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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Honorable R. Markley Dennis, Jr., Circuit Court Judge

Published Opinion No. 5950 (S.C. Ct. App. Filed November 9, 2022)
Appellate Case No. 2019-000938

THE STATE, ... PETITIONER

v.

DEVIN JAMEL JOHNSON, ... RESPONDENT.

APPENDIX

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The State, Respondent,

v.

Devin Jamel Johnson, Appellant.

Appellate Case No. 2019-000938

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5950
Heard April 7, 2022 – Filed November 9, 2022

REVERSED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General W. Edgar Salter, III, of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

KONDUROS, J.: Devin Jamel Johnson appeals his conviction of murder. He contends the trial court erred in admitting into evidence his statement to law enforcement, removing a juror midtrial, and instructing the jury on accomplice liability. We reverse.

FACTS/PROCEDURAL HISTORY

On June 8, 2011, at 10:18 p.m., Akeem Smalls (Victim) was shot while in the courtyard breezeway of Building C at Georgetown Apartments in Charleston County, South Carolina. He died a short time later as a result of being shot. When Victim was shot, he was just outside of an apartment where Sharmaine Johnson lived at the time. Sharmaine[1] was Johnson's sister and Victim's girlfriend. At the time of the shooting, Victim owed Johnson $420.

All four of the fired shell casings discovered at the crime scene were identified as 9mm FC Luger casings. Officers discovered an unfired FC 9mm bullet with Johnson's fingerprint on it in a drawer of a nightstand in Sharmaine's apartment.

Officers interrogated Johnson regarding Victim's shooting. During the interrogation, Johnson initially denied being in Charleston at the time of the shooting. After a few hours of interrogation, Johnson admitted he had been at Georgetown Apartments at the time Victim was shot. Johnson also indicated someone named Creep[2] was with him at the time of the shooting. Johnson stated he saw the shooting, claiming a person named Dee shot Victim and that Johnson and Creep fled the scene out of fear.

Subsequently, officers obtained a search warrant for Johnson's cell phone records, including his historical cell site location information. Verizon provided Johnson's cell phone records, which included call history logs and text messages. The company also supplied cell site location data for outgoing and incoming calls. A grand jury subsequently indicted Johnson for murder and possession of a weapon during the commission of a violent crime.

At trial, the State requested the trial court charge the jury "'the hand of one is the hand of all' . . . because it 'ha[d not] been able to identify a co-defendant.'" *State v. Johnson*, 418 S.C. 587, 591, 795 S.E.2d 171, 173 (Ct. App. 2016) (alteration in original). "The court denied the request, stating it did not 'buy' the State's rationale that the evidence showed two individuals were involved in the crime." *Id.* The

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[1] Sharmaine is also referred to as Shay in the record.

[2] Johnson told the officers he did not know Creep's last name or contact information but described a tattoo he had. He gave the officers the name of another person who knew Creep and through that person officers located a person known as Creep. However, officers did not believe this was the person Johnson claimed was with him when Victim was shot.

court explained that all of the testimony presented indicated Johnson was the shooter. *Id.* After deliberations began, "the jury asked, '[I]f the other individual pulled the trigger, can the defendant still be guilty?'" *Id.* at 592, 795 S.E.2d at 173 (alteration in original). The trial court determined its prior decision not to charge "the hand of one is the hand of all" was incorrect; Johnson disagreed. *Id.* at 592, 795 S.E.2d at 173-74. "[T]he trial court offered [Johnson] the opportunity to reargue his closing argument before [it] recharged the jury," but Johnson declined and moved for a mistrial. *Id.* at 592-93, 795 S.E.2d at 174. The trial court charged the jury on "hand of one, hand of all" and mere presence. *Id.* at 593, 795 S.E.2d at 174. After the recharge, Johnson asserted the evidence did not support the new charge. *Id.* The jury convicted Johnson of both offenses—murder and the possession of a weapon during the commission of a violent crime. *Id.* at 590, 795 S.E.2d at 172.

Johnson appealed, arguing the trial court erred in "instructing the jury concerning 'the hand of one is the hand of all' because the evidence did not support the instruction" and the timing of the instruction prevented Johnson from addressing the theory in his closing argument, "rendering the trial fundamentally unfair."[3] *Id.* at 588, 795 S.E.2d at 171-72. This court reversed his convictions, finding the trial court's decision to later give the charge fundamentally prejudiced Johnson because he "crafted his closing argument in reliance on the trial court's adamancy" during the charge conference that it would not give the charge. *Id.* at 598, 795 S.E.2d at 177. The court addressed only that issue because it was dispositive. *Id.* at 590, 795 S.E.2d at 172.

The State retried Johnson beginning on April 1, 2019.[4] At the outset of the trial, the court held a *Jackson v. Denno*[5] hearing on the admissibility of Johnson's

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[3] Johnson also argued "the trial court erred in (1) admitting text messages and historical cell service location information obtained from his cellular service provider by a search warrant" and (2) admitting his statement to investigators. *Johnson*, 418 S.C. at 588, 795 S.E.2d at 171.

[4] In between the time this court issued the remittitur following the first appeal and beginning of this trial in April 2019, a second trial began. At oral argument, both parties were unclear as to what transpired at the second trial other than the State believed it ended in a mistrial.

[5] 378 U.S. 368 (1964).

statement to David Osborne.[6] Johnson argued the statement was not admissible because it was involuntary due to a combination of factors: the length of time of the interview, his repeated requests for cigarettes, and references investigators made about his daughter. Following testimony from Osborne, the trial court found the statement admissible.

At trial, Tenika Elmore testified that at the time of Victim's death, she and Johnson lived together in Orangeburg. Elmore provided that at that time, she worked in North Charleston and Johnson would occasionally drive her or ride with her to work in her car, a blue 2008 Toyota Camry. The Camry was missing both passenger-side hubcaps. On the day of the shooting, Elmore, Johnson, and Johnson's six-year-old daughter traveled in Elmore's car to Charleston for Elmore to work. Johnson and his daughter dropped Elmore off, and she worked all day. Johnson was alone when he picked her up after work. Elmore believed he was supposed to pick her up at 11 p.m., but she said he was late, which was normal. After Johnson and Elmore picked up Johnson's daughter from his mother's house, they stopped at a gas station on the way back to Orangeburg. Elmore identified Johnson in photos shown to her during her testimony and confirmed that on that night, he was wearing the clothing shown in the photos. The video surveillance from the gas station showed Johnson wearing a white tank top[7] and dark pants on the evening of the crime.

Osborne testified that during law enforcement's investigation of Victim's killing, officers were interested in one portion of video surveillance from Georgetown Apartments showing a car backing into a parking spot and two men exiting the vehicle and walking toward Building C. Osborne indicated that about a minute before the shooting occurred, the two individuals walked towards the breezeway, which was the location of the shooting. The shooting occurred outside of the camera's view. Osborne provided that seconds after the shooting, the two individuals ran back to the car and fled the complex in it. He testified the pair was in a hurry when they came back to the car. He explained the vehicle depicted in the surveillance video was a blue Toyota Camry consistent with the color, make, and model of Elmore's car and both cars were missing the passenger side hubcaps. He provided he could tell the vehicle in the video was missing hubcaps because of

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[6] Osborne was a detective for the Charleston Police Department at the time of Victim's killing and investigated the case, which included interrogating Johnson. At the time of trial, he was no longer a detective; he was an assistant solicitor.

[7] The officers referred to the shirt shown in the video as a white tank top or "wife beater."

the difference in shininess around the wheel area on the two sides of the car. According to Osborne, the driver of the car wore a white tank top and black pants. Osborne testified the only people that could be seen on the videos entering the breezeway area was a man with a dog and the two individuals from the car. He believed the breezeway was the only way to get to the interior of the apartment building without going through an apartment. Osborne was unsure if someone could come in from the pool area. On cross-examination, Osborne acknowledged many cars shown on the security video of the parking lot of the apartment complex had backed into parking spaces. He also agreed the apartment complex security cameras had several blind spots.

Osborne testified about the statement Johnson gave to him. Osborne indicated that for the first four hours of the interview, Johnson claimed he was in Orangeburg at the time Victim was shot. Osborne provided that during the interview, he left the room and allowed Johnson to use Osborne's cell phone. Osborne stated that after Johnson talked on the phone with his mother and Elmore, his story began to change—he admitted being at Georgetown Apartments and indicated he saw the shooting. Based on Johnson's statements, Osborne opined Johnson admitted to being the driver of the vehicle seen in the video.

Robert Holmes testified that he and Victim sold marijuana provided to them by Johnson. Holmes stated Victim stole marijuana valued at about $1,000 from Johnson. Holmes testified that about a week before the shooting, Johnson was looking for Victim and was unhappy with him. On cross-examination, Holmes acknowledged he had told Osborne that Victim had taken $500 worth of marijuana but later gave Johnson money for the marijuana. Holmes also admitted he told Osborne that Victim thought everything was fine between Johnson and himself after that.

