

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Jun 23 2023**

S.C. SUPREME COURT

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

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THE STATE,

Respondent,

vs.

SETH SMITH,

Petitioner.

Appellate Case No. 2023-000974

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**RETURN TO PETITION  
FOR WRIT OF CERTIORARI**

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## STATEMENT OF ISSUES ON APPEAL

### I.

The trial court correctly answered the jurors' question that a person who is a principal could also be an accessory after the fact, and it correctly refocused the jurors' attention on the pertinent question as to whether the State proved Petitioner guilty of the crime charged, accessory after the fact, regardless of whether it was possible for Petitioner to also be a principal because Petitioner was not charged as a principal.

### II.

Petitioner failed to contemporaneously object to the supplemental instruction, so the issue is not preserved for review, and Petitioner was not prejudiced by the purported error.

## STATEMENT OF THE CASE

Petitioner Smith was indicted by the Charleston County grand jury for accessory after the fact to a felony (A, B, C, or murder). The jury convicted Petitioner following jury trial on January 7, 2019, before the Honorable R. Markley Dennis, Jr. Judge Dennis sentenced Petitioner to fifteen years' imprisonment. Subsequently, on July 31, 2019, a hearing was held before Judge Dennis on Smith's motion for a new trial. Judge Dennis denied the motion for new trial by written order dated August 14, 2019.

Petitioner appealed the conviction and sentence. Following briefing, the Court of Appeals affirmed the conviction and sentence. State v. Smith, 2023-UP-087 (S.C. Ct. App. filed March 15, 2023). Petitioner's petition for rehearing was denied by the Court of Appeals and Petitioner filed a petition for writ of certiorari. This return follows.

## STATEMENT OF FACTS

Officer Marchent Faustin of the Charleston Police Department was the first witness for the prosecution. He discussed footage recovered from the murder on Reid Street, a one-way street near East Bay Street in Charleston. The victim, Bennett, was found slumped over the steering wheel in a white Crown Victoria. Meanwhile in surveillance footage, a black vehicle is depicted driving hastily in reverse, going the wrong way on the one way street while the passenger side door is still open. Although the shooting itself was not captured on camera, it occurred at roughly 11:40 a.m. on a Saturday, April 18, 2015.<sup>1</sup> R. p. 57; pp. 60-61; p. 68; State's Exhibit 23 (11:41:30-50)<sup>2</sup>; see also R. p. 353 (testimony that the 18<sup>th</sup> was a Saturday); State's Exhibit 142 (map of Charleston).

Randall Unterbrink with the crime scene unit processed the white Crown Vic. He found several casings and transfer blood on the armrest of the vehicle. Also a Crown Royale bag was found under the armrest between the front seats. R. pp. 74-78. The contents of the Crown Royale bag are displayed in State's Exhibits 88 and 89. (R. pp. 600-01). Both pictures show a sizable bag of green plant matter and a digital scale.

Investigator Ashley Wojslawowicv went to the hospital to retrieve items on Bennett's person which included his cell phone and counterfeit hundred dollar bills totaling a pretend \$3,000. It was obvious the bills were counterfeit because they all had the same serial number and lacked the requisite watermark. Also recovered was \$153 in real cash. R. pp. 144-46. Officer Faustin testified he was familiar with Bennett. He was recently released from prison for narcotics charges. R. p. 66.

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<sup>1</sup> Investigator Paul Krasowski, later explained that the cameras pan through multiple sessions on an automatic timer. R. p. 363. The cameras rotate up to 360 degrees to view multiple vistas at intersections. R. p. 369, lines 19-25.

<sup>2</sup> The exhibit, on file with the Court of Appeals, is a CD containing the video file of the surveillance. Another file is the software tool for viewing the footage. It is labeled OcularisViewer.exe. Clicking on the file opens the software tool and the video footage can be opened through the software tool.

Rayshawn Rivers was sitting in the car with Bennett when Bennett was shot. Rivers was reluctant to testify even though Bennett was like family to Rivers. R. pp. 83-86. Rivers was sitting in the car with his three year-old child and Bennett when the shooter came out of what Rivers described as a brown or black Cadillac and fired repeatedly, killing Bennett. Rivers was shot in the leg. Rivers could not identify the shooter. R. pp. 87-89. The shooter jumped back in the Cadillac, and the Cadillac left. R. pp. 91-92.

Dr. Nicholas Batalis, the pathologist, testified Bennett was shot twelve times in the back from between the shoulder blades all the way to the upper buttocks. Marijuana remained in Bennett's system. Multiple internal organs bled out because of the gunshot wounds to Bennett's trunk causing Bennett's death. R. pp. 229-30.

