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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2019-000938

THE STATE,

Respondent,

vs.

DEVIN JAMEL JOHNSON,

Appellant.

OPINION NO. 5950

PETITION FOR REHEARING PURSUANT TO RULE 221, SCACR

Respondent respectfully asks this Court to grant a petition for rehearing pursuant to Rule 221, SCACR, because this Court's November 9, 2022 published opinion reversing Appellant's Charleston County murder conviction in *State v. Devin Johnson*, Op. No. 5950 (S.C. Ct.App., Nov. 9, 2022) (Howard's Adv. Sh. No. 40 at 12-29), may have overlooked, misapprehended, or misconstrued the following salient facts or points of law:[1]

I. First, Respondent acknowledges that Court correctly stated that:

> The doctrine of accomplice liability arises from the theory that 'the hand of one is

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[1] While this Court did not address the other two issues presented by Johnson because the Court reversed his conviction based upon the trial judge's giving of the accomplice liability instruction, *id.* at 29 n.13, Respondent submits that the trial judge's rulings on those issues was correct for the reasons set forth on pp. 10-36 of the Final Brief of Respondent.

> the hand of all.' " *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014) (quoting 23 S.C. Jur. *Homicide* § 22.1 (2014)). "Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Id.* "A person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act to be guilty under a theory of accomplice liability." *Id.* at 472-73, 758 S.E.2d at 910. "Accordingly, proof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct." *Id.* at 473, 758 S.E.2d at 910. "If 'a person was "present abetting while any act necessary to constitute the offense [was] being performed through another," he could be charged as a principal—even "though [that act was] not the whole thing necessary." ' " *Id.* (alterations in original) (emphases omitted) (quoting *Rosemond v. United States*, 572 U.S. 65, 72, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014)).

Johnson, Howard's Adv. Sh. No. 40 at 24. *See also Butler v. State*, 435 S.C. 96, 97-98, 866 S.E.2d 347, 348 (2021).

Nevertheless, Respondent respectfully submits that the Court overlooked that while the prosecution's theory was that Johnson fired the fatal shot, the direct and circumstantial evidence presented at trial supported the requested instruction on this legal principle. True, the evidence presented was that Johnson had a motive to murder because the victim owed him money, he had access, he set up the murder, and he drove to the apartment complex where the murder occurred. Yet, this was hardly the only evidence before the jury.

The text messages he sent to Stevens not only show his malicious intent, these messages also demonstrate his efforts to secure an accomplice to assist him in killing the victim. His text messages clearly reflect that he was recruiting Stevens to assist in the murder, for whatever reason. Although his initial messages seem innocuous, the one sent at 4:37 p.m. unquestionably revealed his plan when he said, "*hey, I go wet dude ass up tonight*," since the State's evidence was this means to kill someone, The texts also seem to reflect that his level of anxiety increased

each time he did not receive a satisfactory response from Stevens, until at 9:34 p.m., when he told Stevens, "*I can't wait on you. I gotta handle my biz.*" ***R. 356-63*** (emphasis added).

Further, the Court may have overlooked that a very reasonable inference that jurors could infer from the surveillance video and still photos is that he found a person to assist him and that they murdered the victim while acting together, aiding and abetting one another. This evidence reflects that Johnson backed Tenika's blue Camry into a parking place some distance away from the murder scene, which enabled him to quickly leave the complex after the murder. (It was also an unsuccessful effort to avoid detection). He and the unidentified accomplice then walk up to the complex. They are thereafter seen running back to the Camry together, jumping in and fleeing the complex seconds after the shooting occurred. *See State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70 (Ct.App. 2010) (the State can prove "the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, … by circumstantial evidence and the conduct of the parties"). Because there was neither a video of the shooting nor a testifying eyewitness, the State did not have proof as to whether Johnson or his accomplice fired the fatal shots, only that one of them did so.

So, while a very reasonable inference is that Johnson shot the victim, in the absence of a video or an eyewitness to the shooting, it would be equally reasonable for jurors to infer that the other individual was the shooter or was otherwise present, aiding and assisting him in the murder.[2] Thus, the Court may have misapprehended, see *Johnson*, Howard's Adv. Sh. No. 40 at

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[2] As the State correctly observed below, he might have needed someone to provide him a gun because the murder weapon was never found; he could have needed someone to motivate or reassure him, since the defense elicited evidence that he was nonviolent, or he might not have wanted to murder "his sister's boyfriend on the doorstep." ***R. 506-07***.

