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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
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.

BRIEF OF PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made, and finally ruled on by the Court of Appeals on January 19, 2023.

STATEMENT OF ISSUES ON APPEAL

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 is not and cannot legally be an alternative theory of liability under South Carolina law?

STATEMENT OF THE CASE

Respondent, Devin Jamel Johnson, # 359432 (Johnson) is confined in the South Carolina Department of Corrections (SCDC) as the result of his second Charleston County conviction and sentence for murdering Akeem Smalls. The Charleston County Grand Jury originally indicted him on September 12, 2011, for murder (2011-GS-10-5207) and possession of a firearm during the commission of a violent crime (2011-GS-10-5208). ***R. 608-11***. Following a jury trial before the Honorable R. Markley Dennis, Jr., on March 31 - April 3, 2014, he was convicted of both charges and sentenced by Judge Dennis. He timely served and filed a notice of appeal. The Court of Appeals reversed his convictions on November 16, 2016. *State v. Johnson*, 418 S.C. 587, 795 S.E.2d 171 (Ct.App. 2016), *cert. denied* (Nov. 2, 2017). The State's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 20, 2017. This Court denied the State's Petition for Certiorari on November 2, 2017. The Remittitur was sent to the Charleston County Clerk of Court on November 7, 2017.

On December 10, 2018, the Charleston County Grand Jury again indicted Johnson for murder (2018-GS-10-6264, ***R. 612-13***) and possession of a firearm during the commission of a violent crime. He received his third jury trial before Judge Dennis on April 1-4, 2019.[1] John J. Kozelski, III, and Tola Familoni, of the Ninth Circuit Public Defender's Office, represented him at trial. Assistant Ninth Circuit Solicitors Stephanie B. Linder and Price Sigal prosecuted the case. The jury convicted him of murder but acquitted him of the weapons charge. ***R. 492***. Judge Dennis sentenced him to thirty-six years imprisonment. ***R. 493-94; R. 614*** (sentencing sheet).

Johnson filed a motion for new trial on April 15, 2018, in which he argued that the trial

[1] Apparently, a retrial occurred between the issuance of the Remittitur on direct appeal and the trial now being appealed. *See* ***R. 501; 506***.

judge erroneously gave an accomplice liability instruction. ***R. 599-600***. On May 29, 2019, Judge Dennis held a hearing on the motion. ***R. 497-516***. He denied the motion at the conclusion of the hearing. See ***R. 514-16***.

Johnson timely served and filed his notice of appeal. Following briefing and arguments by the parties, the Court of Appeals reversed his conviction based on the accomplice liability charge. *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***.[2] The State filed a timely Petition for Rehearing on November 28, 2022. ***App. 18-33***. Johnson made a Return to the Petition ***App. 34-41***. The Court of Appeals denied rehearing on January 19, 2023. ***App. 42-43***.

The State filed a Petition for Writ of Certiorari on January 30, 2023, and it filed a Petition to Argue Against Precedent on February 6, 2023. Johnson filed a Return to Petition for Writ of Certiorari on March 1, 2023. Johnson has not opposed the Petition to Argue Against Precedent. This Court filed an Order granting both the Petition for Writ of Certiorari and the Petition to Argue Against Precedent on April 20, 2023. This Brief follows.

[2] This opinion is published as *State v. Johnson*, 438 S.C. 110, 882 S.E.2d 190 (Ct. App. 2022), cert. granted, April 20, 2023. The State, however, has retained the Appendix citations to the opinion.

Also, the Court of Appeals 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. ***App. 17***. However, the trial judge's rulings on those issues was correct, and Johnson's arguments lack merit for the reasons set forth on pp. 10-36 of the Final Brief of Respondent. So, this Court should affirm as to those issues, as well.