Jeremy Wright was another prosecution witness that did not want to testify. He admitted he told police that Petitioner and Petitioner's brother, Bryant Smith, parked Petitioner's black Cadillac in the driveway at Wright's girlfriend's house where he was staying. They showed up at his girlfriend's house on the day of the shooting between 1 p.m. and 2 p.m. Petitioner claimed his Cadillac needed to be repaired, and Petitioner and Bryant asked Wright for a ride. Wright drove them downtown and he dropped Bryant off at Hanover Street, then he continued with Petitioner to North Charleston. R. pp. 96-99. After he let Bryant out of the car, Wright saw Bryant drive away in a grey car. R. p. 100. Wright testified the black Cadillac is Petitioner's vehicle. They left the vehicle parked in Wright's driveway until it was later towed away while Wright was at work. R. p. 102. Wright was equivocal about whether or not the vehicle looked different the day it was left at his residence. R. pp. 102-03. However, he identified the vehicle in State's Exhibits 128-30 and State's Exhibit 141 as Petitioner's Cadillac. R. p. 112. Explained more fully later, those photographs are stills taken approximately half an hour earlier in the area where the murder would

occur, and the vehicle in those stills appears to be the same vehicle depicted hastily backing away from the murder in State's Exhibit 23.

Officer Richard Wiersma responded to the crime scene. He recovered four casings from around the white Crown Vic and a cell-phone outside the passenger side of the vehicle. R. pp. 131-33. He was called on May 2 to a residence on Green Park Avenue in the West Ashley neighborhood. A search of the residence resulted in the discovery of two bags of green-leaf substance, letters, and lots of money. Law enforcement found a social security card and other documents at the residence with Petitioner's name and address. R. pp. 136-38.

Jeff Miller with the Charleston Police Department processed the 2000 Cadillac after it was towed from a salvage yard. The Cadillac's wheels were painted, and it did not appear the wheels were factory painted. The Cadillac was missing the bumper. The car had been picked apart for parts. R. pp. 157-59; p. 163.

Debra Turner, the district manager for several Dollar General Stores, testified about records showing the purchase of two cans of brown spray paint on April 20. She also authenticated surveillance video footage showing two men purchasing two cans of spray paint in the store on April 20. R. pp. 184-91; State's Exhibit 119. Later when Petitioner's cousin testified, he would identify Petitioner as one of the two men in the Dollar General video purchasing spray paint. R. p. 248.

Susan Amerman from the Department of Motor Vehicles testified a 2005 Infinity was registered in Bryant Smith's name. She testified one of the addresses Bryant listed was the same Green Park Avenue address searched by law enforcement. Petitioner also showed one of his addresses for his driver's license was the matching Green Park Avenue address. R. pp. 196-97. Petitioner was the registered owner of a 2000 Cadillac Deville with the license plate of KSM819. R. p. 197.

Amerman testified Jibral Acevedo, Petitioner's cousin, transferred the title into his own name on April 20, paying the expedited fee. The sale price was purported to be \$300. R. pp. 203-05; State's Exhibit 158D. However, Acevedo did not get a new license plate, which would mean he would not be able to drive the car. R. pp. 208-09. Despite Acevedo paying an expedited fee, the paperwork stated the purported date of sale was April 1, 2015. R. pp. 209-10.

Jibral Acevedo testified Petitioner is his cousin. They met when he was a teenager and became close. Acevedo testified he calls Petitioner "TJ," which is short for Tony James. Bryant Smith is Petitioner's brother. Bryant is known as "Brisk" and "Little B." R. pp. 232-34. Prior to trial, Acevedo pled guilty to obstruction of justice and was facing a sentencing range of zero to ten years imprisonment. R. p. 235. Acevedo confirmed Bryant owned a silver Infinity. R. p. 238. Acevedo claimed he had been interested in buying Petitioner's Cadillac. On April 20, Petitioner called Acevedo before he went to work and asked Acevedo if he still wanted to buy Petitioner's Cadillac. R. p. 241. Petitioner and someone Acevedo only knew as Bubba picked up Acevedo in a white pick-up truck and took Acevedo to the DMV. Before arriving at the DMV, they stopped at a Dollar General store. Petitioner and Bubba went into Dollar General while Acevedo smoked a cigarette outside. R. pp. 243-46. Acevedo identified Petitioner and Bubba in video surveillance from the Dollar General store. R. p. 248. Next, they went to Jeremy Wright's house, where Acevedo saw the Cadillac he was supposed to buy. R. pp. 249. An hour later they left Wright's house and went to the DMV. They left the Cadillac at Wright's. Acevedo claimed the reason he did not leave Wright's with the Cadillac was because he wanted title in his name. Petitioner gave Acevedo money to pay for the title transfer. Petitioner wanted the transfer completed that day. However Acevedo found out from the DMV employee assisting him that he did not have enough money to pay for the expedited transfer, so he asked Petitioner for more money to complete the

transfer. Acevedo admitted Petitioner did not sell him the car on April 1, contrary to the documentation. R. pp. 249-56. Acevedo never paid for the Cadillac. R. p. 262, lines 18-24.