28, that the evidence was equivocal "as to whether Johnson or [the unknown individual] was the shooter,"[3] and that the trial judge did not abuse his discretion by instructing the jury on accomplice liability. *Id.* The Court's contrary finding draws a conclusion no one can know for certain. Indeed, the Court may have overlooked that this is very similar to the conflicting evidence in *State v. Langley*, 334 S.C. 643, 648-49, 515 S.E.2d 98, 100-01 (1999) (evidence that defendant and co-defendant were seen together, circumstantial evidence placing defendant at the scene of the crime, and eye-witness testimony, was sufficient to warrant submitting the case to the jury on several theories of liability, including the hand of one is the hand of all theory).

II. The Court correctly states that "[i]f any evidence supports a jury charge, the trial court should grant the request." *Johnson*, Howard's Adv. Sh. No. 40 at 23 (citing *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004)). See also *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (when a party requests the trial judge charge a correct and applicable principle of law, the court must charge it) (citation omitted). However, the Court may have overlooked that, in finding the accomplice liability instruction should not have been given, the Court erroneously departed from this correct standard and, instead, focused heavily on the State's theory of the case. See *Johnson*, Howard's Adv. Sh. No. 40 at 27-28. In doing so, the Court committed the same error the trial judge committed in the original trial. *See id.* at 14.4

III. Moreover, in focusing on the prosecution's evidence, the Court may have misapprehended that the prosecution's evidence was that Johnson's reference to Creep in his custodial statement

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[3] This misapprehension is glaring since the Court correctly states "[n]o No eyewitness testified that he or she saw the Victim being shot," *Johnson*, Howard's Adv. Sh. No. 40 at 27, and there was no video surveillance of the shooting.

[4] This error was accentuated by the discussion of how the judge ruled in the first trial, which was irrelevant to this trial.

was a lie, designed to mislead the officers investigating the case. As argued in the Final Brief of Respondent, p. 7, Johnson told officers that "Creep" had a tattoo, and that officers could find him by going to a Summerville pool hall where a man known as "Midget" could help them locate Creep. Sgt. Osborne later tracked down a man in Summerville with the nickname "Creep." Yet, this man was eliminated as a suspect because he did not have a tattoo and he had a different phone number from the "Creep" in Johnson's cell phone directory. R. ***234-35; 242-43; 272-74;*** State's Ex. 80. Therefore, officers did not simply "not believe this was the person Johnson claimed was with him when Victim was shot," *Johnson*, Howard's Adv. Sh. No. 40 at 13, they affirmatively eliminated the "Creep" to whom Johnson referred as a suspect. So, the other person present when the victim was murdered is, like his role in the murder, still unknown to this day.

Also, the Court's finding that "[t]he Record contains no evidence that Johnson recruited anyone to actually shoot Victim; any evidence of recruiting as shown in the text messages is to assist or accompany Johnson," *Johnson*, Howard's Adv. Sh. No. 40 at 28, may have overlooked that it is impossible for the prosecution, the defense, the trial judge, or this Court to know what precise role the unknown individual was recruited to play or played in the murder because there was neither an eyewitness nor a video of the shooting. All that is certain is that both men were present and, inferably, aiding and assisting one another in the commission of the murder.

Furthermore, it is obvious from the jury's question (Court's Ex. 10) "[D]oes the hand of one apply to the possession of a weapon during the commission of a violent crime[?]," that at least some juror(s) disagreed with this Court's conclusion. And, their subsequent acquittal of Johnson on the weapons charge when told it did not, *see R.* ***489-90; 492***, reflects that the jury may have convicted Johnson of murder even though it found that the unknown participant actually was the

shooter: *i.e.*, the murder conviction was based upon the jury's conclusion he was an accomplice to the actual shooter. Again, the evidence was equivocal, and the Court erred in finding otherwise. See *United States v. Hutul*, 416 F.2d 607, 620 (7th Cir. 1969) ("It is not the function of an appellate court to 'substitute our judgment for that of the jury' since 'under our system of justice, juries alone have been entrusted with (the) responsibility' of determining guilt or innocence" (citing *Weiler v. United States*, 323 U.S. 606, 611 (1945) (recognizing a Court cannot substitute its judgment for the jury's)).

