

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Certiorari to the Court of Appeals

The Honorable J. Michelle Childs, Circuit Court Judge

Appellate Case No. 2014-001191

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JUL 28 2014

S.C. Supreme Court

Israel Wilds, ...Respondent,

v.

State of South Carolina, ...Petitioner.

APPENDIX

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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-PETITIONER,

v.

State of South Carolina,.....PETITIONER-RESPONDENT.

BRIEF OF PETITIONER-RESPONDENT

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STATEMENT OF ISSUES ON APPEAL**I.**

The PCR court erred in finding appellate counsel was ineffective for failing to brief the accomplice liability jury charge issue when the charge was supported by the evidence presented at trial and had appellate counsel raised the issue on appeal, it would not have warranted reversal because the issue is without merit; the PCR court also erred in granting relief because Respondent-Petitioner was not prejudiced by appellate counsel's failure to brief a non-issue.

II.

The PCR court erred in finding appellate counsel was ineffective for failing to raise the issue of mere presence on appeal because the accomplice liability charge as given was sufficient under the Austin standard; the PCR court also erred in granting relief because Respondent-Petitioner was not prejudiced by appellate counsel's failure to brief a non-issue.

STATEMENT OF THE CASE

Respondent-Petitioner, Israel Wilds, was indicted at the September 1999 term of the Court of General Sessions for Richland County for murder (99-GS-40-45289) and armed robbery (99-GS-40-40142). The charges were from the March 29, 1999 gunshot assault and armed robbery of Anthony Rumph (Victim) that led to his death on July 8, 1999. Respondent-Petitioner was represented by Douglas Strickler, Esquire. Kathryn Luck Campbell and Knox McMahon, of the Fifth Circuit Solicitor's Office, represented the State. On March 26, 2001, the matter was called to trial before the Honorable Marc H. Westbrook. The jury found Respondent-Petitioner guilty as charged. Judge Westbrook sentenced him to life imprisonment for murder and thirty years' imprisonment for armed robbery.

A timely Notice of Appeal was filed on Respondent-Petitioner's behalf and an appeal was perfected. Joseph Savitz represented Respondent-Petitioner on his appeal. The South Carolina Court of Appeals affirmed Respondent-Petitioner's convictions and sentences. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed Feb. 20, 2003.)

Respondent-Petitioner subsequently filed an application for post-conviction relief on December 15, 2003, and amended it on May 11, 2006. Petitioner-Respondent made its Return on July 6, 2004. An evidentiary hearing was convened on June 8, 2007, at the Richland County Courthouse. Respondent-Petitioner was present and represented by Tara Shurling, Esquire. Petitioner-Respondent was represented by Robert L. Brown, Esquire, of the South Carolina Attorney General's Office. At the hearing, Respondent-Petitioner testified on his own behalf. Also testifying was Douglas Strickler, Esquire.

Following the hearing, both parties submitted proposed orders; PCR was granted by written order dated May 12, 2008, and filed May 14, 2008. Petitioner-Respondent

filed a timely Notice of Appeal on May 29, 2008. Respondent-Petitioner filed a cross-appeal on June 5, 2008.

Thereafter, Petitioner-Respondent filed a Petition for Writ of Certiorari on November 21, 2008. On March 10, 2010, the South Carolina Supreme Court transferred the matter, per Rule 243(l), SCACR, to the Court of Appeals. The Court of Appeals granted certiorari on May 7, 2012. This brief follows.

STATEMENT OF FACTS

On March 29, 1999, Israel "Antwan" Wilds, Respondent-Petitioner, robbed and assaulted Anthony Rumph (Victim). Respondent-Petitioner was charged with armed robbery and murder following the death of Victim on July 8, 1999. He proceeded to trial on March 26, 2001.

At trial, Respondent-Petitioner's co-defendant, Isom Simmons, testified he was fifteen years old at the time of the incident and knew both Joseph Dante Dungee and Israel "Antwan" Wilds, Respondent-Petitioner. (App. pp. 214-17). He described the events of March 29, 1999. (App. pp. 219-41). Essentially, he described walking along Clarendon Street with Dungee and Respondent-Petitioner and seeing Victim. (App. pp. 222-24). He said Respondent-Petitioner stopped and talked to Victim as Simmons and Dungee kept walking. (App. p. 223). Simmons saw Respondent-Petitioner pull out a gun and point it at Victim's chest area. (App. p. 224). Victim grabbed for his back pocket and a struggle ensued. (App. p. 225). Victim pulled his wallet out of his back pocket. (App. p. 225). Next, Respondent-Petitioner "ordered me and Dante to hit him." (App. p. 226). They both hit Victim in the head. (App. p. 226). Simmons said he took cigarettes out of Victim's pocket. (App. p. 226). Victim was still holding on to his wallet, and Respondent-Petitioner put the gun to Victim's chest and shot him at point-blank range. (App. pp. 226-28). Simmons said he ran off after the shooting. (App. p. 228). After the three reached a Shell Station Respondent-Petitioner, who took the wallet and discarded it, handed money to Simmons and Dungee and then left. (App. pp. 228-29). Simmons reported he received about \$10.00. (App. p. 230). On direct examination, the prosecution developed testimony that Simmons was initially charged with armed robbery

and assault with intent to kill, which was changed to murder after Victim died. (App. pp. 237-38). He confirmed the charges were still pending against him and the State had not made or offered any deals on his sentence in return for his testimony. (App. p. 238).

On cross-examination, counsel questioned Simmons about his drug use and his description of the incident. (App. p. 246). He pointed out subtle differences in the statement and his testimony. (App. pp. 242-60).

Joseph Dante Dungee testified similarly about the incident. (App. pp. 298-312). He testified he was fifteen years old at the time of the incident and was currently housed as an adult in the Richland County Detention Center. (App. p. 285). He testified that before the incident he asked Respondent-Petitioner and Simmons "what they were up to, and they said something about robbing somebody." (App. pp. 292-93). He explained Respondent-Petitioner said "[s]omething about I'm going to stick somebody or jack somebody" (App. p. 293). Dungee described seeing Victim walk toward the three of them with a cup in his hand. (App. p. 299). He saw Victim approach Respondent-Petitioner and discuss buying some crack cocaine. (App. p. 301). When he saw Respondent-Petitioner pull out a gun, he and Simmons grabbed Victim. (App. p. 303). He testified he and Simmons both hit Victim and went through his pockets "[be]cause we was [sic] robbing the man." (App. pp. 299-307, p. 305 L. 19). Respondent-Petitioner tried to get Victim's wallet, threatening to "blast" him if he did not give it to him. (App. p. 307). Respondent-Petitioner then shot Victim. (App. p. 307). Dungee fled after the shooting. (App. pp. 307-08). He saw Respondent-Petitioner take money from the wallet and give some of it to Simmons, who later gave him some of the money. (App. pp. 308-12).

Dungee denied he was offered any deal for his testimony and indicated he was

testifying because it was the right thing to do. (App. p. 314).

On cross-examination, Dungee admitted he was currently charged with murder and armed robbery as an adult. (App. p. 317). He stated he did not hope to gain anything from testifying. (App. pp. 317-18). However, he said he was not going to trial and hoped that his charge would be changed to accessory to murder because he did not murder anyone. (App. p. 318). He again stated he was testifying because it was the right thing to do and he hoped his murder charge would be reduced, but he did not know what would happen. (App. p. 319). He said he was going to plead guilty to murder. (App. p. 319). Like Simmons, Dungee was questioned about his statements. (App. pp. 315-27).

Mitochondria DNA testing revealed that Victim's blood was located on Respondent-Petitioner's shoe. (App. pp. 437-38).

After the jury began deliberations, the jury sent a note to the judge asking, "If we say [the defendant] is guilty, are we saying he of the three actually pulled the trigger?" (App. p. 616 L. 4-6). The trial court discussed the note with counsel and whether it was necessary to charge the jury with accomplice liability in light of the question. (App. pp. 616-623). Defense counsel disagreed and argued a hand of one, hand of all accomplice liability charge was inappropriate because no testimony existed that anyone other than Respondent-Petitioner pulled the trigger. (App. pp. 616-17, 619). Defense counsel argued he would have provided ineffective assistance of counsel if the instruction were given because he had not addressed that issue in his closing argument. (App. p. 621). The trial court pointed out defense counsel had argued that law enforcement did not search for guns on the co-defendants and the court did not agree that defense counsel had been ineffective. (App. p. 621). Defense counsel moved for a mistrial. (App. p. 621). The trial court denied the motion for a mistrial and determined it was necessary to charge

the jury with hand of one, hand of all accomplice liability. (App. pp. 621-23). After the trial court recalled the jury from their deliberations and gave the instruction for accomplice liability, defense counsel objected to the charge as given and requested a charge on mere presence. (App. p. 625). The trial court refused to charge mere presence as a separate charge, explaining the reasons as follows:

I don't think I need to add mere presence for this reason. What I did in this was remind the jury that under the hand of one charge, the State must prove beyond a reasonable doubt that they were acting together in the commission of a crime, and assisting each other in the commission of the offense. I believe that takes care of it and covers what should have been covered in that. I don't know I need to add anything. If the jury were to make the determination that he was merely present, then based on my charge they would find the State had not proven he was assisting and acting together with the others, so I think the charge is appropriate and I decline to add to it.