STATEMENT OF FACTS

In June 2011, Johnson lived with Tenika Elmore in Orangeburg, South Carolina. She drove a blue 2008 Toyota Camry. She was gainfully employed in North Charleston, and she commuted to work each day from her Orangeburg residence. Johnson's sister, Sharmaine Johnson, lived in a Charleston apartment complex. The victim, Akeem "Ace" Smalls, was her boyfriend. The victim owed Johnson money. Tenika thought the two men were friendly, but she was unfamiliar with any business relationship between them, and Johnson did not want her to know that he sold "weed." ***R. 97-100; 111-12***.

Johnson dropped Tenika off at work in North Charleston on the morning of June 8, 2011. They were in her Camry, which was missing a hubcap. *See* State's Exs. 25-28. After dropping her off at work, he had the car for the remainder of the day. Although Tenika did not always know where he would go when he dropped her off, he often went either to Sharmaine's apartment in Charleston, or to either Walterboro or Summerville. He was late in returning to pick her up on the 8th and he should have been there at 11:00 p.m. However, he did not seem "rattled" or "shaken up" and he did not tell her anything that he had seen. ***R. 99-104***.

They first drove to Summerville and picked up Johnson's daughter. After stopping to buy gas, they went to their Orangeburg home. Throughout their trip home, he never mentioned anything that had occurred earlier that night. Tenika learned the next morning that the victim had been killed when she overheard Johnson on the phone. He acted as if this was the first time that he heard about it. Finally, Tenika testified that the expression to "wet someone" meant "to shoot them," although she admitted to other possible interpretations on cross-examination. ***R. 104-07; 110-11***.

Robert Holmes testified that he and the victim, Akeem "Ace" Smalls, were close friends

and saw each other frequently. They smoked marijuana daily. They also sold marijuana, which they got from Johnson and whom Holmes met through the victim. The victim had stolen a quarter pound of Johnson's marijuana, which was worth roughly $1,000.00. About a week before the murder, Holmes had a conversation with Johnson, who was looking for the victim. However, Holmes did not tell him where to find the victim. Holmes corroborated that to "wet somebody up" meant to shoot them. ***R. 76-80; 82; 85; 95-96***.

On cross-examination, Holmes explained that Johnson would stash his "high-grade" marijuana at his sister's apartment. The victim would then sell it because Johnson did not know potential buyers in the area, but the victim did. R. 90-91; 94. Holmes admitted telling police that Smalls stole roughly $500.00 worth of marijuana, that Smalls had given Johnson some money, and that Holmes "thought everything was fine." ***R. 91-94***. Obviously, he was dead wrong.

On the night of June 8th, Diangelo Bumcum went to visit friends in Building E of the apartment complex in question. Upon arriving, he saw his close friend, the victim, on the second floor of Building C. The two talked and drank on the porch for several minutes. Eventually, Bumcum left Smalls' apartment and went to visit his friends in Building E. Sometime later, he saw flashlights moving around outside of the apartments and went out to investigate. He saw police officers outside and they informed him that the victim had been shot. ***R. 310-13***.

Bumcum was upset. So, he called some of his family members and told them what had happened. When he spoke to his mother, she told him to come home, and he did so. When he learned that police were looking for him in connection with the murder, he voluntarily surrendered, gave a statement, and fully cooperated with the investigation because he was not involved in the murder. ***R. 313-15***.

Vanessa Bumcum Morton, Bumcum's mother, testified that she had met the victim

through another relative and that he "was like family." She corroborated that Bumcum was "quite hurt" when he called and told her about the victim's death. She told him to come home, and he did so. When they discovered that police were looking for him, she immediately called the police, and they came to her house. Although police obtained a search warrant, she consented to a search and helped them search the house for evidence. She gave them the pants and t-shirt that her son had been wearing on the 9th. ***R. 300-06***.[3]

Charleston City Police Department Officer Matt Jahngen, the first responding officer on June 8th, testified that he received information that a victim of a gunshot wound had "fled the area and could not be located." Other officers were on the scene. So, he began walking down a nearby street until a woman directed him back to Building D of the complex. ***R. 116-20***.