IV. The Court may have also overlooked that its decision in *Wilds v. State*, 407 S.C. 432, 435, 756 S.E.2d 387, 388 (Ct. App. 2014), *cert. dismissed as improvidently granted*, (October 7, 2015), does not require reversal because, among other reasons, it is factually distinguishable.[5] Wilds was tried for armed robbery and murder. Both of his co-defendants testified to their participation in the robbery and testified that Wilds was the triggerman in the robbery. During deliberations, the jury sent a note to the trial court asking, "[I]f we say [Wilds is] guilty of murder, are we saying he of the three [alone] actually pulled the trigger?" Over objection, the trial court instructed the jury on accomplice liability. Subsequently, the PCR court found Wilds' appellate counsel ineffective for not challenging the instruction on appeal. *Id.* at 435-37, 756 S.E.2d at 388-89. This Court affirmed the PCR judge. The Court noted that the jury may have doubted the co-defendants' testimony, but found accomplice liability "may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." *Id.* at 439, 756 S.E.2d at 390. This Court found Wilds was prejudiced because the jury instruction was given in response to the jury's question, enabling

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[5] The Court's reliance upon *dicta* in *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011), which implied that a prosecution of a defendant under principles of accomplice liability was an "alternate theory of liability." *See Wilds*, 407 S.C. at 438-39, 450 SE2d at 390, is discussed *infra*.

it to unanimously find a verdict. *Id.* at 439, 756 S.E.2d at 391. Here, unlike *Wilds* but like the conflicting evidence in *Barber*, 393 S.C. at 236-37, 712 S.E.2d at 438-39, the State did not have proof as to whether Johnson or his accomplice fired the fatal shots, only that one of them did so. As a result, the evidence on this point was equivocal and supported an accomplice liability instruction.

V. Likewise, the Court may have overlooked that neither the South Carolina Supreme Court's decision in *State v. Washington*, 431 S.C. 394, 848 S.E.2d 779 (2020), nor this Court's decision in *State v. Campbell*, 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021), *cert. granted*, Sept. 8, 2022,[6] requires reversal of Johnson's conviction. The Court in *Washington* reversed the petitioner's voluntary manslaughter conviction because it found that he was prejudiced by the trial judge's jury charge on accomplice liability since there was no evidence to support it. 431 S.C. at 403, 848 S.E.2d at 784. *Washington* is factually distinguishable.

There was evidence in *Washington* that the petitioner was the shooter and there was evidence he was not the shooter. The only person who could have possibly been an accomplice was petitioner's uncle, Kinloch. *Id.* at 407, 848 S.E.2d at 786. The Court found that "there was no evidence Kinloch was armed with a firearm, and there was no evidence Kinloch shot Manigault. Kinloch was aggressively questioned as to whether he was armed and whether he shot Manigault. He denied both assertions." *Id.* at 409-10, 848 S.E.2d at 787. The Court held that the petitioner was prejudiced by the instruction because there was not overwhelming evidence that petitioner was the shooter and the charge "invited the jury to speculate" about whether Kinloch was the shooter in the absence of any proof thereof. *Id.* at 411, 848 S.E.2d at 788. Here, the evidence was equivocal as to whether Johnson or the unknown person was the shooter.

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[6] The State file its Reply Brief of Petitioner in *Campbell* on November 21, 2022. *See* https://ctrack.sccourts.org/public/caseView.do?csIID=75124 (last visited Nov. 23, 2022).

Likewise, even assuming *arguendo* that the Supreme Court does not reverse this Court's decision in *Campbell* and that decision stands, it is factually distinguishable from this case. In *Campbell*, this Court found although there was some evidence from which jurors could conclude that someone other than Campbell was the shooter, there was no evidence that the only person who could be his accomplice, Trivell Richardson, was the shooter. *Campbell*, 435 S.C. at 540-41, 868 S.E.2d at 420-21. Again, the evidence at Johnson's trial is equivocal on who shot the victim.