Ultimately, the jury found Respondent-Petitioner guilty as charged, and Judge Westbrook sentenced him to life imprisonment for murder and thirty years' imprisonment for armed robbery. (App. pp. 636-37, 641).

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in his application. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The findings of the PCR court will not be upheld if not supported by probative evidence. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000); Bannister, 333 S.C. at 304, 509 S.E.2d at 810; Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

ARGUMENTS

I.

The PCR court erred in finding appellate counsel was ineffective for failing to brief the accomplice liability jury charge issue when the charge was supported by the evidence presented at trial and had appellate counsel raised the issue on appeal, it would not have warranted reversal because the issue is without merit; the PCR court also erred in granting relief because Respondent-Petitioner was not prejudiced by appellate counsel's failure to brief a non-issue.

“A defendant is constitutionally entitled to effective assistance of appellate counsel.” Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999) (citing Evitts v. Lucey, 469 U.S. 387 (1985)). “However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 749 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). The Petitioner must show that appellate counsel’s performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 525; Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy” Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004) (quoting Jones, 463 U.S. at 754).

The burden is on the PCR Petitioner to prove by a preponderance of the evidence that the ignored issues would have changed the outcome if raised on appeal. (Rule 71.1(e), SCRCPP). The PCR court erred in that the entire basis for the granting of relief is the PCR court's erroneous finding that "[t]he State admitted *no* evidence that would indicate that Dungee, Simmons, and the Petitioner planned together to commit an armed robbery the night of the incident." (App. p. 742 (emphasis in original)). The standard jury charge correctly allowed the jury to believe portions and disregard portions of the testimony of any witness. (App. p. 607 L. 11-13). Also, the jury was correctly instructed that if it found Respondent-Petitioner's statement to be voluntary then it could decide what weight, if any, should be given to the statement. (App. p. 608 L. 18-25, p. 609 L. 1-14). Dungee's and Simmons' statements/testimony, if believed in part, do establish that the three acted together during (and before) the armed robbery. The jury is completely entitled to believe the part(s) of Dungee's and Simmons' statements/testimony when they explain how they took part in the armed robbery. Simultaneously, the jury can disbelieve the portions of Dungee's and Simmons' statements/testimony that it was Respondent-Petitioner alone who pulled the trigger and consider those portions of the co-defendants' testimony as self-serving and not credible. This is precisely what the solicitor argued when Respondent-Petitioner objected to the accomplice liability jury charge. (App. p. 617 L. 9 – p. 618 L. 9, 618 L. 25 – p. 619 L. 17).

"It 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." State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000); see also State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not

be refused.” Mattison, 388 S.C. at 479, 697 S.E.2d at 583. An appellate court will not reverse the trial court’s decision regarding a jury charge absent an abuse of discretion. Id. at 479, 697 S.E.2d at 583-84.

The evidence presented by the defense would require the jury to believe either Simmons or Dungee was the shooter based on Respondent-Petitioner’s defense of alibi. After beginning deliberations, the jury asked, “If we say [the defendant] is guilty, are we saying he of the three actually pulled the trigger?” (App. p. 616 L. 4-6). If the jury then believed Simmons’ and Dungee’s testimony that all three men were involved in the robbery and assault, the evidence could cause the jury to believe all three men were aiding and abetting the others and one of them shot Victim. If the jury was unable to determine which one of the three shot Victim, as indicated by its question, the evidence would support a charge of accomplice liability. Thus, the trial court was correct in charging accomplice liability in response to the jury’s question and the State’s request for the charge. The trial court did not abuse its discretion in charging the jury on accomplice liability.

The PCR court also erred in finding appellate counsel was ineffective for failing to raise the issue that no instruction on pre-arrangement was included in the jury instructions on accomplice liability. Respondent-Petitioner argues “under South Carolina law, an accomplice is accountable for the readily foreseeable consequences of actions he mutually agreed to commit with others.” However, our appellate courts have clarified that no formally expressed agreement is necessary to establish the conspiracy needed to support receiving a jury instruction on accomplice liability. State v. Condrey, 349 S.C. 184, 193-95, 562 S.E.2d 320, 324-25 (Ct. App. 2002). See also State v. Oliver, 275 S.C. 79, 267 S.E.2d 529 (1980); State v. Fleming, 243 S.C. 265, 133 S.E.2d 800 (1963); State

v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). Rather, “[i]t may be shown by circumstantial evidence and the conduct of the parties.” Condrey, 349 S.C. at 194, 562 S.E.2d at 325. Here, the conduct of the parties, as shown by Simmons’ and Dungee’s testimony, demonstrates an agreement to rob Victim. All three participated in hitting him and going through his pockets, and they all shared the money found in the wallet.

“A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence.” Id. “If any evidence exists to support a charge, it should be given.” Id. Here, the evidence presented at trial supported the charge regarding accomplice liability. The State presented testimony of Simmons showing the joint criminal activities of Respondent-Petitioner and Dungee. Simmons testified Dungee and Respondent-Petitioner told him they were going to rob someone. Simmons and Dungee both testified that all three men participated in the robbery and beating of Victim. Thereafter, Respondent-Petitioner shot Victim, which resulted in his death. The trial testimony constituted sufficient evidence whereby a jury could find Respondent-Petitioner was a willing accomplice in the crimes, even if they determined he was not the shooter. In light of the evidence that all three men were acting pursuant to a plan to rob someone, together with the trial court’s charge as a whole, a jury could reasonably have concluded not only that all three men were knowingly involved in the commission of the criminal act, but that there had been some planning and agreement among them pertaining to the act.

Respondent-Petitioner also argues our appellate courts have “routinely rejected” the contention that a party can receive a requested jury charge if the jury believes *part* of a witness’s testimony. However, the cases Respondent-Petitioner cites are all inapplicable to the case at hand. Rather, the cited cases apply only to lesser included

offenses. “The mere contention that the jury might accept the State’s evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty only of the lesser offense.” State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006) (emphasis added). “The mere contestation that the jury might have disbelieved [the victim]’s testimony as to the sexual acts and nature of [the defendant]’s assault does not entitle him to have the jury charged with the lesser offense of ABHAN.” Id. at 611, 635 S.E.2d at 675. See State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976) (“[T]he [p]resence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the ‘mere contention that the jury might accept the State’s evidence in part and might reject it in part will not suffice.’”) (emphasis added) (quoting State v. Hicks, 241 N.C. 156, 159-160, 84 S.E.2d 545, 547 (1954)); see also State v. Tyndall, 336 S.C. 8, 22, 518 S.E.2d 278, 285 (Ct. App. 1999) (possibility that the jury might have disbelieved the State’s evidence as to the circumstances of aggravation and on the remaining evidence found the defendant guilty of simple assault and battery did not entitle the defendant to have the lesser offense submitted to the jury where there was no evidence tending to show defendant was guilty only of simple assault and battery) (emphasis added); State v. Rucker, 319 S.C. 95, 98-99, 459 S.E.2d 858, 860 (Ct. App. 1995) (contention that the jury might have disbelieved the State’s evidence as to the circumstances of aggravation and on the remaining evidence found appellant guilty of the lesser offense of simple assault and battery did not entitle her to have the lesser offense submitted to the jury where appellant presented no evidence she committed some act that could be viewed by the jury as a simple assault) (emphasis added); State v. Hartley, 307 S.C. 239, 241-42, 414 S.E.2d 182, 184 (Ct. App. 1992) (where no evidence showed defendant killed victim without malice, trial judge did

not err in refusing to charge the jury on the crime of manslaughter as a lesser-included offense of the crime of murder) (emphasis added); State v. Foxworth, 269 S.C. 496, 499, 238 S.E.2d 172, 173 (1977) (possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation in ABHAN trial and on the remaining evidence found defendant guilty of the lesser offense of simple assault and battery did not entitle him to have the lesser offense submitted to the jury where all the evidence admitted at trial pointed to the appellant's guilt of assault and battery of a high and aggravated nature) (emphasis added).

Furthermore, Respondent-Petitioner failed to prove prejudice resulted from any alleged error. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland v. Washington, 466 U.S. 668, 691 (1984). "Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. . . ." Id. Defense counsel argued at trial that the supplemental jury charge on accomplice liability in response to the jury's question had rendered him ineffective because he did not have a chance to address accomplice liability law to the jury in his closing argument. (App. p. 621 L. 1-8, p. 623 L. 2-5). However, as the trial court pointed out, defense counsel raised the fact that law enforcement did not search for guns on the co-defendants. (App. p. 621 L. 9-13).

The Supreme Court has upheld the addition of supplemental charges based on jury questions. See State v. Darby, 324 S.C. 114, 477 S.E.2d 710 (1996). The standard of review remains the same for a supplemental jury charge in that the entire charge, both initial and supplemental, must be considered as a whole when reviewed for error. State v. Todd, 290 S.C. 212, 214-15, 349 S.E.2d 339, 341 (1986).

The trial court did not err in charging the jury with accomplice liability because, if believed, Dungee's and Simmons' testimony is evidence that the three acted in concert. Accordingly, it was not ineffective for appellate counsel to elect not to brief such a non-issue and Respondent-Petitioner cannot be prejudiced by the purported failure to brief such a non-issue. If appellate counsel had raised this issue on appeal, the appellate court would have found the issue without merit. Consequently, Respondent-Petitioner suffered no prejudice from appellate counsel's failure to raise the issue on appeal. The PCR court erred in finding otherwise. Accordingly, this Court should reverse the PCR court.