Even though Acevedo never paid for the Cadillac, Petitioner told Acevedo he could keep the car or sell it. They went back to Wright's house, but Acevedo never took possession of the Cadillac. Instead, Acevedo, who stayed overnight with Petitioner, decided to junk the car the next morning, as recommended by Petitioner, because he did not have a driver's license. R. pp. 261-65. Acevedo admitted he saw the bumper was removed and the car wheels were spray-painted. At Petitioner's suggestion, Acevedo agreed to junk the car. The "truck dude" (tow-truck driver?) paid Acevedo \$200 and took the Cadillac. Acevedo never paid Petitioner for the Cadillac. It was free money for him. R. pp. 267-69. Acevedo explained to the jury he lied to the police and told them the car broke down two weeks earlier and he bought the vehicle from someone named TJ, instead of telling them he bought the car from Petitioner. Acevedo spent a year in jail for his lies. R. pp. 271-73.

On cross-examination, Acevedo claimed he did not believe Petitioner would set him up and Petitioner never told him anything about a murder. R. p. 295; p. 300. This opened the door to Acevedo admitting he heard on the streets that Bryant committed the murder. Acevedo admitted he told law enforcement he thought the Cadillac might have been involved in a crime. But he also told them he was in possession of the car two weeks earlier. He claimed he told law enforcement this to help himself, not Petitioner. R. pp. 300-02. Acevedo testified, "I said I burned [the car] . . . I said I did something with the car so I wouldn't be in possession of the car." R. p. 303, lines 6-8. Acevedo testified he was hoping to get a benefit from testifying at trial, but then he admitted it would also be a benefit to still get along with his cousin, Petitioner. R. pp. 303.

Detective Sergeant Paul Krasowski took over as case agent when the first case agent retired because he already was significantly involved in the case. R. pp. 352-54. He explained four casings

were found outside the vehicle and eight inside. All were .40 caliber casings. R. p. 356.

Detective Krasowski described still images from the city's surveillance cameras found in the eastern side (Eastside) of Charleston. Ultimately, they show Bryant's Infinity and Petitioner's Cadillac circling the immediate area in the minutes leading up to the shooting. The location of the cameras are shown in the map introduced as State's Exhibit 142. State's 125 shows a still taken at 11:00 a.m. from the Columbus/Aiken camera depicting the vehicle later determined to be Bryant Smith's Infinity. State's 126 is a photograph captured on the Reid and Drake Street camera showing the Infinity driving down the street at 11:01 a.m. State's 127 is a photograph from the Hanover and Cooper camera taken at 11:04 a.m. While the eye would naturally go to the gentlemen in a white t-shirt standing by a black car, the evidentiary value is the front end of the Cadillac seen approaching the intersection in the upper left corner of the picture. It is seen more fully in State's Exhibit 128. State's Exhibit 129 shows a vanity plate in the front of the Cadillac. Also noteworthy is the Cadillac's black bumper and the lack of a grill emblem. State's 130 depicts the Cadillac completing the turn onto Hannover Street at 11:04 a.m. State's 131 shows the Infinity appearing on the same camera at Hanover and Cooper at 11:05 a.m., and at 11:06, the Infinity is turning down Cooper Street in the direction from which the Cadillac previously approached the intersection in State's 132-34. State's Exhibit 135 shows the Infinity at Columbus and Aiken at 11:09 a.m. The Infinity appears yet again at 11:10 a.m. in the Reid and Drake camera in State's 136. This camera then captures the Infinity's license plate in State's Exhibits 137-39. It was fortunate for law enforcement to have this quality of stills because the camera zooms in and out, and also rotates at 360 degrees. R. pp. 369-70. From these stills, law enforcement was able to determine the license plate number and match the vehicle depicted to Bryant Smith's Infinity. State's 140 shows the Infinity making a turn on Reid Street. Somewhat hidden in the middle right of the still is a vehicle appearing to be the

Cadillac following the Infinity to the intersection. The next still, State's 141, appears to show the Cadillac following the Infinity west down Reid Street. The Infinity is in the darkened band at the top of the still. See R. p. 370, line 22 – p. 371, line 5. The movement described is more readily depicted in State's Exhibit 23, the surveillance video, at 11:12:50 to 11:13:10. Therefore, surveillance from the area shows the Cadillac and Bryant's silver Infinity together in the area of the shooting, and they are circling a small area of Charleston where Bennett was shot within half-an hour. See R. pp. 363-67.

Investigators cross-referenced DMV records with ALPR snapshots. ALPR is an acronym for an automated license plate reader system in which the State has cameras located at various points in Charleston that take photographs of license plates. The photographs are maintained in a database. A snapshot of the Cadillac was captured on April 17 at 10:49 p.m. on East Bay Street. The snapshot shows Petitioner's license plate number, which is KSM819. R. pp. 377-83. Detective Krasowski noted Petitioner was cited for a traffic violation in the Cadillac in March 2015, indicating that he drives the Cadillac. R. pp. 389-90.

Detective Krasowski noted the Cadillac de Ville captured in the footage was somewhat unique due to customization. The grill was all black and featured all-black rims, both customized features. Additionally, the windows were heavily tinted. Finally, the Cadillac emblem that normally would be located on the grill and also would be mounted on the front hood was not present in this Cadillac, and had been removed. R. pp. 375-76.