VI. In footnote 9 of its opinion, the Court acknowledges that "the State submits that Johnson's assertion of a due process violation misunderstands the function of the Due Process Clause because the appropriate inquiry is whether the trial court abused its discretion in giving an accomplice liability instruction because this instruction is not required by the Due Process Clause." *Johnson*, Howard's Adv. Sh. No. 40 at 23 n. 9. While this is correct, the Court goes on to state that "[t]he fact that Johnson mentioned that his due process rights were violated by the jury charge is of no matter." *Id.* In doing so, the Court may have overlooked that it agreed with Johnson's position that due process was violated by the trial judge giving the instruction. *Id.* at 29 (Johnson asserts the trial court violated his due process rights by instructing the jury on the theory of accomplice liability … We agree").

By agreeing with the assertion that there was a constitutional violation, the Court may have overlooked not only that this argument was not preserved because not presented below, see *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal"), but also – and far more importantly - that the claim of a due process violation fundamentally misunderstands the function

of the Due Process Clause. Rather, the appropriate inquiry is whether the trial judge abused his discretion in giving an accomplice liability instruction because this instruction is not required by the Due Process Clause. *See Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial.... But it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority") (citations omitted). *See also Strickland v. Washington*, 466 U.S. 668, (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause"); *cf. Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934) (a state rule of law "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar"). The Court in *Estelle v. McGuire*, 502 U.S. 62 (1991), makes it unerringly clear that:

> In reviewing an ambiguous instruction[,] ... we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. *Boyde v. California,* 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990). And we also bear in mind our previous admonition that **we "have defined the category of infractions that violate 'fundamental fairness' very narrowly**." *Dowling v. United States,* 493 U.S. 342, 352, 110 S.Ct. 668, 674, 107 L.Ed.2d 708 (1990). "**Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation**." *Ibid.*

McGuire, 502 U.S. at 72-73 (footnote omitted) (emphasis added). Accordingly, the Court may have overlooked that its Opinion erroneously found a violation of the United States Constitution where none was asserted at trial and none, in fact, exists.

VII. The Court found that Johnson was prejudiced by the accomplice instruction because

> The record establishes Victim died from being shot with a firearm. For the jury to acquit Johnson of the weapons charge, it must have found the State did not meet its burden of proving Johnson actually shot Victim and therefore, only found him guilty of murder due to the theory of accomplice liability. Therefore, the charge prejudiced Johnson.

Johnson, Howard's Adv. Sh. No. 40 at 28.

In so finding, the Court may have overlooked that it was both legally and factually improper to rely on that acquittal to find prejudice. First, the Court may have overlooked that this point was not properly before the Court on appeal, as a matter of well-settled state court appellate procure because Johnson did not allege any supposed inconsistency in the verdicts in his Statement of Issues on Appeal. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal"). Also, his brief does not mention inconsistent verdicts, whatsoever. While this Court has the authority to affirm based on any ground appearing in the record, *see* Rule 220(c), SCACR, "[a]n appellate court may not, of course, *reverse* for any reason appearing in the record." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000). So, the Court may have overlooked that the issue was not properly before it on appeal. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694.

Secondly, the Court may have overlooked that its reliance on "inconsistent verdicts" is an erroneous misapprehension of substantive state law, since "our supreme court has abolished the rule against inconsistent verdicts in this state. *State v. Alexander,* 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991)." *State v. Mitchell*, 399 S.C. 410, 422, 731 S.E.2d 889, 896 (Ct. App. 2012). Third, the Court's finding, once again, ignores that the evidence was equivocal as to whether Johnson or [the unknown individual] was the shooter. Therefore, the trial judge did not abuse his discretion by

instructing the jury on accomplice liability.

VIII. Additionally, the Court may have overlooked or misapprehended that the decision to give the accomplice liability instruction was not erroneous because it resulted in the submission to the jury of "an alternative theory of liability." First, Johnson's reliance this argument is not properly before the Court on appeal because, as noted in the Final Brief of Respondent at p. 41, fn. 31, he did not raise it at trial. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694. Second, the trial judge's submission of the accomplice liability instruction is consistent with *Barber*.