II.

The PCR court erred in finding appellate counsel was ineffective for failing to raise the issue of mere presence on appeal because the accomplice liability charge as given was sufficient under the Austin standard; the PCR court also erred in granting relief because Respondent-Petitioner was not prejudiced by appellate counsel's failure to brief a non-issue.

Regarding the mere presence charge, the PCR court erred in finding appellate counsel was ineffective and Respondent-Petitioner was prejudiced by appellate counsel's purported deficiency. There are no allegations of ineffective assistance of trial counsel regarding the mere presence charge; however, it was trial counsel who failed to request a mere presence charge until after the jury was recalled and charged with accomplice liability, as the solicitor explained:

Judge, if [trial counsel] wanted it both ways, why didn't he bring it up before the jury came out. He knew what the law was on hand of one, hand of all. I just asked you to charge the applicable law of hand of one, hand of all. He objected to that. If he wanted some more with that, why didn't he do it then? Why didn't he bring it up then? He just wants to bring them back out and talk about mere presence. He's the one that wants it both ways. [Trial counsel] do[es]n't want it charged, but if you're going to charge it once they go back [trial counsel] want[s] to bring them back out and say something else. I don't understand that. I mean, we've sat here and argued under Gardner, under Martin, under Dixon, that it could be done and I assume he knew the law at five fifteen just like at five twenty-five. That's the whole point I'm making about that. I'd like to see the case that he's citing where now he's going to attach mere presence and knowledge of foreseeable consequences.

(App. p. 626 L. 10 – p. 627 L. 2).

Because, as argued above, there is evidence of accomplice liability, the PCR court

also erred in its conclusory dismissal of any applicability of State v. Kelsey.¹ (App. p. 743 n.9). In Kelsey, the issue regarding the jury instruction was not the same as Respondent-Petitioner's issue here, namely that the court erred in refusing to add a mere presence charge. Kelsey argued the trial court failed to give proper mere presence instructions. However, Kelsey stands for the proposition that jury instructions must be considered as a whole and any misleading portions do not constitute reversible error. Id. at 77, 502 S.E.2d at 77; see also State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991). The trial court's instructions, as a whole, were enough to satisfy the notion that mere presence is not enough to convict.

On point is State v. Austin, in which Austin argued the trial court erred in denying his request to charge mere presence. 299 S.C. 456, 385 S.E.2d 830 (1989). The trial court charged, in relevant part, as follows:

[W]here two or more, acting with a common design or a common intent, are present at the commission of a crime, it matters not by whose immediate agency that crime is committed because all would be guilty. . . . [T]here must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting [sic] by some overt act.

Id. at 458-59, 385 S.E.2d at 832. Even though the trial court did not specifically charge mere presence, the Supreme Court found the charges were sufficient as given and covered the substance of the request, finding:

Our review of the charge in question convinces us that the language of the instruction made it sufficiently clear that to find guilt for a crime, 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 the crime through some overt act.

¹ 331 S.C. 50, 502 S.E.2d 63 (1998).

Id. at 459, 385 S.E.2d at 832.

In the case sub judice, the instructions were similar to those in Austin. The jury instructions on accomplice liability stated in relevant part:

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 L. 2-16). These instructions were given in response to a question from the jury after they began deliberating. (App. p. 623 L. 11-25). The jury asked, "If we say [the defendant] is guilty, are we saying he of the three actually pulled the trigger?" (App. p. 616 L. 4-6). After the trial court recalled the jury from their deliberations and gave an instruction for accomplice liability, trial counsel objected to the charge as given and requested a charge on mere presence. (App. p. 625 L. 1-2). Regarding the applicability of any "mere presence" charge, the trial court explained, in its discretion, the reasons for not recalling the jury (again) and including a separate mere presence charge:

I don't think I need to add mere presence for this reason. What I did in this was remind the jury that under the hand of one charge, the State must prove beyond a reasonable doubt that they were acting together in the commission of a crime, and assisting each other in the commission of the offense. I believe that takes care of it and covers what should have been covered in that. I don't know I need to add anything. If the jury were to make the determination that he was merely present, then based on my charge they would find the State had not proven he was assisting and acting together with the others, so I think the charge is appropriate and I decline to add to it.

(App. p. 627 L. 13-25). The PCR court erred in finding the charge did not meet the Austin standard. (App. p. 748).

Moreover, no evidence existed to support a mere presence charge on the facts of

this case. No testimony alleged Respondent-Petitioner was merely present during the robbery and shooting. In defense counsel's opening statement, counsel said Respondent-Petitioner was not at the scene at all. In his closing argument, defense counsel specified that alibi was Respondent-Petitioner's defense. Defense counsel called alibi witnesses to testify Respondent-Petitioner was watching a basketball game at the time of the incident. Mere presence generally applies when either there is some doubt as to whether a person is guilty of a crime by virtue of accomplice liability or the prosecution attempts to establish the defendant's possession of contraband because defendant is present where contraband is found. State v. Dennis, 321 S.C. 431, 420, 486 S.E.2d 674, 678 (Ct. App. 1996). This case fits into neither situation and, thus, it would have been error for the trial court to have charged mere presence.

Appellate counsel was not ineffective, nor was Respondent-Petitioner prejudiced regarding the lack of a separate mere presence charge. The trial court gave the jury instructions that were sufficient as given and covered the substance of the request, thereby meeting the standard set by the Supreme Court in Austin. If appellate counsel had raised this issue on appeal, the appellate court would have found the issue without merit. Consequently, Respondent-Petitioner suffered no prejudice from appellate counsel's failure to raise the mere presence issue on appeal. The PCR court erred in finding otherwise. Accordingly, this Court should reverse the PCR court.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

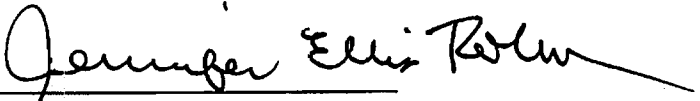
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ATTORNEYS FOR
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October 30, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Israel Wilds, 274010,

Respondent-Petitioner,

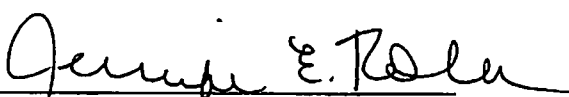
v.

STATE OF SOUTH CAROLINA,

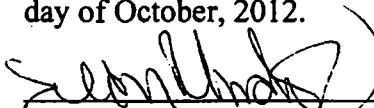
Petitioner-Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Petitioner-Respondent has been served upon opposing counsel, Tara D. Shurling by mailing two (2) copies addressed to: 3614 Landmark Drive, Suite D; Columbia, SC 29204; with postage prepaid, this 30th day of October, 2012.


JENNIFER E. ROBERTS
ATTORNEY FOR PETITIONER-RESPONDENT

SWORN to before me this 30th
day of October, 2012.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: My Commission Expires
January 30, 2013

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
Appellate Case No. 2008-092411

Israel Wilds,.....RESPONDENT/PETITIONER,

v.

State of South Carolina,.....PETITIONER/RESPONDENT.

BRIEF OF RESPONDENT BY PETITIONER/RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The PCR court properly denied relief regarding the Confrontation Clause issues related to the cross-examination of the co-defendants when the co-defendants were adequately cross-examined and when there was no prejudice.

STATEMENT OF THE CASE

Respondent/Petitioner, Israel Wilds, was indicted at the September 1999 term of the Court of General Sessions for Richland County for murder (99-GS-40-45289) and armed robbery (99-GS-40-40142). The charges were from the March 29, 1999 gunshot assault and armed robbery of Anthony Rumph (Victim) that led to his death on July 8, 1999. Respondent/Petitioner was represented by Douglas Strickler, Esquire. Kathryn Luck Campbell and Knox McMahon, of the Fifth Circuit Solicitor's Office, represented the State. On March 26, 2001, the matter was called to trial before the Honorable Marc H. Westbrook. The jury found Respondent/Petitioner guilty as charged. Judge Westbrook sentenced him to life imprisonment for murder and thirty years' imprisonment for armed robbery.

A timely Notice of Appeal was filed on Respondent/Petitioner's behalf and an appeal was perfected. Joseph Savitz represented Respondent/Petitioner on his appeal. The South Carolina Court of Appeals affirmed Respondent/Petitioner's convictions and sentences. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed Feb. 20, 2003.)

Respondent/Petitioner subsequently filed an application for post-conviction relief (PCR) on December 15, 2003, and amended it on May 11, 2006. Petitioner/Respondent made its Return on July 6, 2004. An evidentiary hearing was convened on June 8, 2007, at the Richland County Courthouse. Respondent/Petitioner was present and represented by Tara Shurling, Esquire. Petitioner/Respondent was represented by Robert L. Brown, Esquire, of the South Carolina Attorney General's Office. At the hearing, Respondent/Petitioner testified on his own behalf. Also testifying was Douglas Strickler, Esquire.

Following the hearing, both parties submitted proposed orders; PCR was granted

by written order dated May 12, 2008, and filed May 14, 2008. Petitioner/Respondent filed a timely Notice of Appeal on May 29, 2008. Respondent/Petitioner filed a cross-appeal on June 5, 2008.