Officer Jahngen saw blood on the ground outside of Building D. He followed a trail of blood until he encountered a man who guided him to a lot near the apartment complex. While there, he heard a cry for help and ultimately found the victim lying on his back, on a table, behind an abandoned house. The victim had obviously been shot.[4] Although still conscious, he was generally unresponsive to questions. He only said was that he had been shot in the back and could not breathe. Also, he had removed all of his clothing, except for his boxer shorts and socks, and he had a "great deal of blood" on him. ***R. 116-17; 120-22; 127***. *See also* ***R. 165-71***.

The Department's crime scene investigators responded to the apartment complex on June

[3] She explained on cross-examination that her son was originally arrested for the murder because he was the last person to see the victim alive. ***R. 307-08***.

[4] The forensic pathologist who performed the autopsy opined that the victim died from a gunshot wound to his back, which led to "massive bleeding." The bullet entered the middle of the victim's back, just to the left of center. It then traveled "through one of the ribs on the left side, went through the left lung, and then exited one of the ribs on the left side kind of where the top rib meets your collarbone." ***R. 418-21***.

8th and determined that the shooting had occurred in Building C. In Building C, they found four fired 9 mm. Luger shell casings and blood drops in the entrance of the hallway. In the parking lot outside of the building, they found one of the victim's black Nike sandals under a car door. They ultimately found that the trail of blood drops led from the area of the shooting, to and through other Buildings D and E, and into the parking lot. The drops were also on an air conditioning unit outside of E. They found bullet fragments in Building D. ***R. 129-47; 156***.

David Osborne, who was a Sergeant in the Charleston Police Department's violent crimes unit of at the time of the murder,[5] responded to the crime scene to June 8th. By the end of the evening, police had developed both a person of interest and a vehicle of interest. Sgt. Osborne collected copies of the apartment complex's surveillance video on June 9th. While the murder was not caught on video, the videos from "the office, C and D, in between Building C and D and in between Buildings D and E" provided important evidence against Johnson. (State's Ex. 55). In reviewing the videos, Sgt. Osborne discovered that while the videos had consistent time stamps on them, the time stamp was eight minutes slower than real time. R***. 189-98***.

Using the videos, police determined that the murder occurred at approximately 10:18 p.m. (or 10:10:30 video time) because the victim is seen running out of Building C shortly after that time. Moments later, another camera shows him running across the parking lot between Buildings D and E, which was consistent with the blood trail that had been found. The office camera shows a car that was missing the rear passenger hubcap backing into a parking space at 10:15:55 p.m., which would enable the driver to quickly exit.[6] Two men are seen getting out of

[5] He was an Assistant Ninth Circuit Solicitor by the time of the retrial. ***R. 189***.

[6] The car in the video was consistent with Tenika's blue Camry. ***R. 204-05***. This car was very readily identifiable because it had a unique license plate, and the missing hubcap. *See* State's

this vehicle and walking toward the far end of Building C, where the murder occurred. Within fifteen or sixteen seconds of the shooting, both men are seen running back to the car, getting into it, and quickly driving out of the complex. The driver was wearing a white tank top and black pants. ***R. 198; 200-13; 238-42; 270-72; 280***.[7]

Police spoke with Tenika on June 10th, and she cooperated with them. Police also saw that her Camry "had the same characteristics" of the car in State's Ex. 55, such as the missing hubcap. ***R. 213-14***. With the assistance of the U.S. Marshal's Task force, Johnson was located and arrested in Orangeburg on June 10th. He was brought back to Charleston the same day and he gave a videotaped statement to Inv. Osborne and Det. Craig Kosarko, which was introduced as State's Ex. 80. ***R. 214-19***.

In the portions of his statement that were played for the jury, he repeatedly denied being in Charleston for several hours. He finally admitted that he had gone to the Charleston apartment complex and claimed that he had gone to get his clothing from his sister. A "friend," whom he named only as "Creep," was with him. As they walked to his sister's apartment, Johnson claimed that he saw a dark-skinned black man fire gunshots.[8] Scared, he and Creep ran back to the car and left. He dropped Creep off and later picked up Tenika at her job. He also admitted that the victim owed him money, but he claimed it had been loaned to pay bills and he did not mention

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Exs. 25-28.