The Supreme Court in *Barber* stated that "an alternate theory of liability may ... be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber*, 393 S.C. at 236, 712 S.E.2d at 439. Although the Court's use of the term "alternate theory of liability" in *dicta* is erroneous and needlessly confusing for the reasons argued, *infra*, *Barber* supports the trial judge's decision to instruct jurors on accomplice liability. Like the conflicting evidence in *Barber*, 393 S.C. at 236-37, 712 S.E.2d at 438-39, the State did not have proof as to whether Johnson or the unknown individual fired the fatal shots, only that one of them did so.

IX. While this may be a matter for the Supreme Court to resolve, Respondent submits that this Court may have overlooked or misapprehended that accomplice liability is not and cannot be "an alternate theory of liability."[7] It appears that the reference to accomplice liability, or the hand one is the hand of all, as an alternate theory of liability" was first used by the Supreme Court in *Barber* and later adopted by this Court in *Wilds*. It should be jettisoned as inaccurate, unnecessarily

[7] Respondent argued this in the Final Brief of Respondent at pp. 44-46.

confusing, and misleading. The statement in *Barber* that "an alternate theory of liability may … be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact," *Barber*, 393 S.C. at 236, 712 S.E.2d at 439, was necessarily *dicta*. First, the Court in *Barber* held that the evidence supported an accomplice liability instruction. *Id.* at 236, 712 S.E.2d at 439.[8]

Second and of greater importance, accomplice liability is not and cannot legally be an alternative theory of liability under South Carolina law. The Court in *Barber* adopted the petitioner's erroneous and misguided assertion that accomplice liability is akin to a lesser included offense and should not be given based "on the theory the jury may believe some of the evidence and disbelieve other evidence." *Id.* at 236, 712 S.E.2d at 438-39 (citing *State v. Funchess,* 267 S.C. 427, 229 S.E.2d 331 (1976)).

Yet, the error in this position is plainly obvious. By its very definition, an alternate theory of liability, would be proof that Johnson was guilty of a different offense from murder, such as voluntary manslaughter. *See Liability*, Black's Law Dictionary (11th ed. 2019) ("The quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment"). Yet, charging jurors on accomplice liability does nothing of the sort. Rather, it is simply a different manner of proving a defendant's guilt of the charged offense - here, murder. It is similar to jury instructions on proximate causation, the voluntariness of a custodial statement, or a limiting instruction under Rule 404(b), SCRE.

The accomplice liability doctrine can be directly traced to the early common law

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[8] In reversing Johnson's original conviction this Court, too, implicitly found that accomplice liability is an "alternative theory of liability," as the analogy to the Supreme Court's decision in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001), makes clear. *See State v. Johnson*, 418 S.C. 587, 592-94, 795 S.E.2d 171, 174-75(Ct.App. 2016), *cert. denied* (Nov. 2, 2017).

distinction between principles in the first degree and principles in the second degree. A person is a principle in the first degree if he is the actor or absolute perpetrator of the crime while a principle in the second degree is someone who is present, aiding and abetting the *actus reus*. 4 William Blackstone, *Commentaries on the Laws of England* 34. The law has long held that those persons who are present at a crime aiding and abetting are as equally guilty as principles since at least the time of King Henry IV. *Id.*[9]

Over two centuries ago, the Supreme Court of South Carolina emphatically held in *State v. Fley*, 4 S.C.L. 338, 345 (2 Brev.) (S.C. Const.App. 1809) that:

> It is very clear that *a person aiding and assisting another in committing a murder, is to be regarded as a principal*, and that he may be indicted and punished, although the principal who really gave the mortal blow, or was otherwise the immediate instrument by which the murder was effected, had not been taken. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his own; and all are equally criminal. Fost. 351. *The distinction between principals in the first and second degree* has been exploded. It *is now a distinction without a difference*."