Thereafter, Petitioner/Respondent filed a Petition for Writ of Certiorari on November 21, 2008. On March 10, 2010, the South Carolina Supreme Court transferred the matter, per Rule 243(l), SCACR, to the Court of Appeals. The Court of Appeals granted certiorari on May 7, 2012. Respondent/Petitioner submitted his brief on October 30, 2012. This brief of Petitioner/Respondent follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in his application. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690. The applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the

proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694).

ARGUMENT

The PCR court properly denied relief regarding the Confrontation Clause issues related to the cross-examination of the co-defendants when the co-defendants were adequately cross-examined and when there was no prejudice.

Respondent/Petitioner argues the PCR judge erred in finding trial counsel was not ineffective for failing to raise a specific objection, based on a Sixth Amendment violation, to the trial judge's refusal to permit cross-examination of two co-defendants about the possible sentences they faced, thus not preserving the issue for direct appeal. Additionally, Respondent/Petitioner argues the PCR judge erred in finding trial counsel was allowed ample range on cross-examination so that, even if he should have objected, there was no prejudice. However, because evidence of probative value exists to support the PCR court's findings, this Court should affirm the PCR court's ruling on this issue.

Initially, it is important to note that evidence in addition to the co-defendants' testimony linked Respondent/Petitioner to the crimes. Most importantly, DNA testing revealed that Victim's blood was located on Respondent/Petitioner's shoe. (App. pp. 437-38). Additionally, Timothy Myers provided testimony that Simmons and Dungee went to his home following the incident and that Simmons told Myers "my cousin" (Respondent/Petitioner) had shot somebody.¹ (App. pp. 275-76). Thus, even without the testimony of the two co-defendants, sufficient evidence existed for the jury to find Respondent/Petitioner guilty and he suffered no prejudice as a result of the trial court's decision.

¹ Simmons testified he called Respondent/Petitioner his cousin because he was a friend of the family. (App. p. 218). Respondent/Petitioner also admitted in his statement to police that Simmons called him his cousin. (App. p. 170).

Pursuant to the Sixth Amendment of the United States Constitution, every criminal defendant has a right to “to be confronted with the witnesses against him” during trial. U.S. Const. amend. VI. “Specifically included in a defendant’s Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses.” State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). This right guarantees to a criminal defendant the opportunity to cross-examine the witnesses against him concerning bias. State v. Gillian, 360 S.C. 433, 450, 602 S.E.2d 62, 71 (Ct. App. 2004), aff’d as modified, 373 S.C. 601, 646 S.E.2d 872 (2007); see also Rule 608(c), SCRE (“Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.”).

When cross-examining a witness in regards to the potential for bias, considerable latitude must be allowed. Gillian, 360 S.C. at 450, 602 S.E.2d at 71. Any fact may be elicited which legitimately tends to show interest, bias, or partiality of the witness. State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976). Limitations placed on a defendant’s ability to cross-examine a witness constitute a Confrontation Clause violation when the defendant is prohibited from engaging in “**otherwise appropriate cross-examination**” designed to show a prototypical form of bias from which jurors could draw inferences relating to the reliability of the witness. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (emphasis added). “The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant’s opportunity for effective cross-examination at trial.” Gillian, 360 S.C. at 150, 602 S.E.2d at 71.

However, although a defendant is entitled to an opportunity for meaningful cross-examination, the scope of that cross-examination still rests in the trial judge’s sound

discretion. State v. Whitner, 380 S.C. 513, 519, 670 S.E.2d 655, 659 (Ct. App. 2008). A defendant's right to confront the witnesses against him does not deprive the trial judge of his usual discretion in limiting the scope of cross-examination. State v. Turner, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007). Trial judges may impose reasonable limitations on cross-examination designed to show bias "based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness's safety, or interrogation that is repetitive or only marginally relevant." State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 814 (Ct. App. 1996). A trial judge is permitted to limit a defendant's attempts to demonstrate bias on the part of a witness where there is a clear showing that the cross-examination is somehow inappropriate. Whitner, 380 S.C. at 519-520, 670 S.E.2d at 659. The limitation of cross-examination constitutes reversible error only if the defendant establishes unfair prejudice resulted from the limitation. State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991).

The PCR court recognized this issue was raised on appeal and was deemed to be unpreserved for review. However, the PCR court determined that even if it had been properly preserved, the issue would have failed on the merits. It is clear that in this case, the limitations placed on Respondent/Petitioner's ability to cross-examine the co-defendants on their potential sentences did not constitute a Confrontation Clause violation because Respondent/Petitioner was not prohibited from engaging in "otherwise appropriate cross-examination" designed to show a prototypical form of bias from which jurors could draw inferences relating to the reliability of the witnesses. See Delaware v. Van Arsdall, 475 U.S. at 680. The PCR court found that while the co-defendants may not have discussed their potential sentences, the trial judge did allow full impeachment on numerous aspects of their pending charges including:

1. If they thought they would get their sentences reduced;
2. If they thought they would get their charges reduced;
3. What charges were pending;
4. Whether the State had made any deals in return for the testimony;
5. Whether the State had offered any deals in return for the testimony;
6. Their expectations and hopes in return for their testimony.

(App. pp. 208-09; 258-60; 313-15). Further, the PCR court pointed out that the question under Rule 608, SCRE, is whether ““anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.”” State v. Jones, 343 S.C. 562, 570, 541 S.E. 2d 813, 817 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976) (emphasis added)). In this case, knowing the co-defendants’ potential sentences would not have had a legitimate tendency to throw light on their truthfulness because bias was clearly shown to the jury in the questions regarding their hopes in return for their testimony. Furthermore, because the co-defendants did not know what sentences they would be receiving in exchange for their testimony, there was no need to discuss their potential sentences as there were no lighter sentences with which to compare them. Critically, the PCR court found the co-defendants still faced the maximum penalty; thus, no testimony could have been presented that either co-defendant was avoiding a mandatory minimum sentence by his testimony.

Respondent/Petitioner relies on several cases in his brief to stand for the proposition that barring questions about the specific sentence a co-defendant faces deprives a defendant of the right to meaningful cross-examination under the Confrontation Clause, including State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). However, Mizzell was decided after the trial in this case. It is well-settled that counsel is not required to be clairvoyant. See Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454,

456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial.”). In any case, Mizzell allows a trial judge to impose reasonable limits on the scope of cross-examination within his discretion. Mizzell, 349 S.C. at 331, 563 S.E.2d at 317. Only if the defendant is unfairly prejudiced by the limitation is it reversible error. Id.

Our courts have recognized an interest in prohibiting questioning about potential sentences when the co-defendants face the same charges as the defendant. The general rule is that a jury has no right to learn the potential sentence a defendant faces because that information is irrelevant to his guilt or innocence. Id. at 331, 563 S.E.2d at 318. “The purpose of preventing disclosure of the potential sentence facing the defendant is that such evidence is irrelevant to the jury and could possibly prejudice the State’s right to a fair trial.” Id. at 331, 563 S.E.2d at 317 (quoting Illinois v. Brewer, 615 N.E.2d 787, 790 (1993)). Only in circumstances where a defendant’s right to effectively cross-examine a co-defendant on potential bias outweighs the need to exclude evidence of the defendant’s potential sentence may a court limit the applicability of this rule. Id. at 331-32, 563 S.E.2d at 318; see also State v. Whitner, 380 S.C. at 520, 670 S.E.2d at 659 (Ct. App. 2008). In Mizzell, the co-defendants had not agreed to a plea bargain and the Court found even though no deal had yet been reached, the witness would reasonably feel that his testimony could determine a lesser sentence later. Id. at 332-33, 563 S.E.2d at 318. The Court found it was more likely for a witness to engage in biased testimony based on hopes of future leniency. Id. at 333, 563 S.E.2d at 318.

Here, both co-defendants were charged with the same crimes as Respondent/Petitioner: armed robbery and murder. Thus, in order to bypass the general rule, the trial court would have first had to determine the right to effective cross-

examination outweighed the need to exclude evidence of Respondent/Petitioner's potential sentence. The trial court allowed a meaningful cross-examination with numerous opportunities for impeachment, including specifically allowing trial counsel to inquire into whether the co-defendants believed they would get reduced sentences or reduced charges in exchange for testifying. This clearly demonstrated to the jury the potential for bias because, as Mizzell points out, even the possibility of a deal can show bias. Id. at 332-33, 563 S.E.2d at 318. Because there were no deals, it would have been futile to discuss potential sentences when there were no lighter sentences with which to compare them. Without knowing the length of the sentences the co-defendants might receive in exchange for their testimony, trial counsel was effective in showing bias by cross-examining them on whether they were hoping for lighter sentences.

With Simmons, trial counsel questioned him regarding what his current charges were, whether he was charged as an adult or a juvenile, the fact that no deals had been offered, and the fact that he was hoping for something in return for his testimony. In fact, trial counsel asked about his hopes for his testimony three times. (App. pp. 258-60). As to Dungee, trial counsel questioned him regarding whether he was being charged as a juvenile or as an adult, what his charges were, the fact that he was hoping his murder charge would be changed to accessory to murder, and the fact that nothing had been promised him for his testimony. Thus, through impeachment questioning, Respondent/Petitioner was able to develop, though no promises had been made, that Simmons had been charged with murder and armed robbery and hoped that in return for his testimony the solicitor would do something for him in the future and that he would not have to plead guilty to armed robbery and murder. (App. pp. 258-60). Similarly, the defense developed with Dungee that although no promises or offers had been made to

him in return for his testimony, he hoped his murder charge would be reduced or changed to accessory to murder because he did not murder anyone. (App. pp. 317-18). Unlike Simmons, Dungee stated he did not hope to gain anything but admitted that in return for testifying, he hoped to have his murder charge reduced and declared he would plead guilty to murder. (App. pp. 317-19). Petitioner/Respondent acknowledges the testimony of both witnesses was important to the State's case since each was involved in the crime. However, their testimony was cumulative to each other. The impeachment adequately revealed the desire to seek a reduction based upon their testimony. Thus, cross-examination was adequate to establish bias before the jury.

Simmons testified that he and Dungee went to Timothy Myers' house following the incident to talk to Myers and get some marijuana. He reported, "I told him that my cousin had just shot somebody." (App. pp. 331-32). Myers then testified that Simmons and Dungee² came to his house shortly after Myers heard gunshots. Myers explained that Simmons told him, "[My] cousin just shot somebody." He reported he gave Simmons some marijuana to calm him down. (App. pp. 275-78). Dungee also testified that he and Simmons went to Myers' house following the incident. He explained they got marijuana, Simmons and Myers had a conversation, and Simmons told Dungee he had just told Myers what happened. (App. pp. 311-12).

Even if the trial court erred in excluding evidence of potential sentences, the inquiry does not end there. "A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error if the error was harmless beyond a reasonable doubt." *Id.* at 333, 563 S.E.2d at 318 (quoting *State v. Graham*, 314 S.C. 383,

² Although Myers did not know the name of the person who was with Simmons that night, it appears from the record that he identified that person as Dungee in court. (App. p. 278).

385, 444 S.E.2d 525, 527 (1994)). The Mizzell court found the harmless error analysis depends on the particular facts of each case and upon the following factors:

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Id. at 333, 563 S.E.2d at 318-19 (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

In addressing the above factors, the case sub judice differs from Mizzell. The co-defendants' testimony was important to the State's case; however, it was not the only evidence linking Respondent/Petitioner to the crimes. Each co-defendant's testimony was cumulative to the other, and the testimony of Timothy Myers corroborated Simmons' and Dungee's testimony. Importantly, the cross-examination that was permitted was quite extensive and certainly highlighted each co-defendants' potential bias based on his hope for a lighter charge or sentence. Moreover, the State's case was strong in addition to the co-defendants' testimony. Most importantly, unlike Mizzell, the co-defendant testimony in the case at hand was not the only evidence linking Respondent/Petitioner to the crime. As noted above, DNA evidence linked Victim's blood to Respondent/Petitioner's shoe.

Respondent/Petitioner argues the trial court's restriction was erroneous based on State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991), and, more recently, State v. Gracely, Op. No. 27165 (S.C. Sup. Ct. filed Aug. 29, 2012) (Shearouse Adv. Sh. No. 30 at 49). In Brown, a witness testified in exchange for a lesser sentence and was permitted to *avoid* a mandatory prison term of more than three times the duration she would face on

her plea to conspiracy—this was “critical evidence of potential bias that appellant should have been permitted to present to the jury.” Brown, 303 S.C. at 171, 399 S.E.2d at 594 (emphasis added). In Gracely, the Supreme Court clarified Brown by stating, “The fact that a cooperating witness avoided a *mandatory minimum* sentence is crucial information that a defendant must be allowed to present to the jury.” Op. No. 27165 (S.C. Sup. Ct. filed Aug. 29, 2012) (Shearouse Adv. Sh. No. 30 at 49, 59). However, Respondent/Petitioner’s reliance on both cases is misplaced. Here, there was no evidence either co-defendant actually *avoided* a mandatory minimum sentence. On the contrary, there was no deal or exchange with these co-defendants. All they had was the hope they might receive a lesser charge or a lighter sentence. No one knew what sentences they would receive. Respondent/Petitioner states in his brief that the mandatory minimum sentence is thirty years for murder and ten years for armed robbery. However, Simmons would not have received those sentences because he was charged as a juvenile. In its order, the PCR court points out both co-defendants were still facing the maximum penalty at the time of trial. Thus, Brown and Gracely are inapplicable to the facts of this case.

Respondent/Petitioner argues that trial counsel was equally ineffective regarding the potential cross-examination of both Simmons and Dungee, as if both were facing the same potential sentence. The “potential sentence” cross-examination testimony was different for Simmons and Dungee. Simmons was facing less than four years’ incarceration. Simmons was fifteen years old at the time of the crimes and seventeen years old at the time of the trial and was charged as a juvenile. (App. pp. 215, 258). Absent any evidence of a transfer/waiver from family court to the court of general sessions, the maximum incarceration time Simmons could have received was until his

(B) (2010).³ Respondent/Petitioner asserts Simmons “could be tried as an adult and sentenced to life imprisonment.” However, at the time of trial, Simmons was charged as a juvenile. It is of no moment that he “could be tried as an adult.” Simmons could only have testified to the potential sentence he was facing at the time of trial, which was four years. Accordingly, the potential sentence information (regarding Simmons) that Respondent/Petitioner complains of is indeed distinguishable from the potential *life sentence* cross-examination testimony that supported the Court’s reasoning in State v. Mizzell.

In State v. Curry, this Court found the trial court erred in refusing to allow the cross-examination of co-defendants on the possible sentences they faced. 370 S.C. 674, 681, 636 S.E.2d 649, 652 (Ct. App. 2006). However, this Court determined the error was harmless because the co-defendants’ testimony was not the only evidence linking Curry to the crime. Id. at 681, 636 S.E.2d at 652-53. Because the co-defendants’ testimony was cumulative to others’ testimony, this Court found the error could not have reasonably affected the outcome of the trial. Id. at 682, 636 S.E.2d at 653. Here, other evidence existed that linked Respondent/Petitioner to the crimes. Timothy Myers provided testimony that corroborated Simmons’ testimony that “my cousin” (Respondent/Petitioner) had shot somebody. (App. pp. 169-72). Also, DNA testing revealed that Victim’s blood was located on Respondent/Petitioner’s shoe. (App. pp. 437-38). Thus, even without the testimony of the two co-defendants, sufficient evidence

³ The Juvenile Justice Code has been modified since the time of the trial. See State v. Lamb, 374 S.C. 346, 349 n.1, 649 S.E.2d 486, 487 n.1 (2007) (citing State v. Corey D., 339 S.C. 107, 112, 529 S.E.2d 20, 23 (2000) (explaining that section 20-7-7605, enacted in 1996, is substantially similar to its predecessor statute, section 20-7-430, which was enacted in 1981 and repealed in 1996)). “In both statutes, subsection 6 governed murder cases; the language of both versions is identical.” Lamb, 374 S.C. at 349 n. 1, 649 S.E.2d 486, 487 n.1.

existed for the jury to find Respondent/Petitioner guilty. Thus, the outcome of the trial could not reasonably have been affected.

Even assuming trial counsel was ineffective for not preserving the issue for appeal, there was no prejudice. Attorneys are held to an objective standard of “reasonably effective assistance” under “prevailing professional norms.” There is a presumption that counsel was effective and the applicant must show prejudice to receive relief. Even if counsel was deficient in failing to object to the trial court’s ruling on the basis of a violation of the Sixth Amendment, Respondent/Petitioner must still prove he was prejudiced by his counsel’s failure to object. “[T]he prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal.” See McFadden v. State, 342 S.C. 637, 641, 539 S.E.2d 391, 393 (2000). Prejudice is defined as a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland v. Washington, 466 U.S. 668, 694 (1984). Respondent/Petitioner failed to demonstrate at the PCR hearing that the outcome would have been different had trial counsel properly objected, based on a Sixth Amendment violation, to the trial court’s limitation on cross-examination. For the purposes of a purported failure to preserve an issue for appellate review, Respondent/Petitioner must demonstrate that the outcome of the appeal would have been different if the purported issue had been preserved and successfully argued on direct appeal, i.e., not harmless error. It is Petitioner/Respondent’s position that prejudice has not been demonstrated because any error was harmless. State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 524 (2002). As noted above, the co-defendant testimony in the case at hand was not the only evidence linking Respondent/Petitioner to the crime. DNA testing

hand was not the only evidence linking Respondent/Petitioner to the crime. DNA testing revealed Victim's blood was located on Respondent/Petitioner's shoe. (App. pp. 437-38). Respondent/Petitioner gave a statement to the police initially denying he knew Simmons, but he then admitted knowing him and admitted that Simmons called him his cousin. (App. pp. 169-70). He also admitted he owned several guns after first asserting he did not own any. (App. pp. 170-71). Timothy Myers corroborated Simmons' statement that "my cousin" (Respondent/Petitioner) had shot somebody. (App. pp. 275-76).

Counsel was not ineffective in failing to object to the trial court's ruling based on a Sixth Amendment violation. Furthermore, any error was harmless in light of the strong evidence of guilt. In addition, the cross-examination was sufficient to show the jury the co-defendants' bias by extensively exploring their hopes in connection with testifying. Therefore, there is no reasonable probability that the result of the trial would have been different if counsel had objected. Accordingly, the PCR court correctly found counsel was not ineffective and properly denied relief on this issue.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the PCR court's finding in respect to this issue be affirmed.