Two phone numbers were found on Bennett's phone: one for "TJ" and one for "little B." Detective Krasowski noted Petitioner has a tattoo that says TJ and identifies himself on social media as "Tony James." R. pp. 392-94. As mentioned before, Bryant is known as Little B. R. p. 233, line 21 – p. 234, line 4.

When Detective Krasowski and another detective recovered the Cadillac from the junkyard, Detective Krasowski smelled the distinct odor of spray paint on the vehicle. R. p. 400. He noted the condition of the Cadillac was different from how it appeared on surveillance footage. R. pp. 400-01.

During cross-examination, Detective Krasowski testified the apparent motive for the murder was the result of a drug deal gone bad or some kind of robbery during a planned drug transaction between Bennett and Bryant Smith. R. p. 424. On redirect examination, Detective Krasowski specified he had two independent sources providing information that the night before the murder (December 17), Bennett committed a robbery of drugs in West Ashley. R. p. 446.

Was Bryant the victim of Bennett's robbery? Phone records introduced into evidence show multiple calls between Bennett and Bryant Smith on Friday, December 17, including a series of phone calls from 7:47 p.m. until 8:09 p.m. There is a gap of about six to seven minutes between an inbound call from Bennett concluding at 8:02:21 and an outbound call from Bryant to Bennett at 8:08:04 p.m. that the prosecutor theorized was when the robbery could have occurred. State's Exhibit 152, pp. 4-5. Critically, a series of phone calls ensued between Bryant and Petitioner that night, starting with an approximately five-minute call from Bryant to Petitioner at 8:10 pm., and occurring over the course of the evening until 10:38 p.m., with another call at 1:51 a.m. on Saturday, December 18<sup>th</sup>. State's Exhibit 116, a cellular analysis by FBI Special Agent Simmonds, shows Bennett's phone using the towers near Bryant and Petitioner's West Ashley address at around 8:00 a.m. until 8:13 a.m., then using cell towers in North Charleston starting at 8:16 p.m. until 8:20 p.m., moving away from West Ashley towards the Charleston International Airport. From 9:02 p.m. until 1:36 a.m., Bennett's phone is using cell towers located in the eastern side of Charleston's peninsula near East Bay Street. The same report shows Bryant Smith's phone using cell towers in West Ashley from 7:07 p.m. until 10:37 p.m. and later using cell towers in North Charleston at 1:01 a.m.

and 1:05 a.m. Petitioner's phone is located in West Ashley at 7:30 p.m. and in North Charleston at 8:00 and then 8:10 p.m., but is located near downtown Charleston towers, on the peninsula, from 8:39 p.m. until 10:51 p.m. See R. pp. 324-34 (Agent Simmonds explaining the movement depicted in the cellular analysis).

## ARGUMENT

### I.

**The trial court correctly answered the jurors' question that a person who is a principal could also be an accessory after the fact, and it correctly refocused the jurors' attention on the pertinent question, as to whether the State proved Petitioner guilty of the crime charged, accessory after the fact, regardless of whether it was possible for Petitioner to also be a principal because Petitioner was not charged as a principal. The Court of Appeals correctly found any error was harmless beyond a reasonable doubt.**

Petitioner argues the trial court committed an error of law when it instructed the jury it was possible for someone to be a principal and also commit the separate crime of accessory after the fact. However, the trial court's response to the jury question was a correct statement of law because (1) the State is not required to prove that a person charged as an accessory after the fact was not a principal to the crime, and (2) a principal to the crime commits the crime of accessory after the fact if assisting another principal in evading detection or arrest.

After deliberations began, the jury inquired whether the person accused of accessory after the fact could also be the principal. R. p. 539, lines 14-17. The trial court indicated to counsel that part of its answer to the question would be an indication that someone charged as an accessory after the fact could be a principal to a crime. Defense counsel objected because he believed if a person was a party to a crime, they could not be an accessory after the fact, relying on State v. Blakely, 402 S.C. 650, 656, 742 S.E.2d 29, 32 (Ct. App. 2013). R. p. 539, lines 22-25. The trial court rejected the

legal argument that a party to the crime could not also be an accessory after the fact, noting in Blakely, this Court was addressing a double jeopardy issue, not the substantive question at issue. R. pp. 539-40.

When the jury was summoned back into the courtroom, the trial judge provided the following answer to the jury's question:

. . . What I have now is the Court's Exhibit 2. And it is a question. And I will read: Are the accused, the defendant, in parens [sic], and unknown principal mutually exclusive in the eyes of the law? Can they be the same person?

I am going to answer that by recharging a portion of my charge where I define the elements of – for the crime of accessory after the fact of committing a felony of murder.

And, as you will recall, there are basically three: The felony must have been completed. The accused must have knowledge of the principal that the principal committed the felony. And the accused must harbor or assist the principal felon from being detected. And harboring must have the intention to protect the principal.

