STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable J. Michelle Childs, Circuit Court Judge

2003-CP-40-5973

Israel Wilds, ... Respondent/Petitoner,

v.

State of South Carolina, ... Petitioner/Respondent.

STATE'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the Petitioner State now requests a rehearing on the following points that this Court may have overlooked or misapprehended:

I.

This Court affirmed the PCR court's ruling that Wilds' appellate counsel was ineffective for failing to raise the issue on appeal that the trial court erred by instructing the jury on accomplice liability. However, the State would submit that because it was not error to instruct the jury on accomplice liability, Wilds was not prejudiced by the alleged deficiency. Accordingly, the PCR court erred.

The pertinent case for examination is Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011), which is discussed in this Court's opinion. The South Carolina Supreme Court noted: "Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence

upon which it could rely to find the existence or nonexistence of that fact." Barber, 393 S.C. at 236, 712 S.E.2d at 439. The Supreme Court framed the question as follows: "To support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place." Id., 393 S.C. at 237, 712 S.E.2d at 439. In Barber, the robbers wore masks and there was some question as to which robbers were armed with which weapons, including the murder weapon. However, as in the instant case, the testifying co-defendants insisted Barber shot the victims. The Supreme Court found that the accomplice liability instruction was appropriate because "the sum of the evidence presented at trial, both by the State and defense, **was equivocal** as to who was the shooter." Id., 393 S.C. at 236, 712 S.E.2d at 439 (emphasis added).

Barber is on point with the instant case. Like Barber, only the robbers know which of the three was the triggerman and only the co-defendants' testimony supports that the defendant was the triggerman. Further, as in Barber, the evidence as a whole is equivocal as to which robber was the triggerman. A .22 round was found at the murder scene. In a statement to police, Wilds insisted that he did not own a .22, although he admitted owning other types of guns – a shot gun, .38 pistol, and a 9mm. App. pp. 169-71. A jury might have questioned why Wilds would need to borrow a .22 when he owns three other guns and felt uncomfortable believing the testimony of accomplices making self-serving declarations that Wilds was the shooter.

The same jury could reasonably conclude Wilds still was a participant in the robbery; the victim's blood on Wilds' shoe[1], Wilds' fraudulent alibi defense[2], and Wilds' denial and

[1] App. pp. 437-38.
[2] App. pp. 529-34.

subsequent admission that he knew co-defendant Simmons[3] all serve to confirm Wilds' participation in the robbery. But the co-defendants' testimony was uncorroborated as to Wilds' role as triggerman. The jury certainly believed beyond a reasonable doubt that Wilds was involved in the robbery that resulted in murder, meaning he is guilty of murder. State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) (finding "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").

Wilds stands to gain a windfall – a new trial on a charge for which he has been resolutely proved guilty. The distinction between the actor and abettor is irrelevant under South Carolina law, as discussed by our Supreme Court:

> 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. It sometimes happens that he is comparatively less guilty than those who stimulate or persuade him to be their instrument. 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)).

Further, the operative question is how was Wilds prejudiced by the instruction, a correct statement of law? If no evidence supports accomplice liability, then the jury would not convict on that basis. Due to the accuracy of the instruction, there was no danger of conviction on an improper basis. "Generally, an alleged error in a portion of a charge must be considered in light of the whole charge and must be prejudicial to the appellant to warrant a new trial." Priest v.

[3] App. pp. 169-71.

Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976). Absent evidence of prejudice, the PCR court erred in granting relief. McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (noting a PCR applicant must prove counsel's performance deficient and that the PCR applicant was prejudiced by the alleged deficiency).

The troubling result is that Wilds' participation in the robbery leading to the murder was proved beyond a reasonable doubt, which in turn means he was guilty of murder beyond a reasonable doubt. The jury presciently anticipated the existence of the hand of one, hand of all theory as evidenced by its sapient question to the trial court. The trial court gave a correct statement of law rather than withhold information relevant for the jury. The jury, applying the correct law, arrived at a just verdict, which should be upheld. The trial is an affirmance of the venerable institution of the jury – its collective wisdom is beyond that of even the most enlightened legal scholars. Accordingly, this Court should grant the State's petition and reverse the PCR court's grant of relief.

II.

The PCR court also granted relief on the grounds that appellate counsel was ineffective for failing to raise the issue that the trial court erred in declining to instruct the jury on mere presence. This Court declined to address the issue pursuant to Fitch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal). The State incorporates its arguments presented in its brief and at oral argument in requesting reversal. However, the State briefly would reiterate the following:

The jury instruction given by the trial court on accomplice liability made clear that mere presence alone would not suffice to convict. The instructions in relevant part are as follows:

> Two or more can be guilty of the same offense at the same time if they are together, acting together, assisting each other, in commission of the offense. . . . [The State] must prove again beyond a reasonable doubt that the Defendant and the others were acting together in the commission of the crime, assisting each other in the commission of the offense.

App. p. 624 lines 2-16.

This instruction is similar to the instruction in State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989). In that case, our Supreme Court found that it was not error for the trial court to not instruct the jury on mere presence as the instruction on accomplice liability made clear that the jury should not convict on mere presence alone. Id., 299 S.C. at 458-59, 385 S.E.2d at 832.

In the instant case, the jury would not convict if it thought Wilds was present but did not participate in the robbery. Further, no evidence was presented that Wilds was merely present -- his defense was alibi. Accordingly, the PCR court erred in granting relief on this basis.

WHEREFORE, Petitioner/Respondent requests this Court to grant the petition for rehearing and reverse the PCR court's grant of relief.

Respectfully submitted,

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February 20, 2014

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Honorable J. Michelle Childs, Circuit Court Judge

ISRAEL WILDS

RESPONDENT/PETITIONER,

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the State's Petition for Rehearing on Respondent/Petitioners Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to Tara D. Shurling, Esquire, 3614 Landmark Dr., Suite A, Columbia, SC 29204.

I further certify that all parties required by Rule to be served have been served.

This 20th day of February, 2014.

Norma Bigbee

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