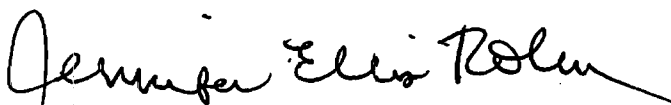
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ATTORNEYS FOR
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November 29, 2012

STATE OF SOUTH CAROLINA
COURT OF APPEALS

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

Israel Wilds, 274010,

Respondent/Petitioner,

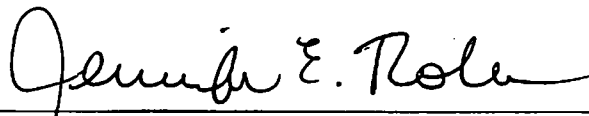
v.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

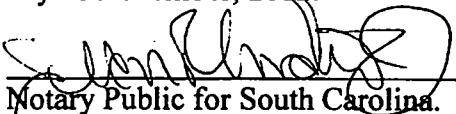
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent by
Petitioner/Respondent has been served upon opposing counsel, Tara D. Shurling by mailing two
(2) copies addressed to: 3614 Landmark Drive, Suite D; Columbia, SC 29204; with postage
prepaid, this 29th day of November, 2012.



JENIFFER E. ROBERTS
ATTORNEY FOR PETITIONER/RESPONDENT

SWORN to before me this 29th
day of November, 2012.



(L.S.)

Notary Public for South Carolina.

My Commission Expires: ~~My~~ Commission Expires
January 30, 2013

STATE OF SOUTH CAROLINA
In the Court of Appeals

ISRAEL WILDS, #274010,

RESPONDENT/PETITIONER,

v.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT.

Appellate Case No. 2008-092411

J. Michelle Childs, Circuit Court Judge
Richland County
Trial Case No. 03-CP-40-5973

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STATEMENT OF THE ISSUE ON APPEAL

Did the lower court err in finding that trial counsel was not ineffective in failing to raise specific objections to the trial judge's refusal to permit cross-examination of two codefendants about the possible sentences they faced?

STATEMENT OF THE CASE

Israel Wilds (Wilds), Respondent/Petitioner herein, was indicted for murder and armed robbery at the September 1999 term of the Court of General Sessions in Richland County. A trial held March 26-29, 2001, before the late Honorable Marc H. Westbrook, presiding judge, resulted in conviction. Wilds was sentenced to life imprisonment for murder and 30 years for armed robbery. On direct appeal the South Carolina Court of Appeals affirmed. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed Feb. 20, 2003).

Wilds filed an Application for Post-Conviction Relief (PCR) on December 15, 2003. An evidentiary hearing was convened on June 8, 2007 before the Honorable J. Michelle Childs, presiding circuit judge. By written order filed May 14, 2008, the circuit court granted relief in part and denied relief in part. The State, Petitioner/Respondent herein, served notice of appeal on May 29, 2008. Wilds instituted this cross-appeal by serving notice of appeal on June 5, 2008. In this cross-appeal, Wilds seeks a new trial on the ground set forth herein to correct a constitutional defect in his 2001 trial and to prevent it from becoming the law of the case in a new trial.

RELEVANT FACTS

The Crime

Anthony Rumph (Rumph) was fatally shot on Rhett Street in the City of Columbia around nine o'clock at night. Although the shooting took place out in the open on a city street, there were no eyewitnesses. Rumph was found lying on the road, unable to speak or identify any perpetrator before his death. Physical evidence at the scene yielded no clues. Items found nearby included Rumph's wallet, a styrofoam cup and a packet of cigarettes, but testing revealed no fingerprints. An unfired .22 caliber bullet collected at the scene was not subjected to any test for any identifying evidence. App. p.81, line 8-p.84, line 13; App. p.111, line 20-p.112, line 24; App. p.116, line 12-p.120, line 19; App. p.139, lines 2-8. The murder weapon was not found.

The Suspects

Eventually the police interviewed codefendants Isom Simmons (Simmons) and Joseph Dante Dungee (Dungee), who admitted they were present when Rumph was shot. Based on their statements, the State put forward a case that Israel Antwan Wilds (Wilds), the Respondent/Petitioner herein, committed armed robbery and murder. Both Simmons and Dungee were age 15 at the time of the incident, considerably younger than Wilds. Both were also charged with armed robbery and murder, Simmons as a juvenile and Dungee as an adult. Their charges were pending when Wilds went to trial. App. p.215, lines 9-14; App. p.234, line 20-p.238, line 3; App. p.258, lines 2-6; App. p.285, lines 6-8; App. p.313, line 22-p.314, line 12; App. p.317, lines 16-21.

Overview of the Evidence

At trial, Wilds presented an alibi defense. Though Wilds lived in the neighborhood where the crime occurred, his cousin, his aunt and her fiancé all testified that Wilds was in his room watching a particular basketball game on the night in question. App. p.481, line 2-p.535, line 24; App. p.557, line 2-p.558, line 12.

To support its case that Wilds robbed and fatally shot Rumph, the State put forward the codefendants' testimony, as well as evidence of an excited utterance by Simmons and blood subsequently found on a shoe owned by Wilds. After deliberating approximately two hours, the jury sent a note asking "*if we say [Wilds is] guilty of murder, are we saying he of the three actually pulled the trigger?*" App. p.615, line 22-p.616, line 6. In response to this question, the jury received a supplemental charge which for the first time instructed them on the law as it relates to accomplice liability. After receiving that supplemental charge, the jury sent a second note and received a second charge on accomplice liability. Less than an hour after receiving the second supplemental charge on accomplice liability, the jury sent yet another note advising the Court that they were in agreement on one charge and not on the other. Finally, after an Allen¹ charge, the jury returned a guilty verdict on both counts. App. p.623, line 8-p.

¹ Allen v. United States, 164 U.S. 492 (1896).

The State's Case

Excited Utterance

Shortly after the incident, Simmons arrived, with Dungee, at the home of his friend Timothy Myers (Myers). Myers did not know Dungee, though he had seen Dungee and Simmons together on other occasions. Simmons, in an excited state, told Myers that "my cousin just shot somebody." Myers did not ask Simmons whom he meant. This was because Myers had heard two gunshots followed by sirens nearby, and he did not want "something that serious" around his house. Supplying Simmons with some marijuana, Myers immediately told him to go away. App. p.274, line 5-p.279, line 3.²

Myers did not testify that he understood to whom Simmons was referring. Myers remembered that Simmons was wearing a plaid shirt and shorts. App. p.282, lines 17-21.

As direct identification evidence, Myers's testimony had no value whatsoever. However, Myers's urgent concern for noninvolvement in the matter implied uncertainty that the shooter was someone other than the two young men now on his property, uncertainty even whether the claim that "my cousin" had shot someone was but an deliberate attempt to drawn suspicion away from Simmons himself or his companion Dungee. A jury could easily have concluded that this statement was intended as cover for the co-defendant's arrival in an excited state immediately after the sound of gunshots in the area. The only evidence that "my cousin" was a reference to

² It was the excited utterance that led investigators to Simmons. The police focused first on Myers because he and Rumph both appeared in the surveillance video of a neighborhood store shortly before Rumph was shot. Simmons was then questioned. He gave a statement implicating himself and Wilds, though he did not mention Dungee. As a result of that statement, Simmons was charged with armed robbery and with assault and battery with intent to kill, which became murder when Rumph later died. App. p.140, line 2-p.153, line 22; App. p.252, lines 11-21. Myers was not charged in connection with the shooting.

Wilds came from Simmons and Dungee. Therefore, it is not independent identification evidence: like the rest of the codefendants' testimony, its value turns on their credibility.

Blood on Wilds' Shoe

The police confiscated a pair of grey suede athletic shoes belonging to Wild. An evidence technician examined the shoes, along with a blood soaked cutting from Rumph's shirt, and found "dots of a substance that could possibly have been sprayed onto that area" of the shoes. The age of these "very, very small" dots could not be determined; however, a swab tested positive for human blood. An extraction of DNA from the cell nucleus yielded no quantifiable human DNA, and no DNA profile. The sample was sent for mitochondrial DNA analysis. App. p.351, line 22-p.354, line 7; App. p.359, line 10-p.360, line 16; App. p.366, lines 13-15; App. p.369, line 17-p.375, line 22; App. p.376, line 22-p.380, line 5; App. p.387, line 20-p.395, line 25; App. p.402, line 24-p.405, line 13; App. p.419, lines 14-15.

The mitochondrial DNA extracted from Wilds' shoe was profiled and compared to DNA extracted from blood on fabric cut from Rumph's shirt. They were found to match. There was an anomaly called heteroplasmy, occurring in four of 794 African-Americans in the available database. The expert acknowledged that the likelihood of this occurrence might increase if the population were restricted to African-Americans in Columbia, South Carolina. The mitochondrial DNA extracted from Wilds' shoe was not compared to a standard from Wilds, or from either of the codefendants. App. p.427, line 21-p.451, line 3.

Items of Wilds' clothing were also examined for the presence of blood. The results were negative: no blood was found. App. p.376, lines 1-16.