[7] The State also introduced a photograph taken from the video depicting the victim as he fled his attackers (State's Ex. 62) that was taken at 10:18 p.m. in real time (***R. 207-08***) as well as photographs of the Camry and its driver (Johnson) as State's Exs. 73-77. R***. 209-11***.

[8] Det. Kosarko had shown Johnson a photograph of Diangelo Bumcum early in the interview and he claimed not to know Bumcum. Yet, after admitting that he saw the shooting, he told the officers that they should look for "D" (Bumcum). Sgt. Osborne confirmed that police were interested in Bumcum because he was the last person to see the victim alive. R***. 235-37***.

marijuana. R***. 220-21; 223-35; 264; 266-67; 279-80***. *See also* State's Ex. 80.

In the interview, Johnson also claimed 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 him. Sgt. Osborne ultimately tracked down a man in Summerville nicknamed "Creep," but 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.

On June 14th, law enforcement found a Luger 9 mm. bullet in a drawer of a nightstand in Sharmaine's apartment (**R. *172-74***) with Johnson's fingerprint on it. Police likewise found eighteen of his prints on Tenika's Camry. ***R. 184-86; 291-95***. On June 14th, Det. Kosarko obtained the surveillance video of the Kangaroo 2 gas station in Summerville because police received information Johnson had been there on the night of the murder. The video (State's Ex. 76) covers from 11:00 pm. on June 8th until 1:00 a.m. on June 9th, and it depicts Johnson arriving at the station around 12:24 or 12:25 a.m. on the 9th. "He was wearing a white tank top and dark pants," such as depicted in the apartment complex video, and he could be seen interacting with other people. He did not seem to be in a state of shock. ***R. 327-32***.

Johnson had a cell phone when he was arrested. Police seized it and obtained a search warrant for his cell phone records covering a period from June 4 through June 9, 2011. They thereafter received these records. ***Rr. 222; 333-37***. His Verizon Wireless cell phone logs (State's Exhibit 57), published through the testimony of Det. Kosarko, reflected that he made or received ten calls between 9:01 and 10:02 p.m. on the night of the murder, but no calls between 10:03 and 10:34 p.m. He then made or received twelve calls between 10:35 and 11:45 p.m. R***. 367-72***; State's Exhibit 57, ***R. 525*** (cell phone logs). Also, he called the victim four days before the

murder. ***R. 382***.

He telephoned a Terry Stevens at 9:04 p.m.; his mother at 9:15, 9:20, and 9:32 p.m.; and his sister, Sharmaine, at 9:30 p.m. (In the call to his sister, he blocked her from seeing his identity). Sharmaine called him at 10:35 p.m. He then called Tenika and, at 11:08 and 11:09 p.m., he called Stevens. Sharmaine called him again at 11:15 p.m. R***. 372-76;*** State's Exhibit 57, ***R.525***.

Additionally, there were a series of text messages between Johnson and Stevens on June 8th. At 12:08 p.m., a text message from Johnson's phone to Stevens' phone read, "I gonna need that bread today, at least half." At 12:10 p.m., he texts, "on my ass, brah." At 12:15 p.m., he texts, "When dat go because I'm almost on E and my girl got to get to work rest of the week." Stevens replied, it would be when he got off work. At 12:27 p.m., Johnson says, "Just hit me up. I be around." At 1:30 p.m., he asks, "What time you get off? I'm whipping. We can cool it." At 1:41 p.m., he asks Stevens, "where you be? I'll be around. I'm driving five." ***R. 338-41; 356-58;*** State's Ex. 82, ***R. ___-__*** (PowerPoint of text messages).[9]

At 1:54 p.m., Johnson says, "just hit me up, five." At 4:37 p.m., he sends a text message, "*hey, I go wet dude ass up tonight*."[10] (Emphasis added). At 4:39 p.m., he asks, "what time you get off?" At 4:44 p.m., he says, "Yeah I take you back to the Chuck," or Charleston. At 8:33

[9] The actual text messages were marked as State's Ex. 85 for identification ***R. 356***.