(Emphasis added). In *State v. Jenkins*, 48 S.C.L. 215, 226 (14 Rich.) (S.C.Const. App. 1867), the Court further explained that "[a]ll who are present concurring in a murder are principles therein, and the death, and the act which caused it, is, in the law, the act of each and of all. There is no distinction in the regard of the law, *in the degrees of their guilt*, or the measure of their punishment, *or the nature of their offence, founded upon the nearness or remoteness of their personal agency* respectively." (Emphasis added). *See also State v. Hunter*, 79 S.C. 73, 73, 60 S.E. 240, 240-41 (1908) (where the defense disputed the State's witness who claimed defendant fired the fatal shot, the Supreme Court affirmed the conviction because *the identity of the shooter was irrelevant* and

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[9] King Henry IV of England reigned 1399-1413.

the defendant was properly convicted as a principle since he was an aider and abettor). *Accord* 1 Bishop, *Commentaries* 470.

More recently, the Court reaffirmed that the absence of a distinction between principals in the first and second degree *sub silentio* in *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000), when it held that "[i]t is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *Id.* *See also State v. Leonard*, 292 S.C. 133, 136, 355 S.E.2d 270, 272 (1987) (same); *State v. Batchelor*, 377 S.C. 341, 345, 661 S.E.2d 58, 59-60 (2008) (same); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (same). Because South Carolina law does not recognize a distinction between liability as a principal in the first degree and liability as a principal in the second degree, and because an accused indicted as a principal may be convicted under accomplice principles, *id.*, the submission of a jury charge on accomplice liability cannot legally or logically create an alternative theory of liability. Nor should the jury be precluded from resolving all of the evidence for itself. See *Weiler*, 323 U.S. at 611; *Hutul*, 416 F.2d at 620. Thus, the reference in *Barber* implying that a charge on accomplice liability is a different theory of liability was necessarily inaccurate, unnecessarily confusing, and misleading *dicta* that does not and cannot require relief here. Rather, it should be corrected by the Supreme Court.[10]

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[10] As further support for the position that this language was *dicta*, Respondent notes that S.C. Code Ann. § 14-1-50 (2003) provides that the English common law applies in this state where it is not inconsistent with the laws of this state. Also, "the common law will not be impliedly changed, but only by clear and unambiguous legislative enactment will the settled rules of the common law be changed." *State v. Carson*, 274 S.C. 316, 319, 262 S.E.2d 918, 920 (1980); *accord Page v. Winter*, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962) ("It is not for this court to repudiate the common law rule because we may think it illogical or undesirable"). *But see Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) (the Supreme Court has the authority under extremely rare circumstances and for compelling need to substantially change the common law). Because

X. Finally, the Court may have overlooked that " '[a] defendant is entitled to a fair trial but not a perfect one.' " *Bruton v. United States*, 391 U.S. 123, (1968) (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)). *See also State v. Mizell*, 332 S.C. 273, 285, 504 S.E.2d 338, 345 (Ct.App.1998). For the previously argued reasons, this Court may have overlooked that Johnson received a fair trial. Accordingly, he was not entitled to relief.

CONCLUSION

Based upon the foregoing, Respondent would ask the Court to grant the Petition for Rehearing, pursuant to Rule 221, SCACR.

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November 28, 2022.

BY: _____
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

Barber did not address the common law rule abolishing the distinction between principles in the first degree and principles in the second degree, the language at issue must be considered *dicta*. *Id.* Of course, if the language in *Barber* relied upon in *Wilds* was not *dicta*, then *Barber* contravenes this well-settled South Carolina law.

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THE STATE,

Respondent,

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DEVIN JAMEL JOHNSON,

Appellant.

CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing, and Certificate of Service has been forwarded to Appellant's counsel, Susan B. Hackett, Esquire via email today, November 28, 2022 to shackett@sccid.sc.gov, and to her assistant Chris Stock, at cstock@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 28th day of November, 2022.

Angela Brown
Legal Assistant to William Edgar Salter, III
Senior Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

November 28, 2022

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

Re: The State v. Devin Jamel Johnson
Appeal from Charleston County
Appellate Case No: 2019-000938

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Petition for Rehearing Pursuant to Rule 221, SCACR along with proof of service in the above-referenced case.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General
S.C. Bar No: 4806

WES/abb
Enclosure

cc: Susan B. Hackett, Esquire (via email only)