Simmons's Testimony

Simmons and Dungee, both 15, had been friends since middle school. They had plans to go to meet and walk to a friend's house on the night in question. On his way to meet Dungee, Simmons encountered Wilds. Simmons and Wilds had first met about six months earlier; they "weren't good friends, but [they] hung out sometimes." App. p.215, line 13-p.218, line 2. Despite having only know reach other for about six months, Simmons claimed that he used to call Wilds "my cousin" not because they were related, but because Wilds was a friend of the family. App. 218, lines 5-13.

Wilds split off as Simmons and Dungee went to visit their friend. Later, on their way home, Simmons and Dungee encountered Wilds again, and the trio walked together down Rhett Street. Walking in the opposite direction was a man Simmons did not know. The man spoke as they passed and asked if they had anything for him. Simmons and Dungee walked on, but Wilds stopped to talk to the man—Anthony Rumph. Seeing that Wilds had stopped, Simmons and Dungee waited off to the side. Wilds had his back to the boys, and Simmons did not know what was said in the conversation. App. p.218, line 22-p.224, line 7; App. p.247, line 3-p.249, line 23.

According to Simmons, Wilds pulled out a gun and pointed it at Rumph's chest. Rumph reached for his back pocket with one hand and grabbed for the gun with the other. They struggled. Rumph pulled his wallet out of his back pocket. Wilds ordered Simmons and Dungee to hit Rumph. Simmons hit him in the back of the head and took his cigarettes out of his pocket. Dungee hit Rumph and took his key chain. Rumph was clutching his wallet to his chest. Wilds shot him in the chest at point blank range. That was the last Simmons saw of the gun. Simmons and Dungee ran off toward a gas station. Simmons dropped the cigarettes as he ran. Wilds

caught up with them and gave each some cash from Rumph's wallet before tossing it to the ground. App. p.224, line 3-p.230, line 14.

Simmons and Dungee parted from Wilds near the gas station and went to Timothy Myers's house. Simmons was nervous and upset. Myers was a close friend who tried to keep Simmons out of trouble. Myers had told Simmons to let him know if anything went wrong, so Simmons confided to him that "my cousin had just shot somebody." App. p.228, line 21-p.232, line 10; App. p.245, lines 9-19. Myers gave the boys some marijuana and they left. App. p.232, line 16-p.233, line 9. Simmons testified that he was wearing blue jeans, a green sweater and a pair of boots on the night in question. App. p.243, lines 22-25.

In his initial statement to the police, Simmons did not mention that Dungee was present at the encounter with Rumph. Simmons likewise did not mention that Rumph grabbed Wilds by the hand in which he held the gun, or that Wilds ordered him to hit Rumph. App. p.252, line 11-p.257, line 8.

The prosecution had offered Simmons no deal in exchange for his testimony. Simmons acknowledged that he hoped for something in return, but he was not expecting it. He was clearly hoping not to go to trial for armed robbery and murder, or to plead guilty to armed robbery or to murder. App. p.258, line 2-p.260, line 4.

Dungee's Testimony

Dungee recognized Wilds when he saw him with Simmons early on the night in question and greeted him with a handshake. Simmons called Wilds "Twan" and said that he was a cousin. According to Dungee, Wilds said something about robbing somebody and Simmons seemed to

be party to the idea. Dungee saw a gun. They walked around the neighborhood. Then Wilds split off, and Dungee and Simmons went to their friend's house. App. p.291, line 3-p.295, line 7.

Later, walking near Rhett Street, Dungee and Simmons met up with Wilds again. They walked single file down Rhett Street as a man with a cup was walking in the opposite direction. The man asked Dungee if he knew the bus schedule, but Dungee did not. The man passed Dungee and Simmons. Wilds, last in the file, stopped and asked the man (Rumph) about crack cocaine. Dungee and Simmons stopped a few feet away. App. 295, line 8-p.302, line 20.

Dungee testified that Wilds pointed a gun and appeared to be robbing Rumph. Dungee and Simmons grabbed Rumph, who tried to jerk away. Dungee hit him in the face, Simmons hit him in the back of the head. Wilds hit him in the back of the head with the gun. Dungee took a cigarette lighter and some coins from Rumph's pockets. Simmons took a pack of cigarettes. When Rumph refused to surrender his wallet, Wilds shot him. App. p.320, line 13-p.307, line 22.

As Dungee began to run, he heard Simmons start to quarrel with Wilds about the shooting. Dungee did not run far before Simmons and Wilds joined him. Wilds distributed cash from Rumph's wallet to Simmons, who then shared with Dungee. The boys parted ways with Wilds and went on to Myers's house. Dungee did not hear the conversation between Simmons and Myers. Simmons told Dungee about confiding in Myers, who had given him a dime bag of marijuana. Dungee told Simmons that he did not intend to tell anybody about the shooting. App. p.307, line 25-p.312, line 4.

In his initial statement to the police, Dungee denied knowing in advance that Wilds had a gun. At trial, Dungee admitted this was a lie. Also, Dungee did not tell the police about seeing

Wilds earlier in the evening, which (according to his testimony) is when he first saw the gun. Dungee's initial account of the interchange with Rumph also differed from his testimony: he omitted the parts about the bus schedule and crack cocaine. App. p.320, line 7-p.324, line 18.

Dungee did not mention, either in his statement or his testimony, that Rumph had struggled with Wilds over the gun. Dungee testified that he had no memory of Rumph going for the gun. App. p.325, line 17-p.326, line 6. However, on cross-examination Dungee did remember that Wilds told him and Simmons to go through Rumph's pockets. This detail had not been part of Dungee's statement or his direct testimony. App. p.326, lie 7-p.327, line 24.

The prosecution had offered Dungee no deal in exchange for his testimony. Although no promises had been made, Dungee acknowledged that he hoped the murder charge would be reduced. App. p.314, line 13-p.315, line 1; App. p.317, line 16-p.319, line 17.

ARGUMENT

Trial counsel was ineffective in failing to raise specific objections to the trial judge's refusal to permit cross-examination of two codefendants about the possible sentences they faced.

Several stories were told about the night Anthony Rumph was shot. For jurors to discern the truth, it was essential that they be able to evaluate the credibility of the witnesses, especially the credibility of two codefendants, whose testimony was the foundation of the State's case. However, their credibility went untested in a meaningful way. This was because the trial judge barred defense counsel from asking either codefendant about the possible sentences they faced. As a result of ineffective assistance of trial counsel, the issue was not preserved for direct appeal.

Standard of Review

Under the two-pronged standard for establishing a claim of ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, the defendant must show first that counsel's advice "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Then, the defendant must show that, but for counsel's deficiency, the outcome of the trial would have been different. *Id.* On appeal from an order denying post-conviction relief (PCR), the PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

How the Issue Arose Below

Trial and Direct Appeal

Codefendants Isom Simmons (Simmons) and Joseph Dungee (Dungee) testified for the prosecution at the trial of Israel Wilds (Wilds). Simmons and Dungee both testified that Wilds shot Anthony Rumph (Rumph) in the course of an armed robbery. Simmons and Dungee both knew about the gun and participated in the robbery. The variations in their testimony and their pretrial statements were considerable, as set forth in detail in the Statement of Facts *supra*.

Simmons and Dungee were both 15 at the time of the crime. Both were charged with murder and armed robbery, Simmons as a juvenile and Dungee as an adult. Neither had been offered any deal in exchange for testifying against Wilds. Simmons acknowledged that he hoped for something in return, but he was not expecting it. What he was not hoping for was to go to trial for armed robbery and murder, or to plead guilty to armed robbery or to murder. Dungee likewise acknowledged that he hoped the murder charge would be reduced.

Before Simmons or Dungee testified, and apparently after a discussion in chambers, the trial judge limited the scope of cross-examination to general expectations about reductions in the charges or sentences, ruling that the codefendants must not be asked about "any details about the potential sentences and that sort of thing." App. p.208, line 14-p.209, line 2; App. p. 209, lines 18-21. Defense counsel put the following objection on the record:

With regard to the pending charges as against Mr. Simmons and Mr. Dungee, they are currently, according to the Solicitor, both charged with murder and armed robbery.

We would submit to the Court that I should be able to question them not merely about the existence of the charges but what they hope to get as a result of their testimony.

Their understanding of the penalties they're facing now and specifics of the fact that they are looking at life in prison on the murder charge, and their hopes in regard to a reduction in sentencing.

App. p.209, lines 5-15.

On direct appeal, Wilds asserted that the trial judge's ruling was an erroneous application of Rule 608, SCRE, and a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. Supp. App. pp.11-20. The Court of Appeals found this argument to be unpreserved and affirmed. *State v. Wilds*, Op. No. 03-UP-152 (S.C. Ct. App. 2003), Supp. App. pp.9-10.

Post-Conviction Relief

At the post-conviction relief (PCR) hearing, Wilds asserted that defense counsel was ineffective in failing to object that the limitation on cross-examination of the codefendants violated his Sixth Amendment right to confront adverse witnesses. App. p.670, line 13-p.673, line 8. Defense counsel testified that he should have expressly based his objection on the confrontation clause of the Sixth Amendment. App. p.705, line 25-p.706, line 19.

The PCR judge denied relief on this issue. The judge ruled that defense counsel was allowed ample range of cross-examination so that, even if he should have objected, the error was harmless. App. p.753.