[10] Sgt. Craig Kosarko testified that he had previously heard the term "wet" somebody means "I'm going to shoot somebody," which "essentially … means that when you shoot somebody, their clothes get wet from the blood." ***R. p. 359***. Sgt. Osborne also testified that the phrase means "to shoot somebody. ***R. 247-48***. Of the five definitions for the phrase listed in the Urban Dictionary lists, three refer to killing someone. The "Top Definition" is "[t]o shoot or (sometimes stab) a person several times, usually in an attempt to murder them. Called 'wet up' because there is enough blood to soak their clothes, leaving them 'wet'." *See* https://www.urbandictionary.com/define.php?term=wet+up, last visited July 31, 2020.

p.m., he says, "Just bring your ass down here because I'll come down there before my 5 word." At 8:59 p.m., "I need you. When you gonna be home." Then, at 9:34 p.m., he tells Stevens, "I can't wait on you. *I gotta handle my biz*." ***R. 356-63*** (emphasis added)***;*** State's Ex. 58-59, ***R.526-27*** (official printout of text messages)***;*** State's Ex. 82.[11]

Johnson and his mother exchanged several text messages on June 9th, the day following the murder. At 7:03 p.m., he tells her, "I want to be all right. Shay got it all twist up right now, but I know you praying." At 7:43 p.m., she responded, "How you mean you want to? All right. Deal with yourself. Maintain your cool. Let them figure it out. You had nothing to do with it." A minute later, his mother sends a text directing him to "[c]lear all your texts." At 10:38 p.m., he sends her a text, saying, "Talk to her, ma, and don't forget to erase your texts." ***R. 364-67;*** State's Ex. 64, ***R. 528-30*** (official printout of text messages). The Verizon historical cell site location information relating to Johnson's cell phone from 9:01 to 11:40 p.m. on June 8, 2011, reflected that for most of June 8, 2011, his phone used cell sites in the Summerville and North Charleston area. The one anomaly was a call at 10:02 p.m., when the phone used a tower near the interchange of the 1-26 and I-526. **R.** ***398-407; 409-14;*** *see also* State's Ex. 70.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only" and it is "bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson,* 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citation omitted). An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "The burden is upon the appellant to satisfy [the

[11] Again, the murder occurred at roughly 10:18 p.m. **R.** ***360***.

appellate] court that there has been prejudicial error." *State v. Smith*, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956).

ARGUMENTS

I. This Court should vacate the Court of Appeals' erroneous reversal of Respondent Johnson's murder conviction based on the trial judge's accomplice liability instruction and affirm, since the evidence presented at trial supported the instruction on this legal principle since the evidence was in conflict as to whether Johnson or his accomplice shot the victim.

The State submits that this Court vacate the Court of Appeals' erroneous reversal of Respondent Johnson's murder conviction based on the trial judge's accomplice liability instruction and affirm because the direct and circumstantial evidence presented at trial supported the instruction on this legal principle since the evidence was in conflict as to whether Johnson or his accomplice shot the victim.

After denial of Johnson's motion for a directed verdict, the State asked whether the trial judge intended to instruct the jury on accomplice liability. The trial judge stated that he would "charge it in the sense of what is the hand of one. It talks about accomplice. It doesn't go into great deal about it. … [b]ut … it talks about being a part of it, … [and] playing some role in it." ***R. 428-29***. Johnson objected to the instruction and the trial judge agreed to allow him to argue his objection after the charge had been given. ***R. 429***.

The trial judge subsequently instructed jurors that they could consider principles of accomplice liability in determining whether the State had established Johnson's guilt on the charge of murder, but they could not consider accomplice liability on the charge of possession of a weapon during the commission of a crime. Instead, he charged jurors that the State had to prove beyond a reasonable doubt that Johnson possessed a firearm "at the time that that murder

was committed." See ***R. 479-80***.[12]

Following the jury instructions, Johnson objected to the "hand of one/hand of all charge" because the State did not present "any evidence that the person that [he] was with that night was the shooter." Instead, all of the State's evidenced pointed to Johnson as the shooter. "[E]ven their own State's witness [Sgt. Osborne] said we don't have enough to say he's involved or not, and that's why I think the Court should have declined to read that hand of one/hand of all charge." ***R. 486-87***.

The trial judge stated that he had thought the same as Johnson in the first trial of the case, until "the jury asked a very legitimate question," which caused him "to reflect on" the request for an accomplice liability instruction in the first place. He tries to learn from his mistakes, and he found that the instruction was "appropriate" in light of the evidence presented. ***R. 487-88***. After the present murder conviction, the trial judge stated that he felt the jury had convicted based on accomplice liability. ***R. 493***. Johnson thereafter moved for a new trial based on the trial judge's accomplice liability instruction. *See* ***R. 599-607***.

At the hearing on his motion, he asserted that the State's theory and the prosecution's circumstantial evidence in all three trials was that Johnson shot the victim and that the State had not presented any evidence that anyone else shot the victim. He further argued that *Wilds v. State*, 407 S.C. 432, 435, 756 S.E.2d 387, 388 (Ct. App. 2014), *cert. dismissed as imprudently granted*, (October 7, 2015), was "directly on point" and required a new trial because in *Wilds* the Court had found appellate counsel was ineffective for not arguing the trial court erroneously gave an accomplice liability instruction under what Johnson felt were "very similar" facts. ***R.***

[12] He later reiterated this portion of his charge when the deliberating jury sent a note (Court's Ex. 10) asking if the hand of one instruction applied to the weapon charge. ***See R. 489-90***.

501-03.

Johnson claimed the jury's verdict reflected that jurors did not believe he was the shooter and found that the person with him was the shooter "by process of elimination." He also pointed to Sgt. Osborne's admission on cross-examination that the State lacked probable cause to serve a murder warrant on "Creep" if that person was identified. Rather, the State did not know the degree of "Creep's" involvement and whether he had conspired. ***R. 504-05***.

In response, Assistant Solicitor Linder pointed out that she "made a very specific point to not say that [Johnson] was the shooter because I think there were questions about that." He "had motive, access, he set up [the murder], he drove there [and] he was involved with everything." Yet, "he was recruiting … assistance." When Stevens did not respond to his "innocuous text messages," he became very specific about his plans and "ultimately … he came with another person." Unaware of his reason for recruiting someone to aid him, Ms. Linder hypothesized that he might have needed someone to provide him a gun because the murder weapon was never found; he could have needed "a cheerleader," 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***.

Addressing Sgt. Osborne's testimony that "he would not have charged Creep without talking to him," she pointed out that the State did not know whether "Creep" was the person who was with Johnson when the murder occurred. Johnson did not say this in his original statement, only later. Also, he had a telephone contact for "Creep" in his phone, but he was less than honest about this person's identity. He said his friend Creep lived in Summerville and described him as having a tattoo. When Sgt. Osborne called the number in the phone, the person who answered would not talk to him. Also, Sgt. Osborne tracked down a man nicknamed "Creep" in

Summerville, but this man did not have a tattoo and his cell phone number was not the one listed in Johnson's phone. "So[,] there's nothing to say that this Creep person is actually the individual that was in the car." ***R. 507-08***. *See also* "Statement of Facts." She correctly observed that Johnson's reliance on *Wilds* was misplaced because it was factually distinguishable, since Wilds' co-defendants testified that he was the shooter. Accordingly, all of the evidence was that he was the shooter. Because there was no eyewitness testimony in this case, the trial judge's accomplice liability instruction was proper. ***R. 508-09***.

Johnson contended in reply that the judge erroneously gave the instruction because the State did not prove who the shooter was or that the other person was involved. Rather, he argued that this other person may have been merely present. ***R. 509-10***.

