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

RICHLAND COUNTY FILED 2020 JUN -1 AM 8:45

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Jocelyn Newman
Circuit Court Judge

2757
Judge Code

MAY 28, 2020
Date

For Clerk of Court Office Use Only

This judgment was entered on the 1st day of June, 20 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT Jeanette W. McBride

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

WITNESSES

(S) Lindler - RCSD

ARREST WARRANT NUMBER

M237686

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: APR 14 2010

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2010-GS-40- 829

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

April TERM 2010

154

THE STATE
vs.

Jamaal **Hinson**

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

1380

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on April 14, 2010, the Grand Jurors of Richland County present upon their oath:

MURDER

That Jamaal Hinson did in Richland County on or about January 16, 2010, feloniously, willfully and with malice aforethought, kill one Anthony Salley by means of a gunshot wound and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

W. Barry Giese

Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)
STATE)
VS. Jamaal Hinson)
AKA:)
Race: Black Sex: Male Age:)
DOB: [redacted]90 SS#: [redacted])
Address: [redacted])
City, State, Zip:)
DL# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010 -GS- 40 - 829
A/W#: M237686
Date of Offense: 1-16-10
S.C. Code §: 16-3-10
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: Murder
in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☑ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant initial)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor | 77500 SC Bar # | Defendant | Attorney for Defendant | SC Bar #

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections**, ☐ **County Detention Center,** for a determinate term of 40 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered** PTUP _____

Total: $_____ plus 20% fee: _____ $_____ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED ☐

☐ set by SCDPPPS _____ Attend Voc. Rehab. or Job Corp.

Recipient: _____ May serve W/E beginning _____
Substance Abuse Counseling ☐

*Fine:

§14-1-206 (Assessments 107.5%)		$_____
§14-1-211(A)(1) (Conv. Surcharge)	$100	$_____
§14-1-211(A)(2) (DUI Surcharge)	$100	$_____
§56-5-2995 (DUI Assessment)	$12	$_____
§56-1-289 (DUI Breath Test)	$500	$_____
§35.13 (Public Def/Prob)	$25	$_____
§73.3, 1B TP (Law Enforce. Funding)	$25	$_____
§33.7, 1B TP (Drug Court Surcharge)	$100	$_____
§50-21-114(BUI Breath Test Fee)	$50	$_____
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$_____
3% to County (if paid in installments)		$_____
§90.11 TP (SCCJA Surcharge)	$5	$_____
TOTAL		$_____

Random Drug/Alcohol Testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ Beginning _____
$ _____ paid to Public Defender Fund
Other: _____
$25 $ _____

☐ Appointed PD or appointed other counsel, §35.13 TP
☐ Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE _____

Clerk of Court/Deputy Clerk Jeanette McBride JJP
Court Reporter: McCurdy

Judge Code: 2161
Sentence Date: 11-18-11

CERTIFIED TRUE COPY OF ORIGINAL FILED,
Jeanette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA