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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Certiorari to the Court of Appeals
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Opinion No. 5950 (S.C. Ct.App., Nov. 9, 2022)
Appellate Case No. 2023-000131

THE STATE,

Petitioner,

vs.

DEVIN JAMEL JOHNSON,

Respondent.

PETITION TO ARGUE AGAINST PRECEDENT

Pursuant to Rule 217, SCACR, Petitioner (the State) moves this Court for permission to argue against precedent. The State's Petition for Writ of Certiorari to the Court of Appeals, filed on January 30, 2023, is currently pending before this Court. The Court of Appeals reversed Respondent Johnson's Charleston Cunty murder conviction based on the trial judge's jury charge on accomplice liability. *State v. Devin Johnson*, Op. No. 5950 (S.C. Ct.App., Nov. 9, 2022) (Howard's Adv. Sh. No. 40 at 12-29). ***App. 1-17***. This Petition relates only to Argument II of the State's Petition (s*ee* pp. 22-24).

The State seeks permission to argue against *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011), to the extent it states that that an accomplice liability is "an alternative theory of liability" that should only be given "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." *Id*. Contrary to this *dicta*,[1] this Court's earlier precedent makes unerringly clear that an accomplice liability instruction is not and cannot legally be an alternative theory of liability under South Carolina law because if two individuals are acting together and aiding each other in the commission of an offense, it does not matter who inflicted the mortal blow.

Although the Court may find this Petition is unnecessary because the Court of Appeals' opinion reversing Johnson's conviction is erroneous for the reasons set forth in Argument I of the certiorari petition (Petition for Writ of Certiorari, pp. 10-21), the State notes that this Court has previously demonstrated its willingness to correct misapplications and misunderstandings of State law, notwithstanding principles of *stare decisis*. *See*, *e.g*., *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (restricting propriety of charge malice may be inferred from use of deadly weapon), *overruled*, *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (prohibiting inference of malice from use of deadly weapon); *State v. Stewart*, 433 S.C. 382, 391-93, 858 S.E.2d 808, 813 (2021) (overruling *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987) and holding it is improper to charge jury defendant's knowledge and possession of drugs may be inferred when drugs are found on the property under the defendant's control). The present case presents such an error that begs for a similar correction, by overruling *Barber* to the extent it states that a charge on accomplice liability is "an alternative theory of liability" that should only be given "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

[1] The State has argued that this language was necessarily *dicta* because the Court in *Barber* held that the evidence supported an accomplice liability instruction. *Id*. at 236, 712 S.E.2d at 439.

fact" because this is inaccurate, unnecessarily confusing, and misleading *dicta* that does not and should not require relief in cases where an accomplice liability instruction is given to the jury.

The reference to an accomplice liability, or the hand one is the hand of all, instruction as "an alternate theory of liability" was first used by this Court in *Barber* and later adopted by the Court of Appeals in *Wilds*. The phrase is not found in earlier precedent, it is not part of a jury charge given to jurors, and it should be overruled. Stated succinctly, this understanding of accomplice liability charges is simply wrong.[2]

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)).[3] 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 or involuntary 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. Instead, 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 in criminal cases, or jurors' consideration of the voluntariness of a custodial statement. It is doctrine of expanding who may be convicted as a

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

[3] The petitioner's argument in Baber resulting in this error is found at pp. 10-12 of the "Brief of Respondent/Petitioner Pursuant to *White v. State*" filed in that case.

principal, not excluding an accused from liability if he inflicted the mortal wound, or reducing his culpability in any manner.

The accomplice liability doctrine finds its origins in the early common law distinction between principles in the first degree and principles in the second degree. Historically, 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 in its commission, are as equally guilty as principles since at least the time of King Henry IV. *Id*.[4]

Over two centuries ago, this Court 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*

[4] King Henry IV of England reigned from 1399 until 1413.

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, this Court affirmed the conviction because *the identity of the shooter was irrelevant* and 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. Likewise, the person inflicting the mortal wound cannot be prejudiced by the trial court giving the instruction.

Indeed, there could not be a serious challenge to the instruction had Johnson been jointly tried with another individual. At such a trial, the instruction would not have been limited to the co-defendant. Nor would jurors be instructed on the erroneous language that accomplice liability only applies if jurors find that "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. Also, jurors should not be precluded from resolving all of the evidence for itself. See *Weiler*, 323 U.S. at 611; *Hutul*, 416 F.2d at 620. Therefore, Respondent requests this Court grant its request to argue against the particular language in *Barber* because that language is an incorrect statement of the law and is confusing to circuit courts attempting to correctly apply the law.

CONCLUSION

Based upon the foregoing, Respondent asks the Court to grant the Petition to argue against precedent, pursuant to Rule 217, SCACR.

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February 6, 2023. BY:______________________________
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