As I further charge you that accessory – a person may be convicted even if the principal is unknown or has not been charged or has not yet been prosecuted.

And so to answer your question, the name of the principal really doesn't really have any bearing in your decision. Can it be one in the same person? It is in theory it could be. The key is whether or not the person, the acts taken by the person, were after having knowledge that the crime had been committed and completed; two, that they knew that the principal – had reason to know the principal committed that crime; and three, the acts taken by the person were to protect the principal from being then detected or arrested.

If those elements are present it doesn't matter what – who the principal was, because you are not dealing with the principal. You are dealing with the person accused of basically in this case being an accessory after the fact of the crime that was committed by the principal. So the identity, as I have stated, is really not significant in so far as your determination. The key is whether those elements pertaining to the person accused of the accessory are present.

R. p. 541, line 2 – p. 542, line 13.

**The trial court asked defense counsel if he had any other objection than the Blakely**

**objection and defense counsel indicated he did not have any other objection.** R. p. 542, lines 17-21. The jury reached a verdict and right before the jury was recalled to announce their verdict, defense counsel revisited the supplemental charge and cited State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998) arguing again that if a person is more than merely present during the commission of a crime, he cannot then be guilty of accessory after the fact. The trial court rejected the legal premise of the argument. Defense counsel also argued the State was required to prove the guilt of the principal, which the trial court also rejected as a matter of law. R. pp. 544-49.

First, the only objection to the instruction that is preserved is the argument that someone who is a principal to the crime, but not charged as a principal, cannot be found guilty as an accessory after the fact. In other words, a viable defense to the charge of accessory after the fact is a claim that the alleged accessory is really a principal.

The objection that the State is required to prove the guilt of the principal is not preserved for review, because it came after the verdict was rendered, although not yet announced. “Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review.” State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). A post-verdict motion made after the opportunity for a trial court to remedy the alleged wrong does not preserve an issue for review. See State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) (finding the issue not preserved due to failure to move for mistrial until after the verdict: “One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal.”).

The trial court’s instruction was a correct statement of law. The trial court correctly advised the jury to focus on the elements of accessory after the fact and whether the State met its burden of proof and not whether Petitioner might be a principal. The trial court also correctly confirmed that

in theory a principal could also be an accessory after the fact. To restate the elements the State is required to prove the following: (1) a completed felony; (2) the accused knew the principal committed the felony; and (3) the accused harbored or assisted the principal felon. State v. Legette, 285 S.C. 465, 466, 330 S.E.2d 293, 294 (1985); State v. Blakely, 402 S.C. 650, 656, 742 S.E.2d 29, 32 (Ct. App. 2013).

In the instant case, there is likely at least two principals to the crime, the shooter and the driver. “The distinction between principals in the first and second degree has been long since exploded; it is now considered a distinction without a difference.” State v. Putman, 18 S.C. 175, 178 (1882) (quotation marks omitted) (quoting State v. Fley, 4 S.C.L.338 (1809) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)).

Petitioner argues that the instruction eliminated the requirement that Petitioner must have aided another person. However, the instruction, taken as a whole does not eliminate that requirement. The trial court acknowledged that a person could be a principal and an accessory after the fact but quickly refocused the jury’s attention on the fact Petitioner was only charged as an accessory and the jury was required to find the elements of accessory after the fact regardless of the identity of the principal. The rest of the charge was clear that an accessory needed to have knowledge that the accessory was aiding a principal to the crime. The trial court charged, “The key is whether or not the person, the acts taken by the person, were after having knowledge that the crime had been committed and completed; two, that they knew that the principal – had reason to know the principal committed that crime; and three, the acts taken by the person were to protect the principal from being then detected or arrested.” R. p. 541, line 23 – p. 542, line 4. These instructions clearly contemplate the accessory must be aiding someone else, the principal.

Conceivably, Petitioner might have factually been one of those two principals, but he was not

charged as a principal. Because accessory after the fact is a distinct crime, a defendant charged with accessory after the fact is not entitled to a defense that he is not guilty because he was a participant in the crime itself. Recently, the Georgia Supreme Court revisited prior case law finding the statutory offense of hindering, similar to its prior common law offense of accessory after the fact, could not coexist with the charge of murder. Nalls v. State, 815 S.E.2d 38, 46 (Ga. 2018) (“One guilty of violating the hindering statute ‘would be classified as an “accomplice after the fact” at common law’ . . .”). The court noted its prior case law concluded a person guilty of hindering could not also have “participated in the major crime as a party to the crime.” Id. But then Nalls commented:

In so doing, the court also failed to consider whether the principle that being an accessory after the fact does not make one a party to the crime was appropriate to invert; whether a person is a party to the crime simply by being an accessory after the fact is not necessarily the same question as whether a party to the crime can also be found guilty of accessorial liability.

Id. The Georgia Supreme Court concluded:

There is nothing in the statute that precludes a conclusion that a person who was a party to the primary crime may also be guilty of the separately charged crime of hindering, where the evidence shows that the person has hindered the apprehension or punishment of another person who also is a party to that crime. To conclude otherwise would read into the statute an element – that the defendant was not a party to the primary crime – that is not present.

Id. at 47-78. The court concluded a jury could find the defendant (co-appellant Baskin) was one of the gunmen who shot at the murder victim and also subsequently hindered the apprehension of codefendants Baty and Nalls by driving them away from the scene of the crime. Therefore, “it would not have been a correct statement of law to tell the jury that it had to choose between convicting Baskin of murder and convicting him of hindering.” Id. at 49.

This holding is consistent with the Georgia Supreme Court's observation, "An accessory after the fact is not considered an accomplice to the underlying crime itself, but is guilty of a separate, substantive offense in the nature of obstruction of justice." Vergara v. State, 695 S.E.2d 215, 219 (Ga. 2010) (citations and internal quotation marks omitted).

In Ramos v. State, 696 So.2d 461 (Fla. Dist. Ct. 1997), Ramos was charged and convicted as an accessory after the fact. She lived with the perpetrator of the robbery, Cruz, and shared a child with him. Ramos worked at a drug store, and as part of her duties, would, along with a co-worker, walk and make daily deposits of cash proceeds at the nearby bank. Prior to the robbery, she told Cruz about the deposit procedures and even commented in the presence of her mother and Cruz how easy it would be for someone to rob them of the deposit. Cruz robbed Ramos and her unwitting coworker. Ramos then provided a description of the perpetrator to law enforcement contrary to the description provided by her coworker. After law enforcement located Cruz and the coworker identified Cruz as the robber, Ramos claimed she was not sure, but she did not think Cruz was the perpetrator. Subsequently, Cruz admitted to the robbery, and three weeks later, Ramos admitted for the first time to her relationship with Cruz. The prosecutor argued Ramos' conduct before as well as after the crime supported her guilt as an accessory after the fact. Ramos argued the trial judge erred in refusing a proposed jury instruction that if she was guilty as the principal, she could not be convicted as an accessory. Id. at 461-62. The reviewing court cited Staten v. State, 519 So.2d 622 (Fla. 1988), citing in relevant part the following:

Although Florida has abolished the common law distinctions between principals, aiders and abettors, and accessories before the fact, accessory after the fact remains as a separate offense. The accessory after the fact is no longer treated as a party to the crime but has come to be recognized as the actor in a separate and independent crime, obstruction of justice. . . . Thus, the culpability of the accessory after the fact is substantially different from that of a principal, reflecting an

intent to punish as an accessory after the fact only those persons who have had no part in causing the felony itself but have merely hindered the due course of justice.

Ramos, 696 So.2d at 463 (quoting Staten, 519 So.2d at 626). Ultimately, the reviewing court found no fault with the trial judge's analysis which observed the jury, under the facts of the case, could have found Ramos provided assistance both before and after the robbery, and the trial judge did not consider Staten to preclude that possibility. The trial judge's principle reason for refusing the instruction is that it would confuse the jury because the jury could be led to believe that if Ramos assisted Cruz both before and after the crime, she could not be convicted after the fact even though the government proved the crime of after the fact beyond a reasonable doubt. Ramos, 696 So.2d at 465.

In State v. Mitchell, 337 So.2d 1189 (La. 1976), the Louisiana Supreme Court held Mitchell could be charged as both a principal and an accessory after the fact. Mitchell was a passenger in a car, who jumped out and snatched a purse from a pedestrian. She then switched places with the accomplice and driver, Butler, and drove away from the crime scene. The court observed the fallacy in Mitchell's argument that there was only one principal. Mitchell and Butler left the car together and robbed the victim together before running back to the car. Therefore, both Mitchell and Butler were principals to the crime, and Mitchell became an accessory after the fact by driving the getaway vehicle. The court further noted that even though Mitchell's chief objective may have been to save herself from apprehension, "she must have adverted to the fact that she was also aiding another principal . . . to escape from arrest, trial, conviction or punishment." Id. at 1190 (internal quotation marks omitted).

Like Mitchell, the evidence in the instant case points to two principals, the triggerman who was driven away by the other principal, the driver in the black Cadillac. South Carolina courts make

no distinction between those who aid and abet another in committing a crime and the actor who is aided:

All persons present, aiding and abetting a murder, are regarded as principals, and equally guilty. The actual perpetrator is regarded as the agent or instrument by which the crime is perpetrated, not as the chief criminal or more guilty than his associates. . . . The distinction between principals in the first and second degree has been long since exploded; it is now considered a distinction without a difference.

State v. Putman, 18 S.C. 175, 178 (1882) (quotation marks omitted) (quoting State v. Fley, 4 S.C.L.338 (1809) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)).

As in Mitchell, if Petitioner was in fact one of the two principals, although not charged as one, he nevertheless could be found guilty as an accessory after the fact based on his actions in disposing of the vehicle.