Vanessa Morton testified that while watching the news on television, she learned law enforcement was looking for her son Diangelo Bumcum. She indicated she immediately called the police, who then came to her house. She provided Bumcum did not try to run, despite knowing the police were coming and he willingly went with them. Morton told police she would help them search her house and gave the police the clothing her son had been wearing. Police arrested Bumcum for Victim's murder. Morton testified police arrested her son because he was the last person seen with Victim. The charges against Bumcum were later dismissed, and he was released several months after his arrest. Morton identified her son in a photo from about ten minutes before the shooting and indicated he was wearing a white tank top.

Bumcum testified that on the night of Victim's killing, he saw Victim on the porch outside an apartment in Building C of Georgetown Apartments. Bumcum provided he stopped to talk with Victim and their conversation was friendly. On cross-examination, he testified he went inside the apartment to use the restroom. He then left to go to another apartment building in the complex and about thirty to forty-five minutes later, learned Victim had been killed. Bumcum testified he worked at Jiffy Lube performing car services around the time period Victim was killed.

Detective Craig Kosarko testified that at the same time Osborne was questioning Johnson, he was questioning Bumcum. Detective Kosarko stated that at the end of the interview, he collected the shirt Bumcum was wearing during the interview because Bumcum stated he wore it on the day of the shooting. Osborne also participated in Bumcum's interrogation at times. Osborne testified that after talking to Bumcum, he looked at the video from the apartments again and observed someone walking from Building C to Building D about ten minutes before the shooting. He testified that due to the video quality, he had difficulty identifying details of the person's face but the body type of the person shown on the video was consistent with Bumcum's. He indicated the person did not appear to be walking in a hurry. Osborne testified that Bumcum's shirt tested positive for particles of lead, which Osborne attributed to Bumcum's job. Osborne testified that lead is one of three types of particles that need to be detected to identify gunshot reside; the other two being antimony and barium. Osborne provided that all three substances must be present to have a positive test result for gunshot reside. Osborne provided that lead is prevalent in brake pads and Bumcum worked at Jiffy Lube. However, Osborne indicated he never asked Bumcum about it.

Osborne also testified that during the interrogation of Johnson, Detective Kosarko showed Johnson a picture of Bumcum. Osborne indicated that Johnson first stated he did not know the person in the photo. However, Osborne provided that later in the interview, once Johnson admitted being at the apartment complex, he identified Bumcum as the shooter.

Detective Kosarko testified that a series of text messages from Johnson to Terry Stevens from the day Victim was killed showed Johnson was attempting to get Stevens to help him with something. At 4:37 p.m., Johnson texted "i go wet dude ass up da nite." The final message to Stevens, at 9:34 p.m. stated, "i cnt wait on u i gotta handle my bizz."

Detective Kosarko also testified the phone records showed that on the night Victim was killed, ten phone calls were placed to and from Johnson's phone number between 9:01 p.m. and 10:02 p.m. and no phone calls were placed between 10:03 p.m. and 10:34 p.m. Additionally, twelve phone calls were placed between 10:35 p.m. and 11:40 p.m. Detective Kosarko indicated that the phone records also showed Johnson called his sister, Victim's girlfriend, twice at 9:30 p.m. on the evening of the crime. The phone records show the person placing those two calls dialed *67 before dialing the number, which Detective Kosarko explained would prevent the phone number from displaying on the phone of the person receiving the call. The two phone calls lasted twelve seconds and twenty-eight seconds.

Detective Kosarko further testified about a series of text messages between Johnson and his mother the day following the shooting. Johnson's mother texted him asking if he was alright and he responded: "I want to b[e] alrite sha[y] got it all twist up rite now but i kno[w] [yo]u prayin[g]." Later that same day Johnson's mother texted him, "How you mean you want to alright[]. Deal with [yo]urself, maintain your cool let them figure it out you had[ ]nothing to do with it." One minute later, Johnson's mother sent him another text that stated: "Clear all [yo]ur texts."

Elmore testified that "to wet somebody up" means "[t]o shoot them." On cross-examination, when asked if she had stated that "wet or to get wet" also "means to get drunk or intoxicated," she responded, "That's an interpretation, yes." Additionally, she confirmed she had not "heard [Johnson] say get wet meaning to stab or shoot somebody." She agreed Johnson used that term to mean intoxicated. Holmes testified that "to wet somebody up" means to shoot the person. On cross-, redirect, and recross-examination, he explained the terms wet and "wet up" are two different things; that getting wet means to get drunk or intoxicated, whereas wetting someone up means to shoot that person. Additionally, Osborne testified that based on his experience, to wet somebody up means "you're going to shoot somebody," explaining "when you shoot somebody multiple times, they bleed and then they get wet." Osborne also clarified, "Wet somebody up is different than get wet. Get wet is getting high. Wet somebody up or wet them up is shoot somebody." Detective Kosarko also stated that to wet somebody up meant to shoot or kill someone, describing "when you shoot somebody, their clothes get wet from the blood."

During the State's case, an issue arose with a juror; initially, the trial court was concerned the juror possibly had fallen asleep and later, the juror informed the

court he knew one of the witnesses who had testified.[8] After the court spoke to the juror and the parties argued about whether the juror should be excused, the trial court stated it was excusing the juror because the State provided it would have exercised a preemptory challenge if the juror had indicated during voir dire he knew one of the witnesses.

Prior to the trial court charging the jury, Johnson asked the trial court if it planned to charge the jury on accomplice liability. The trial court stated it was going to charge the jury on "what is the hand of one." Johnson replied he was objecting to that language being included in the charge.

Following closing arguments, the trial court charged the jury. The charge included the following language:

> Now, in conjunction with the crime of murder, I would charge you of this principle of law. It's called the hand of one is the hand of all.
>
> If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of the acts or act done in carrying out the common plan or purpose. If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all.
>
> Now, prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of the crime. Mere knowledge or merely being present by another person and the crime is committed, that's not sufficient to convict a person of the crime.
>
> In order to convict the defendant -- even if the defendant was present when it is committed, is not sufficient to

[8] The juror knew the witness by a different last name than the one the trial court listed during voir dire.

> convict. You must -- guilt is -- to convict the defendant as a principal, a principal is proven by showing an actual or constructive presence at the scene as a result of a prior arrangement. Therefore, finding a prior arrangement, plan or common scheme is necessary for a finding of guilt as a principal.
>
> The State must prove beyond a reasonable doubt by competent evidence that the theory of the hand of one is the hand of all. A principal in a crime is one who either actually commits the crime or who is present aiding, abetting or assisting in committing the crime.
>
> When a person does an act in the presence of and with the assistance of another, the act is done by both. Where two or more are acting with a common plan or scheme or intent are present at the commission of the crime, it does not matter who actually commits the crime. All are guilty.
>
> And of course, as with any other aspect, the State has to prove each of those facts that we just discussed beyond a reasonable doubt. That means you are firmly convinced.

After the trial court charged the jury, Johnson objected:

> I just wanted to note on the record that we are objecting to the hand of one/hand of all charge.
>
> We don't believe that the State has presented any evidence that the person that . . . Johnson was with that night was the shooter. I think the evidence that they presented exclusively in this case was the fact that . . . Johnson was the shooter, and I will say that I believe I gave a softball to . . . Osborne when I asked him whether or not he would serve a murder warrant on the person once he found out who he was and he did say no, that is tricky because he's a passenger and I would want to find out his involvement in this case before I did that.

> So I think even their own State's witness said we don't have enough to say he's involved or not, and that's why I think the [c]ourt should have declined to read that hand of one/hand of all charge.

The trial court responded:

> And while I agree with you that certainly there was a lot of indication of that in this particular case, I truly believe the hand of one/hand of all is most appropriate, especially with the fact that we have -- well, the evidence.
>
> Of course, we have the evidence, if the jury believes it, of course, that . . . Johnson -- in taking instruction that the State has presented that he was intending to go kill him, go shoot him. Whether he died or not, I don't know if that was necessarily it. Probably making him bleed I think was what the typical literal statement of the vernacular, but that part of it and then getting somebody to assist him, that seems to imply I want to get somebody and maybe he didn't want to do it himself. Maybe he wanted somebody else to be the shooter, but he was going to assist. So I believe all of that really falls into that accomplice part of being participating and so I respect your position, but I think it's appropriate under the evidence of this case.

During deliberations, the jury sent a note that asked: "Does the 'hand of one' apply to the possession of a weapon during the commission of a violent crime?" In response, the trial court provided the jury with the following additional instruction:

> If the State has proved beyond a reasonable doubt that the murder has been committed, then in order to have a conviction for the hand of one/hand of all, the State would also have to prove beyond a reasonable doubt that . . . Johnson had possession of a firearm at the time that that murder was committed.

> In other words, hand of -- you can't -- assuming just for the sake that there were two people and three people, whatever, the person -- in order to be convicted, the hand of one doesn't apply to anything but the murder. It does not apply to the -- to the firearm possession. You have to prove actual possession of that in order to return a verdict of guilty.

After returning to deliberations, the jury convicted Johnson of murder but acquitted him of the weapons charge. The trial court sentenced him to thirty-six years' imprisonment, with credit for time served of 2,604 days. Johnson filed a motion for a new trial, arguing the trial court erred in charging the jury on accomplice liability. Following a hearing, the trial court denied the motion. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) (quoting *State v. Laney*, 367 S.C. 639, 643-44, 627 S.E.2d 726, 729 (2006)).

LAW/ANALYSIS

Johnson argues the trial court violated his due process rights by instructing the jury on the theory of accomplice liability, specifically the hand of one is the hand of all because the State presented no evidence Johnson acted in concert with another.[9] We agree.

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[9] As a threshold matter, 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. The fact that Johnson mentioned that his due process rights were

"Generally, the trial [court] is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). "The law to be charged must be determined from the evidence presented at trial." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). If any evidence supports a jury charge, the trial court should grant the request. *Brown*, 362 S.C. at 262, 607 S.E.2d at 95. A charge is correct if it adequately explains the law and contains the correct definition when read as a whole. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). If jury instructions as a whole "are free from error, any isolated portions [that] may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). "A jury charge [that] is substantially correct and covers the law does not require reversal." *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603.

"To reverse a criminal conviction on the basis of an erroneous jury instruction, we must find the error was a prejudicial error." *State v. Bowers*, 436 S.C. 640, 646, 875 S.E.2d 608, 611 (2022). "Prejudicial error in a jury instruction is an error that contributed to the jury verdict." *Id.* Should an appellate court find a jury charge erroneous, the court must then decide if the charge affected the jury's deliberations, contributing to the verdict. *See id.* If the appellate court has "any reasonable doubt as to whether the erroneous charge contributed to the verdict," it must reverse the conviction. *Id.* at 647, 875 S.E.2d at 611.

"[S]ome principles of law should not always be charged to the jury." *State v. Perry*, 410 S.C. 191, 202, 763 S.E.2d 603, 608 (Ct. App. 2014); *see also State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 583 (2019) (stating some matters allowed during jury argument should not be included in the jury charge). "Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002); *see also id.* at 205, 208 n.1, 573 S.E.2d at 803, 804 n.1 (reversing a conviction even though a jury charge was a correct principle of law because it "was not warranted by the facts adduced at trial").

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violated by the jury charge is of no matter. Johnson provides that the standard of review applicable here is that of reviewing a jury charge and is for the abuse of discretion. He does not mention due process again.

"The doctrine of accomplice liability arises from the theory that 'the hand of one is 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 (2014)).

In *State v. Washington*,[10] our supreme court determined the trial court erred by instructing the jury on accomplice liability. 431 S.C. 394, 397, 848 S.E.2d 779, 781 (2020). The supreme court provided "an alternate theory of liability may not be charged to a jury 'merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" *Id.* at 409, 848 S.E.2d at 787 (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 438). The supreme court explained that "[f]or an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.'" *Id.* at 407, 848 S.E.2d at 786 (second alteration by court) (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 439). The supreme court noted the record in that case contained evidence the defendant was the shooter but also contained evidence he was not the shooter. *Id.* Accordingly, the supreme court held that "[t]he question becomes whether there was equivocal evidence the shooter, if not [the defendant], was an accomplice of [the defendant]." *Id.*

[10] Johnson's brief mentions this court's *Washington* opinion and noted that the supreme court had granted the petition for certiorari and heard arguments. No opinion had been issued at the time of the filing of the briefs. Johnson provided the supreme court's opinion to this court as a supplemental authority.

The supreme court examined the case of *Wilds v. State*,[11] in which this court affirmed the finding that the trial court erred by giving an accomplice liability jury charge. *Washington*, 431 S.C. at 409-10, 848 S.E.2d at 787. The supreme court observed that this court in *Wilds* noted no evidence was presented that anyone other than the defendant was the shooter. *Washington*, 431 S.C. at 409, 848 S.E.2d at 787 (citing *Wilds*, 407 S.C. at 439-40, 756 S.E.2d at 390-91). The supreme court in *Washington* posited that the jury, like the jury in *Wilds*, may have doubted the testimony from the only possible accomplice that he did not shoot the victim. *Id.* at 410, 848 S.E.2d at 787. However, the supreme court found to warrant an accomplice liability jury instruction, some evidence must have been presented that the possible accomplice shot the victim. *Id.* The supreme court held because neither party presented such evidence, the trial court erred by giving the accomplice liability jury instruction. *Id.* at 403, 410-11, 848 S.E.2d at 784, 787-88.