The trial judge noted that there was a video showing two people getting out of the car and walking to the apartments. Shortly thereafter, the video shows them running out of the apartments and "jump[ing] into the car." Also, Johnson had sent a text indicating in slang that he planned to shoot someone that night and there was other circumstantial evidence implicating him in the murder. The trial judge further noted that the jury had acquitted Johnson on the weapon charge, which indicated that it found the State had not proved that he had possession of it beyond a reasonable doubt. He then rhetorically asked, "Please tell me how there isn't some evidence of a shooter and this man being a shooter and being involved in a plan to go kill somebody[?]" He then denied Johnson's motion. ***R. 510-11; 513-16***.

The trial judge did not abuse his discretion. The law to be charged must be determined from the evidence presented at trial." *State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). The trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by any record evidence. *State v. Brandt*, 393 S.C.

526, 549, 713 S.E.2d 591, 603 (2011); *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App. 2005).

The Court of Appeals correctly recognized that:

> 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, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014)).

Johnson, Howard's Adv. Sh. No. 40 at 24. ***App. 13***. *See also Butler v. State*, 435 S.C. 96, 97-98, 866 S.E.2d 347, 348 (2021).

Yet, the Court of Appeals 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 he 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. But, this was hardly the only evidence before the jury. The text messages he sent to Stevens not only show his malicious intent, they also demonstrate his efforts to secure an accomplice to assist him in killing the victim.

When considered in connection with the video footage and photos taken therefrom at the

apartment complex in the minutes leading up to and following the murder, 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).

A very clear and 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 one 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. 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***. *See also* Argument II, *infra*. Thus, contrary to the Court of Appeals' conclusion, see *Johnson*, Howard's Adv. Sh. No. 40 at 28 (***App. 16***), the evidence was equivocal "as to whether Johnson or [the unknown individual] was the shooter," and the trial judge did not abuse his discretion by instructing the jury on accomplice liability. *Id*. This error is glaring since the Court of Appeals correctly recognized that "[n]o eyewitness testified that he or she saw the Victim being shot," *Johnson*, Howard's Adv. Sh. No. 40 at 27 (***App. 15***), and there was no video surveillance of the shooting.

Moreover, the Court's contrary finding that Johnson was the shooter draws a conclusion no one can know for certain. Indeed, 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).[13]

[13] Also, the jury's question in Court's Ex. 10, "[D]oes the hand of one apply to the possession of a weapon during the commission of a violent crime[?]," reflects that at least some juror(s) disagreed with the Court of Appeals' 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)).

Therefore, while the Court of Appeals 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 (***App. 12***), in concluding the accomplice liability instruction should not have been given, the Court erroneously departed from this correct standard, and instead erroneously focused heavily on the State's theory of the case. See *Johnson*, Howard's Adv. Sh. No. 40 at 27-28 (***App. 15-16***). In doing so, the Court committed the same error the trial judge committed in the original trial.[14] Indeed, there could not be a serious challenge to the instruction had Johnson been jointly tried with another individual and the instruction would not have been limited to the co-defendant.

Additionally, the Court of Appeals' erroneously found 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), required reversal because Johnsen's argument in this regard was procedurally barred sine it was not presented at trial. *Contra State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Furthermore, *Wilds* is factually distinguishable.

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.

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[14] Further, in focusing on the prosecution's evidence, the Court ignored that the prosecution's evidence was that Johnson's reference to Creep in his custodial statement was a lie, designed to mislead the officers investigating the case. As argued in the Final Brief of Respondent, at 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." However, 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 n. 2 (***App. 2 n. 2***), 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.

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 jurors on accomplice liability. Subsequently, the PCR court found Wilds' appellate counsel was ineffective for not challenging the instruction on appeal. *Id*. at 435-37, 756 S.E.2d at 388-89. The Court of Appeals affirmed the PCR judge.

The Court noted that the jury may have doubted the co-defendants' testimony but found that 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. The Court found Wilds was prejudiced because the jury instruction was given in response to the jury's question, enabling 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 v. State*, 393 S.C. 232, 236-37, 712 S.E.2d 436, 438-39 (2011),15 the State did not have proof as to whether Johnson or his accomplice fired the fatal shots, only that one of them inferably did so. Thus, the evidence on this point was equivocal and supported an accomplice liability instruction.