Petitioner relies on Morman v. State, 458 So.2d 88 (Fla. Dist. Ct. App. 1984). Morman alleged a double jeopardy violation because he was convicted as a principal and an accessory after the fact for the same robbery. The Florida court found there was no double jeopardy violation but noted a person could not be an accessory after the fact to themselves. The court then explained the record on appeal lacked any information to indicate how many people were involved in the robbery, observing that if there were two or more robbers, it was possible that Morman could be a principal as a robber, and also be an accessory after the fact if he aided one of the other robbers. Id. at 89. In the instant case, the evidence points to a driver and a passenger that was the shooter. It is possible for Petitioner to be a principal and an accessory after the fact to the other principal in the car if he happened to be present.

Petitioner's argument, made after the jury reached its verdict, that the State needed to prove

the guilt of the principal to prove Petitioner guilty as an accessory after the fact, is based on an incorrect reading of State v. Massey, 267 S.C. 432, 229 S.E.2d 332, 339 (1976). In Massey, the Supreme Court found that the accessory statute did not require the principal to be convicted and if the principal was acquitted, a person aiding the principal after the fact could still be convicted as an accessory, modifying the common law rule. The Supreme Court quoted favorably a Wisconsin case, in relevant part:

It seems very clear that the legislative intent . . . was to provide for the prosecution of an accessory independent of the prosecution and outcome of the principal. The crime of the accessory is a substantive offense . . . .

If failure to apprehend the principal, his death or acquittal necessitates acquittal of the accessory, then our statute is no improvement over the common law. . . .

Id. at 444-45, 229 S.E.2d at 338-39 (quoting State v. Hess, 288 N.W. 275, 276-77 (Wisc. 1939)).

In the instant case, the prosecution only needed to prove the murder occurred. It was never required to prove the identity of the gunman or the identity of the driver. Accordingly, the argument based on Massey is insufficient to impugn the trial court's instructions to the jury regardless of whether the argument was timely raised.

The identity of the actors in committing the murder were not positively identified in the instant case, and the evidence certainly left open the possibility that Petitioner was present in his own vehicle or even driving the vehicle, and therefore the possibility Petitioner was the principal. If Petitioner was actually a principal, this would only mean that he was guilty both as a principal of murder and an accessory after the fact to murder under the sound reasoning in Mitchell. However, as in Ramos, the possibility Petitioner was maybe guilty of another uncharged crime should not obscure the jury's determination that Petitioner committed the charged crime of accessory after the fact. The trial court's jury instruction was appropriately tailored to refocus the jury on the only

charge the jury was called upon to determine, the accessory after the fact charge. Accordingly, the trial court's supplemental instruction was proper and appropriate.

Further, the Court of Appeals correctly found any error was harmless. On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007). "In reviewing jury charges for error, this [c]ourt must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Id.

In the instant case, the trial court did charge in its initial instruction that a person must aid another person in order to be an accessory. The trial court's answer to the jury question admonished the jury to focus on whether the elements of accessory after the fact were met. The trial court reiterated that an accessory must provide aid to the principal knowing that the principal likely committed a crime. The instruction never stated that a person could be guilty as an accessory for aiding himself. In the present case, the evidence points to two principals, a passenger (the shooter) and a driver. If Petitioner was one of those two principals, then he would be guilty as an accessory after the fact to the other principal in his actions to dispose of the vehicle. Further, the defense at trial was that Petitioner was completely uninvolved in the crime. Therefore, the Court of Appeals correctly found any error in the instructions to the jury were harmless.

## II.

**Petitioner failed to contemporaneously object to the supplemental instruction, so the issue is not preserved for review, and Petitioner was not prejudiced by the purported error.**

Petitioner argues the trial court erred because "another person" was missing from the

supplemental instruction; the trial court's initial instruction admonished that the jury must find "the defendant knew that another person called the principal committed a murder." Defense counsel did not make an objection on this basis to the trial court either before or after the trial court answered the jurors' note. Defense counsel only raised an objection to this language for the first time in his motion for a new trial.

"[A] defendant's failure to object to the charge as made or to request an additional charge, when an opportunity has been afforded to do so, results in a waiver of his right to complain about the charge on appeal." State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); State v. Armstrong, 263 S.C. 594, 600, 211 S.E.2d 889, 892 (1975) ("At the conclusion of the charge, an opportunity was afforded to counsel to make any objections thereto. No objection was made that the instructions given were inadequate nor were any additional requests made to the court. The failure to timely request a specific charge or charges constituted a waiver of any right to complain on appeal of asserted errors in the charge.").

An issue first raised in a post-trial motion is not preserved for appellate review. Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); State v. King, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999) (stating a defendant may not use a motion for a new trial to raise an issue for the first time).

The Court of Appeals correctly found the issue was not preserved for review on the basis that a defendant could not raise an issue in a motion for a new trial for the first time. Petitioner claims that the trial court had the opportunity to correct his error, but that is not true because the jury could not be recharged since the jury already rendered the verdict by the time Petitioner made his motion for a new trial. This goes to the policy behind the contemporaneous objection requirement – an

objection needs to be lodged at a time the trial judge has the opportunity to cure the purported error, in this case, the opportunity to recharge the jury before the jury reached a verdict. State v. Hicks, 330 S.C. 207, 214, 499 S.E.2d 209, 217 (1998) (a contemporaneous objection to omission of charge is required to preserve the issue even in capital case).