Recently, in *State v. Campbell*, this court decided whether an accomplice liability instruction was improperly given.[12] 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021), *cert. granted*, S.C. Sup. Ct. Order dated Sept. 8, 2022. In that case, this court found the trial court had erred in giving the instruction and reversed the conviction. *Id.* at 541, 868 S.E.2d at 421. This court provided:

> Based on the evidence presented at trial, only Richardson could have been [the defendant's] accomplice. On the day of the shooting, Richardson rode with [the defendant] from North Charleston to [the location of the shooting], parked the car for [the defendant], and drove [the defendant] back to North Charleston. Like in *Wilds* and *Washington*, the jury could have doubted Richardson's testimony that he was not involved in a common plan or scheme with [the defendant] to carry out the shooting. Nevertheless, neither party presented evidence that Richardson and [the defendant] had joined together in a common plan or scheme to carry out the shooting. Indeed, Richardson testified he did not know [the defendant] was going to drive to [the shooting location] or why [the defendant] asked him to park the car on [a particular s]treet.

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[11] 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014).

[12] Johnson has provided this opinion as a supplemental authority.

Campbell, 435 S.C. at 540, 868 S.E.2d at 421.

This court further explained:

> Even if Richardson's involvement was equivocal evidence he and [the defendant] worked together to carry out the shooting, the Record must have also contained some evidence Richardson was the shooter for the accomplice liability instruction to be proper; it did not. Again, the jury could have doubted Richardson's testimony that he was not the shooter. Still, while security footage showed Richardson walking in [the shooting location] around the time of the shooting, it also showed him walking without a rifle, wearing a white T-shirt and ball cap rather than a hoodie, and getting into the gold Buick rather than a lime green car. Consequently, Richardson does not meet the description of the man seen by [a witness].

Id. at 541, 868 S.E.2d at 421.

This court determined because "neither party presented evidence that either [the defendant] was working with the man seen by [the witness] or that Richardson was the shooter," the trial court erred by giving an accomplice liability jury instruction. *Id.*

"Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence . . . of the intent to commit the crime when intent or state of mind is in issue." *State v. Sweat*, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (omission by court) (quoting Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)).

The trial court here erred in giving the accomplice liability jury charge. The State's theory of the case was that Johnson and the passenger in his car killed the Victim. No eyewitness testified that he or she saw the Victim being shot. Johnson provided in his statement to the police that he saw one person shoot Victim, and he identified Bumcum as that shooter when law enforcement showed him a photo of Bumcum. The record shows a car with two men in it backed into a parking space, which Osborne suggested the individuals were "trying to get out in a hurry." The two individuals walked together toward the crime scene, remained for a few

seconds, and quickly ran back to the car together and fled the complex. Osborne opined Johnson and another male were the individuals in the vehicle seen in the video. The car seen in the video is consistent with the car Johnson was known to be driving that night. From the video, the clothing of the driver of the car matched the clothing Johnson was wearing that night. Johnson admitted in his statement that he was at the apartment complex and present at the shooting. Cell phone data also placed Johnson at the complex. Further, Johnson admitted Creep was with him at the time of the crime. The State's entire theory of the case was that Johnson was the shooter.

The State presented evidence Victim owed Johnson a debt. The State also introduced text messages that Johnson was going to wet someone up, which meant to shoot or kill a person. The 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.

An accomplice liability charge was not proper because the evidence is *not* equivocal as to whether Johnson or Creep was the shooter—all the evidence presented only went to Johnson being the shooter; no evidence was presented of Creep being the shooter. *See Barber*, 393 S.C. at 236, 712 S.E.2d at 439 ("Like a lesser-included offense, an alternate theory of liability may only 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. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted."). Additionally, although the record contains little evidence Bumcum was the shooter, to the extent that Bumcum could have been the principal, the State presented no evidence Johnson was working with him.

The weapons charge of which the jury acquitted Johnson states it applies when "a person is in possession of a firearm or visibly displays what appears to be a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime." S.C. Code Ann. § 16-23-490(A) (2015). 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.

CONCLUSION

The trial court erred by charging the jury on accomplice liability and that error prejudiced Johnson.[13] Accordingly, Johnson's conviction of murder is

REVERSED.

WILLIAMS, C.J., and VINSON, J., concur.

[13] Because this issue is dispositive, we need not reach Johnson's issues regarding the voluntariness of his statement and the juror disqualification. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

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

[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

[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

[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.

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.

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

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5950

THE STATE,

RESPONDENT,

V.

DEVIN JAMEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2019-000938

RETURN TO PETITION FOR REHEARING

On November 9, 2022, this Court issued a published opinion reversing Appellant's conviction for murder. On November 28, 2022, the state petitioned this Court for rehearing. The following day, this Court requested Appellant respond to the petition for rehearing. Pursuant to Rule 221(a), SCACR, and this Court's request, Appellant now files this return. Appellant respectfully requests this Court deny the state's petition for rehearing because no matter was overlooked or misapprehended by this Court in arriving at its well-reasoned decision.

