STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5950 (S.C. Ct. App. filed Nov. 9, 2022)
Lower Court Case No. 2018-GS-10-06264

THE STATE,

PETITIONER,

V.

DEVIN JAMEL JOHNSON,

RESPONDENT

APPELLATE CASE NO. 2023-000131

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

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

I. Should this Court grant certiorari to correct the Court of Appeals' erroneous reversal of Respondent Johnson's murder conviction based on the trial judge's accomplice liability instruction, since the evidence presented at trial supported the instruction because the evidence was in conflict as to whether Johnson or his accomplice shot the victim?

II. Whether this Court should grant certiorari to overrule dicta in Barber that an accomplice liability instruction 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," because this Court's earlier precedent makes unerring clear that an accomplice liability instruction in not and cannot legally be an alternative theory of liability under South Carolina law?

RESPONDENT'S COUNTER STATEMENT OF THE ISSUES PRESENTED

I. Did the Court of Appeals – an error-correcting appellate court – properly determine the trial judge's erroneous instruction on accomplice liability, specifically regarding the theory that "the hand of one is the hand of all," required reversal where the state failed to present any evidence that Respondent acted in concert with another person?

II. Should this Court deny certiorari to address whether accomplice liability is an alternate theory of liability where the law is clear that accomplice liability is an alternate theory and resolution of this question is not necessary for determining whether the trial judge erred in this case?

STATEMENT OF THE CASE

On December 10, 2018, a Charleston County grand jury indicted Respondent for murder (2018-GS-10-6264) and possession of a weapon during the commission of a violent crime. R. 608-609; R. 612-613. The state, represented by Stephanie B. Linder and Price Sigal, called the case for trial before the Honorable R. Markley Dennis, Jr., and a jury on April 1-4, 2019. R. 1. John J. Kozelski, III, and Tola Familoni represented Respondent. R. 1.

Despite the state's attempts to pepper its opening statement and closing argument with references to accomplice liability, the *actual* evidence presented failed to support any theory of accomplice liability. The state's consistent story was that Respondent shot Aakeem Smalls. In her opening statement, the solicitor told the jurors that Smalls was "approached by two individuals," one of whom was Respondent. R. 64, ll. 1-6. Further, the solicitor told the jurors that one of the men pulled out a 9 millimeter handgun and began firing. R. 64, ll. 7-13. According to the solicitor, Respondent had a reason to kill Smalls – "the age-old reason for so much conflict in this world. Money." R. 66, ll. 13-15. The solicitor explained that Smalls disrespected Respondent by failing to pay a debt, and Respondent "couldn't have Aakeem Smalls walking around town owing him a debt without repercussions." R. 66, ll. 22-24.

Robert Holmes sold marijuana with his best friend, Smalls. R. 77, ll. 9-24. Respondent, who was the brother of Smalls' girlfriend, provided them with the marijuana to sell. R. 77, l. 25 – R. 78, l. 18. Business was good for the partnership. R. 91, ll. 3-4. Smalls was selling out of product quickly. R. 92, ll. 3-4.

At the trial, Holmes alleged that Smalls stole approximately $1000 worth of marijuana from Respondent; however, Holmes did not witness the actual theft. R. 79, ll. 5-18; R. 91, ll. 10-11. Although Holmes initially denied telling the police Smalls stole only about $500 worth of

marijuana, he was forced to admit the discrepancy between his testimony and his statement to police when confronted with his actual words to the investigators. R. 91, l. 22 – R. 94, l. 7. Additionally, Holmes begrudgingly admitted that Smalls gave Respondent some money for the missing marijuana, and Smalls "thought everything was fine." R. 94, ll. 8-12.

Further, Holmes claimed that he talked to Respondent approximately one week before Smalls' death on the phone, that Respondent was looking for Smalls, and that Respondent was not happy. R. 79, l. 19 – R. 80, l. 11. Holmes never told anyone about this phone call – he waited until Respondent's trial to reveal its alleged existence. R. 85, l. 11 – R. 86, l. 2.

On June 8, 2011, Respondent drove his girlfriend, Tenika Elmore, from their home in Orangeburg to her job at Verizon in North Charleston. R. 100, l. 22 – R. 101, l. 5. Respondent was driving Elmore's blue Toyota Camry. R. 101, ll. 6

Later, Respondent went to the apartment shared by Respondent's sister and Smalls. State's Exhibit #80. Respondent was accompanied by his acquaintance, "Creep." State's Exhibit #80. Respondent was not aware of Creep's given name. State's Exhibit #80. Although Respondent initially told the police that he was going to the apartment to get some clothing, he later admitted he was going there to assess his supply of drugs maintained by Smalls. State's Exhibit #80. While walking to his sister's apartment, Respondent saw a dark-skinned black male in the area. Respondent heard gunshots. Scared, he and Creep ran back to the car and left. State's Exhibit #80. Respondent dropped off Creep, and then went to pick up Elmore from work. State's Exhibit #80.

Shortly after 11 p.m., Respondent picked up Elmore. R. 103, ll. 11-14. The two then drove to the home of Respondent's mother in Summerville to pick up Respondent's daughter. R. 104, ll. 6-11. On their way home to Orangeburg, they stopped at a gas station near Respondent's mother's house. R. 104, ll. 12-19.

The lead detective, David Osborne, pinpointed the time of the shooting to 10:18 p.m. R. 198, ll. 11-12. Around 10:15 p.m. the video from the apartment complex showed a small car park in the lot. R. 203, l. 15 – R. 204, l. 9. Osborne opined that the small car in the video was "consistent" with the car owned by Elmore and driven by Respondent. R. 204, l. 14 – R. 205, l. 15. Just one minute before the shooting, the video showed two individuals walk toward the breezeway where the shell casings were later found. R. 205, l. 20 – R. 206, l. 7. Shortly thereafter, the video showed two individuals reenter the car in the same position they exited. R. 207, ll. 4-11.

Defense counsel asked Osborne if he would charge the passenger with murder if he were able to locate him. R. 273, ll. 5-6. Osborne responded that it was "a little bit trickier with the passenger." R. 273, l. 7. Oddly, he then said, "The driver took the shooter there, the driver took the shooter from there." R. 273, ll. 7-9. Osborne explained he "would have to show that the passenger, whoever it was, Creep, whoever, was actively involved in the murder." R. 273, ll. 9-11. He described it as "a close call." R. 273, ll. 11-12.

While interrogating Respondent, the police showed him a photograph of Diangelo Bumcum. State's Exhibit #80. Respondent told the police that Diangelo was the person he saw outside of Smalls' apartment shortly before the shooting. R. 267, ll. 1-15; State's Exhibit #80. In fact, the police had arrested Diangelo already and charged him with Smalls' murder based upon what their investigation had uncovered so far. R. 236, ll. 12-17. Osborne interrogated Diangelo and informed him repeatedly that his story was impossible. R. 267, ll. 18-25; R. 320, ll. 4-8.

However, Osborne told the jurors that Diangelo was not guilty of shooting Smalls because the video from the apartments showed Diangelo, or someone who looked like Diangelo in Osborne's opinion, walking away from Smalls' apartment shortly before the shooting, just as Diangelo told Osborne repeatedly during the interrogation. R. 238, l. 3 – R. 239, l. 12. When

Osborne determined he needed to dismiss the charge against Diangelo, he did not immediately release him. R. 268, ll. 13-14. Instead, he contacted Diangelo's mother who told Osborne to let Diangelo stay in jail. R. 268, ll. 15-22; R. 305, ll. 15-16. Osborne said the police agreed to keep Diangelo in jail for what may have been a week or two after the police determined he was not their suspect. R. 268, l. 25 – R. 269, l. 3. Diangelo explained that he was not released until "a few months" after his arrest. R. 325, ll. 1-7.

After the police released Diangelo, they received a report from SLED that Diangelo's shirt tested positive for a lead particle, which is a component of gunshot residue. R. 269, l. 14 – R. 270, l. 17. Osborne reasoned the particle was present because Diangelo worked at Jiffy Lube at the time. R. 270, ll. 3-12.

At the shooting scene, the police found four shell casings. R. 138, ll. 11-21. They were all FC Luger .9-millimeter shell casings. R. 140, l. 18 – R. 141, l. 4. About a week after the shooting, the police collected an unfired bullet from the nightstand of a bedroom in the apartment Smalls shared with Respondent's sister. R. 172, l. 2 – R. 174, ll. 6. The bullet was an FC .9-millimeter. R. 174, ll. 2-12. The police identified a print on this unfired cartridge as belonging to Respondent. R. 294, l. 11 – R. 295, l. 9.

Additionally, the police obtained Respondent's phone records. Prior to noon on June 8, 2011, Respondent sent a text message to Terry Stevens, in which he said, "I need that bread today, at least half." R. 357, l. 10 – R. 358, l. 8. Later, Respondent asked, "When that go because I'm almost on E and my girl got to get to work the rest of the week." R. 358, ll. 10-12. The detective opined that Respondent was "essentially asking Terry to help him out with something at this point," but Respondent "didn't really explain why." R. 358, ll. 15-20. Respondent asked what time Terry got off from work. R. 358, ll. 23-24. The penultimate text message, according to the state, was one

sent by Respondent at 4:37 p.m., in which he stated, "hey, I got - - I go wet dude ass up tonight." R. 359, ll. 3-4. The detective claimed this meant to shoot somebody. R. 359, ll. 14-15. Then, at 9:34 p.m., Respondent sent a message that he could not wait on Terry and he had to handle his business. R. 360, ll. 7-10.

In its closing argument, the state conceded it was relying entirely on circumstantial evidence against Respondent. R. 431, ll. 8-9. The state also told the jury about the "concept" of "the hand of one is the hand of all." This "legal concept" provided that "one person is responsible - - criminally responsible for the acts of everything done by the other person." R. 431, ll. 23-25. The state told the jurors of the "classic example," which it claimed its case was, "if there are two people but only one gun and one bullet, if those two people are acting together, they are together, they are assisting each other, aiding each other, abetting each other, planning with one another, all of that, it means the act of one is the act of all." R. 432, ll. 1-6.

The state theorized that Respondent "tried to recruit backup" in his text messages to Terry Stevens. R. 439, ll. 21-22. Yet, the state admitted Stevens was not involved. R. 440, ll. 22-23. Further, the state argued that Respondent's fingerprint on the unfired ammunition that was of the same brand and caliber as the shell casings found at the scene meant that Respondent had access to the same ammunition. R. 445, ll. 19-25. However, the state argued that it did not matter whether Respondent pulled the trigger or merely supplied everything to his passenger because under the hand of one theory, Respondent was guilty. R. 445, l. 25 – R. 446, l. 5.

The judge charged the jury as follows regarding accomplice liability:

> 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 convict. You must - - guilt is - - to convict the defendant as a principal, a principal is proven by showing an actual or construction 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.

R. 479, l. l. 8 – R. 480, l. 20.[1]

Further, the trial judge instructed the jurors that they could consider the second indictment – possession of a weapon during the commission of a violent crime – only if the jurors determined Respondent "fired the shot, not just assisting and aiding." R. 484, ll. 6-10. The judge told the jurors that if they found Respondent "was not the person that was the shooter," then the jurors could not return a verdict of guilty on the weapon charge. R. 484, ll. 21-25. While deliberating, the jury asked if "'the hand of one' appl[ied] to the possession of a weapon during the commission of a

[1] Respondent objected to the instruction during the brief charge conference. R. 429, ll. 2-11.

violent crime" charge. R. 489, l. 22 – R. 490, l. 2; R. 524. The judge again instructed the jurors as follows:

> 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 Mr. - - Mr. 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 doesn't apply to the - - to the firearm possession. You have to prove actual possession of that in order to return a verdict of guilty.

R. 490, ll. 3-15.

After the instructions were given, Respondent objected to the instruction on accomplice liability because the state failed to present any evidence that the person with Respondent was the shooter. R. 486, l. 21 – R. 487, l. 1. "[T]he evidence ... presented exclusively in this case was the fact that [Respondent] was the shooter." R. 487, ll. 1-3. Defense counsel noted that when he questioned whether Osborne could arrest the passenger, Osborne indicated it was "tricky" because the person was the passenger, not the driver of the car. R. 487, ll. 3-8. Osborne indicated he would "want to find out his involvement in this case before" he arrested the person for murder. R. 487, ll. 3-8. As defense counsel explained, the lead detective, and now an assistant solicitor, did not believe there was sufficient evidence of the passenger's involvement to satisfy the probable cause requirement for an arrest warrant. R. 487, ll. 3-12.

The judge reasoned that the state's evidence showed Respondent was going to shoot Smalls based upon the text message regarding "wet up." R. 488, ll. 3-8. Further relying upon the text messages, the judge rationalized his decision based upon his belief that Respondent was "getting somebody to assist him," and that "maybe he didn't want to do it himself. Maybe he wanted somebody else to be the shooter, but he was going to assist." R. 488, ll. 9-12. The judge

"believe[d] all of that really [fell] into that accomplice part of being participating." R. 488, ll. 12-15.

The jury found Respondent guilty of murder and not guilty of possessing a weapon. R. 492, ll. 15-23. Based on the jury's verdict, the judge remarked that "the verdict clearly states this time that it was a hand of one/a hand of all." R. 493, ll. 12-15. The judge then sentenced Respondent to thirty-six years imprisonment. R. 493, l. 24 – R. 494, l. 1; R. 614.

On April 15, 2018, Respondent filed a motion for new trial based upon the judge's erroneous instruction to the jury regarding accomplice liability. R. 600. On May 29, 2019, the judge heard argument on the motion. R. 497. During the hearing, defense counsel noted the state theorized that Respondent was the actual shooter. R. 501, l. 21 – R. 502, l. 1. He noted that "it came to a climax in their closing statement when they put forth the little puzzle pieces that they said they had proven to the jury throughout the trial that came to - - came together to fit [Respondent]'s booking photo." R. 502, l. 2-6. At no time did the state "put forth that anybody else was the shooter." R. 502, ll. 7-8. Defense counsel noted that the jury did not believe Respondent was the shooter, which was clear based on the verdict. R. 504, l. 1-7. However, the jury used the process of elimination to determine the passenger was the shooter, despite the lack of evidence "to suggest that this person was a co-conspirator." R. 504, ll. 8-13.

After noting Osborne's testimony that he did not have probable cause to charge the passenger and the state's failure to present any evidence other than Respondent was the shooter, defense counsel argued the state failed to present any evidence to suggest Respondent was conspiring or in some sort of agreement with another person. R. 504, l. 14 – R. 505, l. 24. In fact, the state's evidence against the passenger was that he was "merely present." R. 509, ll. 13-25. Thus, defense counsel explained the jury instruction was erroneous. R. 505, ll. 19-24.

The state conceded that Respondent "had the motive, the access, he set up, he drove there; he was involved with everything." R. 506, ll. 12-15. The state hung its hat on its claim that Respondent was "recruiting for assistance." R. 506, ll. 16-18. The solicitor claimed that his text messages were "pretty darned specific as far as what the plans were." R. 506, ll. 20-22. Failing to include the fact that the person to whom Respondent was sending the messages was not the person who went with him to the apartments, the state made the illogical argument that "ultimately, he was - - he came with another person." R. 506, ll. 20-23.

The state did not "know why he wanted another person there." The state theorized that "maybe he - - that person provided the gun, because the gun was not found." R. 506, l. 25 – R. 507, l. 2. Next, the state offered that "[p]erhaps, he needed a cheerleader." R. 507, ll. 3-6. Offering another hypothetical, the state suggested that "[p]erhaps he didn't want to, you know, kill his sister's boyfriend on the doorstep." R. 507, ll. 7-11.

At the conclusion of the hearing, the judge denied the motion. R. 516, l. 11. The judge found that he did not know whether the passenger was the shooter or that Respondent was the shooter. R. 513, ll. 2-7. However, he noted the jury found Respondent was not the shooter, but convicted him as an accomplice. R. 513, ll. 8-15. The judge found there was "no evidence of actually beyond a reasonable doubt evidence that who - - which one was the shooter." R. 513, ll. 14-20. The judge thought it "was a pretty fair verdict" and noted that if the passenger were tried, the same verdict "should" be reached. R. 513, ll. 21-23. After recalling his involvement in a death penalty case, the judge asserted there was "an abundance of evidence" "of a shooter and this man being a shooter and being involved in a plan to go kill somebody." R. 516, ll. 2-4.

On May 29, 2019, Respondent served his notice of appeal. After briefing and oral argument, the Court of Appeals reversed Respondent's conviction on November 9, 2022. State

v. Johnson, Op. No. 5950 (S.C. Ct. App. filed Nov. 9, 2022) (Howard. Adv. Sh. No. 40 at 12); App. 1-17. The state filed a petition for rehearing on November 28, 2022. App. 18-33. On December 9, 2022, Respondent filed a return. App. 34-41. The Court denied the petition on January 19, 2023. App. 42-43. Subsequently, the state filed its petition for writ of certiorari on January 30, 2023. Days later, the state oddly filed a motion to argue against precedent. This filing is odd because "[p]ermission of the appellate court shall not be required to argue against precedent in the brief." Rule 217, SCACR. The Rule provides that leave of court to argue against precedent is only required for oral argument, and that such leave must be requested at least fifteen days prior to oral argument. Here, certiorari has not been granted; oral argument certainly has not been requested. It appears the state used this motion as an opportunity to argue its case yet again. This return follows.

ARGUMENT

I. The Court of Appeals – an error-correcting appellate court – properly determined the trial judge's erroneous instruction on accomplice liability, specifically regarding the theory that "the hand of one is the hand of all," required reversal where the state failed to present any evidence that Respondent acted in concert with another person.

"'The law to be charged must be determined from the evidence presented at trial.'" State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007) (quoting State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). There must be some evidence in the record to support the charge to the jury. Id. "Under the 'hand of one is the hand of all' 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." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) (citing State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999)). According to this Court, "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." Langley, 334 S.C. at 648, 515 S.E.2d at 101.

"Under accomplice liability theory, '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.'" Id. at 648-649, 515 S.E.2d at 1010 (quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). Mere association with admitted members of a conspiracy or an admitted perpetrator of a crime is insufficient to constitute the guilt of the defendant on trial. See State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Mouzon, 326 S.C. 191, 485 S.E.2d 918 (1997). Further, "[p]rior

knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime." Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995); see also State v. Thompson, 347 S.C. 257, 647 S.E.2d 702 (Ct. App. 2007). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010) (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)) Rather, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal." State v. Hill, 268 S.C. 390, 395-396, 234 S.E.2d 219, 221 (1977).

Recently, this Court held a trial judge erred by instructing a jury regarding accomplice liability where there was no evidence that anyone other than the defendant shot the decedent. State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020). On August 25, 2013, a large crowd, including the deceased, Washington, and Washington's uncle, gathered at a nightclub. Id. at 398, 848 S.E.2d at 781. The deceased told multiple people at the club that Washington and his uncle were following him around the club. Id. The deceased even told the bartender that the uncle was going to shoot him and "they" were going to kill him. Id.

At closing time, there was a fight in the parking lot of the club. Id. One witness claimed he heard gunshots near the end of the fight and saw the decedent on the ground. Id. The witness saw Washington with a small silver revolver in his right hand and firing toward the decedent. Id. The witness "was 100% sure" Washington shot the decedent. Id. Another witness also placed a gun in Washington's hand during the melee. Id. The state also introduced evidence of the uncle telling his brother during a telephone call that Washington shot the decedent. Id. On cross-examination, the uncle denied admitting that he shot the decedent or telling anyone else he had shot the decedent. Id. at 399, 848 S.E.2d at 782.

A witness called by Washington testified that Washington was not involved in the fight and he never had a gun. Id. This witness also testified to seeing Washington run as shots were fired. Id. at 401, 848 S.E.2d at 782. Another witness for Washington testified that Washington was "nowhere near where any of the shots were fired." Id.

Over objection, the trial judge instructed the jury on the hand of one is the hand of all. Id. at 406, 848 S.E.2d at 785. This Court held the judge erred. Id. This Court explained: "For 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 on which it could rely to find the existence or nonexistence of that fact.'" Id. at 407, 848 S.E.2d at 786 (quoting Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011)) (alterations in original). According to this Court, "there was evidence [Washington] was the shooter," and "[t]here was also evidence [Washington] was not the shooter." Id. The question for this Court was "whether there was equivocal evidence the shooter, if not [Washington], was an accomplice of [Washington]." Id. The uncle was the only possible person who could fall into the category of accomplice for Washington. Id. This Court then scoured the record for any evidence the uncle was the shooter. Id.

The deceased's statements to the bartender that the uncle was going to shoot him were not evidence that the uncle ultimately did shoot him. Id. The testimony of the eyewitnesses that Washington was running from the scene as shots were fired did not create any inference that uncle was the shooter; rather, the only inference from this testimony was that Washington was not the shooter. Id. This Court also rejected the state's assertion that Washington's cross-examination of the uncle constituted evidence that the uncle was the shooter because uncle denied the accusations. Id. at 408, 848 S.E.2d at 786.

This Court explained that there was evidence that uncle and Washington acted in concert in following the deceased around the club and giving him dirty looks, there was evidence that Washington and uncle fought with the decedent, and there was evidence that Washington shot the decedent. Id. at 409, 848 S.E.2d at 787. However, in order for the accomplice liability instruction to be proper, there must have been some evidence that uncle shot the decedent. Id. This Court held there was "no evidence" that uncle was armed with a firearm and "no evidence" uncle shot the decedent. Id. Although the jury may not have believed uncle's denials that he shot the deceased, this Court emphasized that "an alternate theory of liability may not be charged to the jury 'merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" Id. (quoting Barber, 393 S.C. at 236, 712 S.E.2d at 438).

Finally, this Court held the accomplice liability instruction prejudiced Washington. Id. at 411, 848 S.E.2d at 788. This Court explained that the evidence against Washington was not overwhelming, particularly, in light of several witnesses testifying Washington was not even armed or in the immediate area when the shooting occurred. Id. This Court explained: "The insertion of the accomplice liability charge into the case invited the jury to speculate whether [uncle] – the only possible accomplice of [Washington] – shot [the decedent], when there was no evidence [uncle] was the shooter." Id.

In Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011), this Court examined the propriety of an accomplice liability charge. This Court explained that "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." Id. Resolving the issue of whether the "hand of one" charge was correct, this Court asked whether there was any evidence that another co-conspirator was the shooter and the defendant was

acting with him when the robbery took place. Id. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 295-296, 534 S.E.2d 268, 269 (2000)); see also State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972); State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007). The evidence showed the robbers were clothed in black and wrapped shirts around their heads, that the defendant was involved in the planning and execution of the robbery, and that one of the robbers other than the defendant may have been the shooter. Id. at 237, 712 S.E.2d

The Court of Appeals affirmed a grant of post-conviction relief where appellate counsel failed to raise on appeal the trial judge's error in instructing the jury on accomplice liability and mere presence where the evidence failed to support the charge. Wilds v. State, 407 S.C. 432, 435, 756 S.E.2d 387, 388 (Ct. App. 2014).[2] On the afternoon of March 29, 1999, Wilds was walking down the street with two companions when they saw Rumph approaching them. Wilds commented to the others that he thought Rumph had some money. Id. Wilds stopped to talk to Rumph while his companions continued walking. Id. at 436, 756 S.E.2d at 388. Wilds unexpectedly pulled out a pistol. Rumph handed over his wallet. Id. at 436, 756 S.E.2d at 389. Wilds ordered his companions to hit Rumph and they complied. Wilds' companions took items from Rumph, including a cigarette lighter and change. Wilds then shot Rumph. Id. After the shooting, Wilds and his companions ran. When the stopped, Wilds gave the companions money from Rumph's wallet and told them to stay quiet. Id. One of the companions told Wilds to get rid of the gun. Id.

Wilds was charged with armed robbery and murder of Rumph. During the deliberations, the jury sent a note asking if the jury found Wilds guilty of murder, would that be a finding that Wilds alone pulled the trigger. Id. at 437, 756 S.E.2d at 389. Over Wilds' objection, the judge instructed the jury on accomplice liability, but refused to instruct the jury concerning mere presence. Id.

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[2] This Court granted the petition for certiorari on November 20, 2014. After hearing argument on October 7, 2015, the Court dismissed the writ as improvidently granted.

The Court explained that "no evidence ... indicated anyone other than Wilds was the shooter." Id. at 439, 756 S.E.2d at 390. "The only evidence presented was that Wilds was the shooter, and [his companions] joined in the robbery after Wilds pulled the gun on Rumph." Id. The Court recognized that the jury may have had doubts about the companions' testimony; however, those doubts failed to support a charge on the alternate theory of liability, such as accomplice liability. An alternate theory "'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" Id. (quoting Barber, 393 S.C. at 236, 712 S.E.2d at 438). The Court found prejudice to Wilds "[b]ecause the instruction was given in response to the jury's question regarding whether a conviction meant it found Wilds actually pulled the trigger, and because the jury returned guilty verdicts after receiving the instruction." Id. at 439, 756 S.E.2d at 390-391.

In the present case, the prosecution presented no evidence to support an instruction to the jury concerning accomplice liability or "the hand of one is the hand of all." The only evidence presented by the state was that Respondent was the shooter. There was no evidence that the passenger in the car was the shooter or that Respondent and the passenger agreed upon some criminal enterprise prior to the shooting. The evidence was not equivocal on some integral fact as would be required in order to instruct the jury on accomplice liability. In fact, the evidence presented by the state was that Respondent and an unknown passenger arrived at the apartment complex, walked in the direction where the shooting occurred, Respondent shot Smalls due to a debt, then Respondent and the passenger ran back to Respondent's car. There was no indication that Respondent and the passenger had planned to engage in any action upon arrival at the apartment or that the shooting was the natural and probable consequence of any agreed upon action.

The state relied upon text messages Respondent sent to Stevens to show Respondent's intent and his efforts to secure an accomplice. Pet. at 15. 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 Respondent that could have been the shooter. As the petition for writ of certiorari acknowledges, Respondent's text messages did not even suggest the involvement of a second person as all text messages were in the first person singular – "I." Pet. at 15. Even the penultimate text message, according to the state's theory, was in the first person singular as Respondent allegedly indicated that he – and he *alone* – could not wait on Stevens as he had to handle his business. Pet. at 15. The only conclusion that can be drawn from these text messages is that if Respondent 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.

Additionally, the state argued the jurors could infer from the surveillance video and still photos that Respondent acted with another person. Pet. at 15. 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 Respondent'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 Respondent *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 Respondent "*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 16 no.15 (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. Respondent 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.

The state faulted the Court of Appeals for focusing too heavily on the state's theory of the case. Pet. at 17. However, the Court did not focus solely on the state's theory of the case; rather, the Court considered 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 Respondent's 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 Respondent referred as a suspect simply because the police located someone using the nickname "Creep" in Summerville and eliminated that person "as a suspect because he did not have a tattoo and he

had a different phone number from the 'Creep' in [Respondent]'s cell phone directory." Pet. at 17 n.17. If the "Creep" the police found did not have the tattoo described by Respondent or the phone number listed in Respondent's phone for "Creep," then all the police could do was eliminate the "Creep" the police found from being the person to whom Respondent referred in his statement to police. There is *absolutely no way* the police could eliminate the 'Creep' to whom Respondent referred as a suspect when the "Creep" the police found was not the one described by Respondent.

Perhaps the most telling sentence in the state's petition for writ of certiorari 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 17 n.17. (emphasis added). As the state admitted below, it was "*impossible* for the prosecution, the defense, the trial judge, or th[e] Court [of Appeals] 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." App. 22 (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." App. 22. What the state claimed was an inference is actually pure speculation.

The state argued the Court of Appeals acted legally and factually improperly by relying on the jury's acquittal of Respondent on the weapons charge in light of the jury being informed that the accomplice liability instruction did not apply to the weapons charge. Pet. at 20. To support this claim, the state made the incongruous argument that the 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 Respondent did not "alleged any supposed inconsistency in the verdicts

in his Statement of Issues on Appeal" or in his brief, and that South Carolina abolished the rule against inconsistent verdicts in this state. Pet. at 20.

Not only is the state's argument on this point bizarre in that the state's position is that Respondent 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 alternate theory of accomplice liability. The Court of Appeals correctly looked to the entire record to determine if the judge's error was prejudicial to Respondent, as the Court was required to do. The Court's examination of the jury's verdict concerned the "reversible" part of the reversible error analysis. In order to obtain relief, an Respondent must show error and prejudice arising from that error in order for it to be deemed reversible error.

Likewise, the state's contention that Respondent's argument that the trial judge erred by submitting an alternate theory of liability to the jury is not properly before this Court on appeal because it was not raised at trial is misleading. Again, Respondent'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 alternate theory of liability. While the state may not like that term, that is the term that has been used by this 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 Respondent's brief.

II. This Court should deny certiorari to address whether accomplice liability is an alternate theory of liability where the law is clear that accomplice liability is an alternate theory and resolution of this question is not necessary for determining whether the trial judge erred in this case.

The state requested this Court grant certiorari to overrule language in Barber describing accomplice liability as "an alternate theory of liability." This Court must reject the state's invitation. First, accomplice liability *is* an alternate theory of liability; thus, the language is absolutely accurate. Respondent respectfully disagrees with the state's contention that "[b]y its very definition, an alternate theory of liability would be proof that [Respondent] was guilty of a different offense from murder, such as voluntary or involuntary manslaughter." See Pet. at 22. An alternate theory of liability is just that – an alternate theory of why one person is just as liable as another (accomplice liability) or an alternate theory of why one person is just as liable for a crime that was the natural and probable cause of the person's intent (transferred intent). It is *not* a way of showing someone is guilty of an alternate offense as posited by the state.

Put another way, accomplice liability is an alternate way of showing a defendant had the requisite *mens rea* to engage in the criminal conduct albeit through an accomplice. See Holmes v. State, 972 P.2d 337, 341 (Nev. 1998) (explaining that "the commission of a felony and premeditation are merely alternative means of establishing the single *mens rea* element of first degree murder, rather than constituting independent elements of the crime" for statutory murder); State v. Van Harris, 502 A.2d 880, 883 (Conn. 1985) (explaining that a defendant was charged properly in a single count with robbery in the second degree under two alternate theories of liability, including whether he intentionally aided another person in committing robbery in the second degree); State v. Kelley, 716 P.2d 1052, 1053 (Ariz. Ct. App. 1986) (explaining that "[t]he nature of the crime of first-degree murder explains why it is proper to charge both

premeditated and felony murder alternatively in one count. If a person is charged with first-degree murder which can be committed by either of the two ways outlined above, the result is the same in each case: a dead person. It is irrelevant to the result whether the person committed it with premeditation or it occurred during the commission of a felony.").

Second, overruling Barber to remove that language is not necessary for determining whether the trial judge erred here; thus, the state is asking this Court to grant certiorari for the sole purpose of issuing an advisory opinion, which this Court will not issue. See e.g., Gainey v. Gainey, 279 S.C. 68, 69, 301 S.E.2d 763, 764 (1983) ("This Court will not issue advisory opinions on questions for which no meaningful relief can be granted.").

Third, the state has had multiple opportunities since Barber to make the request it has made here, but the state has failed to do so. See State v. Washington, 431 S.C. 394, 409, 848 S.E.2d 779, 787 (2020) (calling accomplice liability an "alternate theory of liability" and the state failing to ask for rehearing to change this language when it could have done so even though it had referred to accomplice liability as an alternate theory of liability in its brief); State v. Campbell, 435 S.C. 528, 539, 868 S.E.2d 414, 420 (Ct. App. 2021) (calling accomplice liability an "alternate theory of liability" and the state failing to ask for rehearing to change this language and or ask for certiorari to be granted in the case to address the label); State v. Sellers, 2021-UP-254 (S.C. Ct. App. filed July 7, 2021) (state's brief of respondent filed after this Court granted certiorari calling accomplice liability an "alternate theory of liability"). The state's prior repeated failures to make the request at issue here belies its current contention that the matter is of such importance as to invoke this Court's jurisdiction. See Rule 242(b), SCACR (providing that a writ of certiorari will be granted only where there are special and important reasons).

Finally, the state repeatedly characterizes the offensive language as dicta and requests this Court invoke its jurisdiction, which is reserved for special and important reasons, to overrule it. "Judicial dicta is not essential to the decision." Nash v. Tindall Corp., 375 S.C. 36, 40, 650 S.E.2d 81, 83 (Ct. App. 2007) (internal quotation omitted). "Dicta or, as it is also known, dictum, 'is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision." Id. at 40-41, 650 S.E.2d at 83 (internal quotation omitted). Why should this Court invoke its jurisdiction to overrule language that the state characterizes as dicta, which, by definition, is non-binding?

CONCLUSION

Respondent respectfully requests this Court deny the state's petition for writ of certiorari because no special or important reason exists. However, if this Court were to grant the petition and reverse the decision issued by the Court of Appeals, Respondent respectfully requests this Court reject the state's demand that this Court "affirm as to those issues" not decided by the Court of Appeals because the state claimed "the trial judge's rulings on those issues was correct." Pet. at 2. Instead, Respondent respectfully requests this Court remand to the Court of Appeals for consideration of the other issues raised by Respondent. State v. Grovenstein, 335 S.C. 347, 354 n.6, 517 S.E.2d 216, 219 n.6 (1999).

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Appellate Defender

ATTORNEY FOR RESPONDENT

This 1st day of March, 2023.