The purported omission was not prejudicial. First, evidence shows at least two principals – the driver and the shooter. If Petitioner was a principal, he had another principal to aid, and therefore could be an accessory after the fact. Further, Petitioner was not prejudiced by the recharge that excluded the “another person” clause because Petitioner’s defense was not a claim that he was not guilty of accessory because he was the principal. Instead the defense was the State failed to prove he knew there was a murder. During closing argument, defense counsel argued there was no evidence Petitioner was aware a murder occurred. R. p. 510. He argued, “There was no testimony to link Seth to this crime scene.” R. p. 511, lines 4-7. Defense counsel concluded closing argument by telling the jury, “Not one witness to say that Seth had knowledge of a murder. Not one person is currently a suspect in that murder. Not one fingerprint or shred of DNA linking Seth to the crime scene. Seth Smith did not have knowledge of murder. And Seth Smith is not guilty.” R. p. 522, lines 3-7.

Petitioner relies on State v. Johnson, 418 S.C. 587, 795 S.E.2d 171 (Ct. App. 2016) and State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) to argue the trial court’s omission of “another person” from the instruction on accessory after the fact resulted in an unfair trial. Neither case is applicable to the present case. In Johnson, the trial court rejected the prosecution’s request for an instruction on accomplice liability and assured defense counsel he would not provide the instruction. However, after deliberations began, the jury sent a jury note inquiring as to whether they could still find Johnson guilty if another person pulled the trigger. The trial court responded to the note, over

counsel's objection, by charging the jury an accomplice liability instruction. Id. at 589-91, 795 S.E.2d at 173-74. This Court found that the trial judge's decision to instruct the jury on accomplice liability was fundamentally unfair. This Court observed defense counsel crafted the closing argument in reliance on the lack of an accomplice liability instruction and this Court agreed that providing defense counsel the opportunity to reargue closing argument was insufficient because it would require defense counsel to "shift theories." Id. at 593-94, 795 S.E.2d at 174. In the present case, the record fails to indicate that defense counsel relied on the "another person" language or would have shifted his argument if he anticipated the "another person" language would be omitted. Instead, defense counsel argued no evidence showed Petitioner was at the crime scene or knew about the murder, an argument that is not contrary to the instruction provided.

In Jones, the trial judge indicated he would instruct the jury with "hesitate to act" language in the trial judge's instruction for reasonable doubt. Defense counsel crafted his closing argument using the "hesitate to act" language. Then the trial judge, based on the prosecution's subsequent objection, omitted the language from the judge's instruction. Jones, 343 S.C. 576-77, 541 S.E.2d at 820-21. The Supreme Court found the defendant reasonably relied on the judge's representation he would provide that instruction, and found, "The effect of the judge's after the fact decision to excise the hesitate to act language from his charge was to diminish appellant's attorney's credibility in the eyes of the jury." Id. at 577-78, 541 S.E.2d at 821. In the instant case, because the instruction did not contradict any aspect of defense counsel's argument, it did not impact defense counsel's credibility in the eyes of the jury.

In contrast, in State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (Ct. App. 2014), the trial judge instructed the jury that time was not an element of the offense for the charge of lewd act on a minor. On appeal, Perry argued the instruction prejudiced him because he centered his strategy on attacking

inconsistencies in the evidence regarding the timing of the alleged incident. This Court rejected the argument, observing, “Because Appellant does not argue that an altered ruling impaired his trial strategy, we find Appellant’s reliance on Jones is misplaced.” *Id.* at 198, 763 S.E.2d at 606.

In *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), the trial judge presiding over a death penalty trial initially indicated he would provide a charge to the jury during the penalty phase that if the jury found an aggravating circumstance, but recommended life, the defendant would not be eligible for parole for thirty years. However, at the beginning of the penalty phase, the trial judge stated he would not provide the parole eligibility instruction after all. The Supreme Court rejected the argument that this change was fundamentally unfair, holding: “[W]e find no evidence the trial judge’s initial indication he would give a parole eligibility charge influenced either voir dire, the selection of jurors, or the presentation of evidence during the guilt phase of the trial.” *Id.* at 391-92; 472 S.E.2d at 238.

In the instant case, there is no indication the new instruction was fundamentally unfair because it was not inconsistent with Petitioner’s defense. Petitioner’s defense was the State failed to prove he was present or otherwise had knowledge the murder occurred, not that Petitioner could not be convicted as accessory after the fact because he was a participant and therefore, a principal to the murder. Therefore, the new instruction did not result in prejudice to Petitioner, even assuming error. Error without prejudice does not warrant reversal. *McWee*, 322 S.C. at 393, 472 S.E.2d at 239. Therefore, this Court should affirm the conviction and sentence.

**CONCLUSION**

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari. Should his Court grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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