Likewise, neither this Court's decision in *State v. Washington*, 431 S.C. 394, 848 S.E.2d 779 (2020), nor this Court of Appeals' decision in *State v. Campbell*, 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021), *cert. granted*, Sept. 8, 2022, requires reversal of Johnson's conviction.[16] 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

[15] The Court of Appeals' reliance upon *dicta* in *Barber*, stating 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 in Argument II.

[16] This Court has granted the State's certiorari Petition in *Campbell* and the parties have filed their briefs.

was no evidence to support it. 431 S.C. at 403, 848 S.E.2d at 784. *Washington* is factually distinguishable because there was evidence in *Washington* that the petitioner was the shooter and there was evidence that 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. Likewise, even assuming *arguendo* that this Court does not reverse *Campbell* and that decision stands, it is factually distinguishable from this case. In *Campbell*, the 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.

Another egregious error in the Court of Appeals' reasoning is the conclusion that submission of the instruction violated due process. In footnote 9 of its opinion, the Court of Appeals acknowledged 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*. This comment ignored that the Court then turned around and agreed with Johnson that the trial judge's ruling did violate due process. See Howard's Adv. Sh. No. 40 at 23, 29. ***App. 11 & n. 9***. However, the due process argument was not preserved for review because not raised at trial. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94. Worse, and far more importantly, the finding of a due process violation fundamentally misunderstands the function of the Due Process Clause.

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").

Estelle v. McGuire, 502 U.S. 62, 72-73 (1991), makes it unerringly clear: "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. ... And we also bear in mind our previous admonition that **we "have defined the category of infractions that violate 'fundamental fairness' very narrowly**." .... "**Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation**." (citations omitted and emphasis added).

Additionally, the Court of Appeals 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 (***App. 16***).

This conclusion ignores that it was both legally and factually improper to rely on that acquittal to find prejudice. First, this point was not properly before the Court on appeal because Johnson did not allege any supposed inconsistency in the verdicts either in his Statement of Issues on Appeal, see Rule 208(b)(1)(B), SCACR or in his brief. See *Dunbar*, *supra*. "An 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). Secondly, the Court erroneously relied on inconsistent verdicts. *State v. Alexander,* 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991) (abolishing the rule prohibiting inconsistent verdicts). Moreover, and contrary to the Court of Appeals' conclusion, the trial judge correctly found that the evidence was equivocal as to the shooter's identity.

Also, 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 preserved for appellate because he did not raise it at trial. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694; FBOR at p. 41, fn. 31. Second, the trial judge's submission of the accomplice liability instruction is consistent with *Barber*. This 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 phase "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.

II. 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 is not and cannot legally be an alternative theory of liability under South Carolina law.

This Court should grant certiorari to overrule *Barber*'s *dicta* 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." *Barber*, 393 S.C. at 236, 712 S.E.2d at 439.[17] Contrary to this *dicta*, 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

[17] 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.

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.

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 as exceptionally inaccurate, unnecessarily confusing, and misleading. Stated succinctly, this understanding of accomplice liability charges is simply wrong.[18]

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 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. 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 in criminal cases, or jurors' consideration of the voluntariness of a custodial statement. Moreover, it is doctrine of expanding who may be convicted as a principal, not excluding an accused from liability, or

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

reducing his culpability.

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. 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*.[19]

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 their offence*, *founded upon the nearness or remoteness of their*

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

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, this 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. 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, this Court should overrule *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 fact" because this is inaccurate, unnecessarily confusing,

and misleading *dicta* that does not and cannot require relief here.[20]

CONCLUSION

Therefore, this Court should vacate the decision of the Court of Appeals and affirm the giving of the accomplice liability instruction, affirm on his remaining arguments, and reinstate Respondent Johnson's murder conviction.

Respectfully submitted,

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[20] As further support for the position that this language was *dicta*, the State notes that S.C. Code Ann. § 14-1-50 (2003) provides that the English common law applies 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 *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 the above well-settled South Carolina law.