Respondent first complains that this "Court overlooked that while the prosecution's theory was that [Appellant] fired the fatal shot, the direct and circumstantial evidence presented

at trial supported the requested instruction on th[e] legal principle" of accomplice liability. Pet. at 2. In support of this position, the state cites to "text messages [Appellant] sent to Stevens ... [to] demonstrate his efforts to secure an accomplice to assist him in killing the victim." Pet. at 2. However, the state omits that the state presented no evidence that Stevens actually agreed to be an accomplice, if that is indeed what the text messages sought, or that Stevens was an accomplice. In fact, according to the state's own evidence, there was no one other than Appellant that could have been the shooter. As the petition for rehearing acknowledges, Appellant's text messages did not even suggest the involvement of a second person as all text messages were in the first person singular – "I." Even the penultimate text message, according to the state's theory, was in the first person singular as Appellant allegedly indicated that he – and he *alone* – could not wait on Stevens as he had to handle his business. Pet. at 3. The only conclusion that can be drawn from these text messages is that if Appellant did act, then he did so *alone*. The state's suggestion that this evidence supports the trial judge's instruction on accomplice liability is simply incorrect.

Next, the state argued this 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 murder murdered the victim while acting together, aiding and abetting one another." Pet. at 3. Thus, it is necessary to examine what the video actually showed. The video showed two people arrive at the apartment complex were the deceased lived at 10:15 p.m. in a car that was "consistent" with the car owned by Appellant's girlfriend. The individuals got out of the car and walked toward the breezeway where shell casings were later found. Shortly thereafter, the video showed two individuals reenter the car in the same positions they exited. This – a video showing two people arriving in a car together and two people leaving in a car

together around the time of the shooting – is the state's best argument that Appellant *and someone else* had joined together to accomplish the illegal purpose of murdering the deceased.

To this end, the state argued in its petition as it did at trial that Appellant "*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.'" Pet at 3 no.2 (emphasis added). Far from "beyond a reasonable doubt," the best the state could argue was that its evidence "might" or "could" show a variety of things that "might" or "could" add up to accomplice liability. Appellant respectfully disagrees that these so-called "very reasonable" inferences could be drawn from the video in light of what the video actually showed. The state is, and was, merely speculating. Of course, in order for a judge to instruct the jury regarding an alternate theory of liability, such as accomplice liability, there must be "any evidence" to support the alternate theory. Nevertheless, the state's speculation of what the evidence "might" show is a far cry from what the evidence actually showed.

Next, the state faults this Court for failing to follow the law by "focus[ing] heavily on the state's theory of the case." Pet. at 4. By describing this Court's opinion as "focused heavily on the state's theory of the case," the state admits this Court did *not* focus *solely* on the state's theory of the case, which would be erroneous. Instead, this Court focused on the entirety of the evidence presented, which included the lead detective's testimony that it was a "close call" as to whether he could even charge the passenger of the car with murder. The lead detective – who was a member of the prosecutor's office as a lawyer at the time of Appellant's second trial – was hardly a neutral witness. In other words, the state's own lead detective, who had every motive to

support the state's request for an accomplice liability instruction, could not be convinced that there was any evidence to charge the passenger with murder.

Demonstrating the leaps in logic the state is willing to make to maintain its conviction, the state claimed the police "affirmatively eliminated the 'Creep' to whom [Appellant] referred as a suspect" simply because the police located someone using the nickname "Creep" in Summerville and eliminated him "as a suspect because he did not have a tattoo and he had a different phone number from the 'Creep' in [Appellant]'s cell phone directory." Pet. at 5. If the "Creep" the police found did not have the tattoo described by Appellant or the phone number listed in Appellant's phone for "Creep," then all the police could do was eliminate the "Creep" the police found from being the person to whom Appellant referred in his statement to police. There is *absolutely no way* the police could "eliminate the 'Creep' to whom [Appellant] referred as a suspect" when the "Creep" the police found was not the one described by Appellant.

Perhaps the most telling sentence in the state's petition for rehearing is its concession that the state presented no evidence of accomplice liability when it admitted that the identity of "the other person present when the [deceased] was murdered is, like *his role in the murder*, still *unknown* to this day." Pet. at 5 (emphasis added). The fact that this is a concession of the lack of any evidence to support an accomplice liability instruction is the state's claim that it was "*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." Pet. at 5 (emphasis added). Despite recognizing this impossibility, the state argued, "All that is certain is that both men were present and, inferably, aiding and assisting one another in the commission of the murder." Pet. at 5. What the state claimed was an inference is actually pure speculation.

Repeatedly, the state complained about this Court's reliance on binding appellate precedent because the cases were "factually distinguishable." Pet. at 6 (claiming Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014) is factually distinguishable); Pet. at 7 (claiming State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020) is factually distinguishable); Pet. at 8 (claiming State v. Campbell, 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021) is factually distinguishable). No two cases are ever exactly the same factually; thus, there will always be factual distinctions a party can make. What is important from those cases is the legal principles they embody, which this Court correctly articulated and then applied to the facts presented in the case sub judice.

At least the state acknowledged how the judge's erroneous instruction was prejudicial. As the state indicated, the jury's note regarding "the hand of one" and its subsequent acquittal of Appellant on the weapon charge showed the jury "convicted [Appellant] of murder even though it found that the unknown participant actually was the shooter." Pet. at 5-6. Yet, the state claimed "it was both legally and factually improper to rely on that acquittal to find prejudice." Pet. at 10. To support this claim, the state made the incongruous argument that this Court's use of the jury's verdict to determine if the erroneous jury instruction impacted the verdict was not preserved for appellate review because Appellant did not "alleged any supposed inconsistency in the verdicts in his Statement of Issues on Appeal" and that South Carolina abolished the rule against inconsistent verdicts in this state. Pet. at 10. Not only is the state's argument on this point bizarre in that the state's position is that Appellant failed to raise on appeal a legal doctrine that has been abolished, but the issue presented on appeal was *not* that the jury reached inconsistent verdicts. The issue raised on appeal was whether the trial judge erred by instructing the jury on the alternative theory of accomplice liability. This Court correctly looked to the

entire record to determine of the judge's error was prejudicial to Appellant, as this Court was required to do. This Court's examination of the jury's verdict concerned the "reversible" part of the reversible error analysis. In order to obtain relief, an appellant must show error and prejudice arising from that error in order for it to be deemed reversible error.

Likewise, the state's contention that Appellant's argument that the trial judge erred by submitting an alternative theory of liability to the jury is not properly before this Court on appeal because it was not raised at trial is misleading. Again, Appellant's issue on appeal is whether the trial judge erred by instructing the jury on accomplice liability. Trial counsel objected to the instruction, and this was the issue raised on appeal. Accomplice liability is an alternative theory of liability. While the state may not like that term, as is evident by its brief and petition for rehearing, that is the term that has been used by the South Carolina Supreme Court to describe accomplice liability. It is not a separate basis for relief on appeal as the state posits. Rather, it is the same basis for relief as that raised in Appellant's brief.

Appellant must note that in its brief of respondent filed in State v. Washington, 431 S.C. 394, 848 779 (2020), the state took no exception to the Supreme Court's categorization of accomplice liability as an alternate theory of liability as the state filed no petition for rehearing. In fact, the state quoted the exact language from Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011) that called accomplice liability an alternate theory of liability. See Brief of Respondent p. 34 in Washington. Likewise, the state did not complain when this Court cited to the Barber language in Wilds v. State, 431 S.C. 394, 848 S.E.2d 779 when it filed its petition for rehearing. Rather, the state quoted the exact language. See Pet. for Rehearing p. 1 in Wilds. Even in the state's recently filed briefs in State v. Campbell, Appellate Case No. 2022-000349, expressed no beef with this Court's citation and quotation of the language from Barber that is now deemed so

offensive and erroneous. See Brief of Petitioner in Campbell; Reply Brief of Petitioner in Campbell. Had the state any real reason to complain about the calling of accomplice liability an alternate theory of liability, surely the state would have done so in its first available opportunity.

Appellant respectfully requests this Court deny the state's petition for rehearing as this Court neither overlooked nor misapprehended anything in reaching its well-reasoned and thoroughly researched opinion that follows binding appellate court precedent.

Susan B. Hackett
Appellate Defender

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PO Box 11589
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ATTORNEY FOR APPELLANT

This 9th day of December, 2022.

RECEIVED
Dec 09 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEVIN JAMEL JOHNSON,

APPELLANT

APPELLATE CASE NO. 2019-000938

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the return to petition for rehearing in the above-referenced case has been served upon William Edgar Salter, III, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Devin Jamel Johnson, #359432, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of December, 2022.

Susan B. Hackett

Susan B. Hackett
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ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Devin Jamel Johnson, Appellant.

Appellate Case No. 2019-000938

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.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
Susan Barber Hackett, Esquire
W. Edgar Salter, III, Esquire
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The Honorable R. Markley Dennis, Jr.

FILED
Jan 19 2023