Discussion

Under the Confrontation Clause, the accused must be allowed to impeach the credibility of a cooperating codefendant with specific evidence of potential sentences, especially mandatory minimum sentences.

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI; see Pointer v. Texas, 380 U.S. 400 (1965) (it is through the Fourteenth Amendment to the United States Constitution that the Sixth Amendment applies to the states). The right guaranteed in the Confrontation Clause may be

answered through the cross-examination of adverse witnesses, whereby the jury is exposed to facts that tending to show interest, bias or partiality. Delaware v. Van Arsdall, 475 U.S. 673 (1986); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002).

“Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” Rule 608(c), SCRE. The scope of inquiry is extensive to allow the jury to fulfill its function: “anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.” State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976).

One prototypical source of interest, bias or partiality is a cooperating codefendant’s expectations as to his own sentencing. The appellate court of South Carolina have repeatedly held that, in barring questions about the specific sentences a codefendant faces, a trial judge deprives the defendant of the right to meaningful cross-examination under the Confrontation Clause. State v. Gracely, 731 S.E.2d 880 (S.C. 2012); State v. Mizzell, *supra*; State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff’d as modified, 373 S.C. 601, 646 S.E.2d 872 (2007).

Where the codefendant, but for his cooperation, faces a mandatory minimum sentence, the violation is magnified. Here, Simmons and Dungee both were charged with murder and armed robbery, crimes of extreme violence for which both would or could be tried as an adult and sentenced to life imprisonment. The mandatory minimum sentence for murder is 30 years. S.C. Code Ann. 16-3-20(A) (Supp. 2011). The mandatory minimum sentence for armed robbery is 10 years. S.C. Code Ann. 16-11-330(A) (2003). The trial judge’s ruling meant the jury was

never exposed to these facts, from which jurors could appropriately draw inferences as to credibility. See Van Arsdall, 475 U.S. at 680.

Even at the time Wilds was tried, this restriction was clear error under Brown. The recent Gracely decision may enhance the clarity, but it does not change the law in effect since Brown was decided in 1991:

To the extent our directive in Brown was unclear, the instant case provides an opportunity to clarify. The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.

Gracely, 731 S.E.2d at 886 (emphasis in original).

Moreover, before Wilds' direct appeal was final, the Supreme Court held that the mere potential for a favorable deal as to sentencing was sufficient to establish error. The Court agreed that

the absence of the agreement, if anything, suggests the witness will testify more favorably to the State's position. [The codefendant] would reasonably have felt the quality of his cooperation would determine the degree of benefit he would later receive. See *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir.1976) ("[A] promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced; the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.").

Mizzell, 349 S.C. at 332-33, 563 S.E.2d at 318.

Defense counsel rendered ineffective assistance in failing to preserve the Confrontation Clause violation for review on direct appeal.

That the trial judge's ruling violated the Confrontation Clause can hardly be gainsaid. An appellate court considering the issue on its merits would not have held otherwise. However, as this Court ruled, the issue was unpreserved for appellate review. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed Feb. 20, 2003).

In failing to include any reference to the Confrontation Clause as the basis for his objection, defense counsel rendered ineffective assistance in violation of the Sixth Amendment right to counsel. With one Sixth Amendment violation on top of the other, Wilds has satisfied the first prong of his claim under Strickland v. Washington, *supra*.

The determination of prejudice under Strickland turns on whether the underlying violation was harmless beyond a reasonable doubt.

Having met the first prong of the Strickland standard, Wilds must show that, but for counsel's error, there is a reasonable probability that the outcome of the direct appeal would have been different. This is the second prong of the Strickland standard. This turns on whether the underlying Confrontation Clause violation was harmless beyond a reasonable doubt. *See Van Arsdall*, 475 U.S. at 684 (a Confrontation Clause violation is not per se reversible error).

The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id.

In view of the importance of the codefendants' testimony and the jury's doubts regarding their credibility, the absence of corroborating evidence on material points, and the likely impact full disclosure of potential sentences would have had on an otherwise weak prosecution case, the Confrontation Clause violation clearly was not harmless beyond a reasonable doubt.

Here, the State would have been utterly unable to establish guilt beyond a reasonable doubt without the testimony of Simmons and Dungee. The testimony of each was cumulative

only to the testimony of the other. The testimony of each was riddled with inconsistencies, even acknowledged lies. As explained in Mizzell, that no deal had yet been reached would likely have increased the codefendants' motivation to please the prosecution. This inference was available to the jurors, who knew no deal had been offered. But the jurors could not fully gauge the level of motivation because they were not exposed to the specifics of the looming sentences—even setting aside the maximum of life and mandatory minimum of 30 years for murder, the mandatory minimum of 10 years for armed robbery alone would have seemed quite onerous to a teenage boy.

Furthermore, the corroborative value of other evidence was minimal. To the extent it was reliable, the DNA match from the "very, very small" blood spots on Wilds' shoe established at most that the shoe came in contact with Rumph's blood. It provided no insight as to the timing and circumstances of that contact. Because Rumph lay on the street bleeding in the neighborhood where Wilds lived, his shoe could have come in contact with a minute amount of blood well after Rumph was shot. If this inference is speculative, an inference that Wilds was necessarily present at the time of the shooting would be equally speculative. As the evidence technician stated, the age of the spots was not known.

Likewise, the excited utterance evidence had limited corroborative value. Timothy Myers (Myers) testified that Simmons, in an excited state, told Myers that "my cousin just shot somebody." This corroborated Simmons's testimony that he told Myers that "my cousin had just shot somebody" immediately after the incident. But it did not tend to prove that Wilds shot Rumph. As previously argued, the jury might easily have been suspicious of the circumstances under which Simmons made this statement to Myers and his motives for doing so.

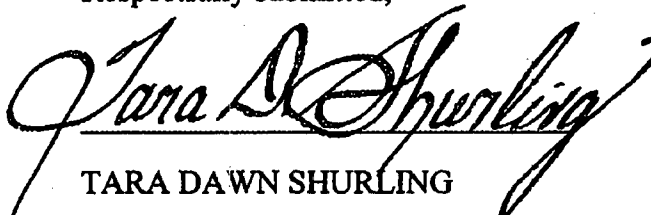
As identification evidence, Myers's testimony had no value whatsoever, either directly or corroboratively. Myers did not ask Simmons whom he meant, nor did he testify that he understood to whom Simmons was referring. In fact, Myers's urgent concern for noninvolvement in the matter implied uncertainty that the shooter was someone other than the two young men now on his property—uncertainty even as to whether "my cousin" was but a euphemism for Simmons himself. The only evidence that "my cousin" was a reference to Wilds came from Simmons and Dungee. Dungee testified that he knew whom Simmons meant, but Myers did not.

Finally, to put this all in context, the record shows that the jury deliberated five hours and returned with two notes, both of which tend to show doubts about the codefendants' credibility. But for the trial judge's ruling, the damaging potential of the cross-examination defense counsel sought to engage in would have been fully realized. Therefore, the Confrontation Clause violation was not harmless beyond a reasonable doubt.

CONCLUSION

For the reasons stated, the Petitioner's convictions and sentences should be reversed and his case remanded for a new trial.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT/PETITIONER

October 30, 2012

STATE OF SOUTH CAROLINA
In the Court of Appeals

ISRAEL WILDS, #274010,

RESPONDENT/PETITIONER,

v.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT.

Appellate Case No. 2008-092411

J. Michelle Childs, Circuit Court Judge
Richland County
Trial Case No. 03-CP-40-5973

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that certificate that this Brief of Respondent/Petitioner complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief is in compliance with the August 13, 2007 Order of the Supreme Court of South Carolina relating to the inclusion of personal data identifiers and other sensitive information in documents.


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This 30th day of October, 2012.

STATE OF SOUTH CAROLINA
In the Court of Appeals

ISRAEL WILDS, #274010,

RESPONDENT/PETITIONER,

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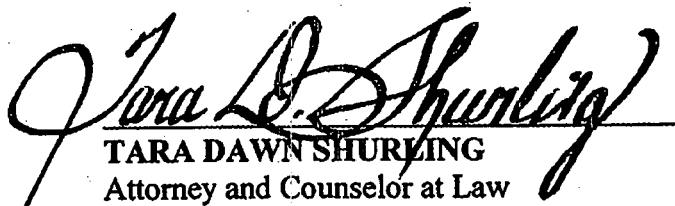
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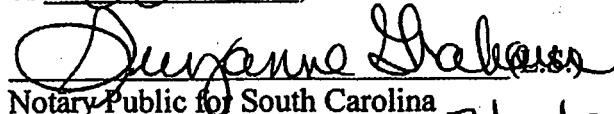
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of Respondent/Petitioner's Brief in the above-entitled case has been served upon opposing counsel, Jennifer Ellis Roberts, Assistant Attorney General, Office of the Attorney General, P. O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 30th day of October, 2012, 2012.


TARA DAWN SHURLING
Attorney and Counselor at Law

ATTORNEY FOR RESPONDENT/PETITIONER.

SWORN TO BEFORE me this 30th day
of October 2012.


Notary Public for South Carolina

My Commission Expires: 3/12/2013

**STATE OF SOUTH CAROLINA
In The Court of Appeals**

ISRAEL WILDS, #274010,

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BRIEF OF RESPONDENT BY RESPONDENT/PETITIONER

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Statutes

U.S. Const. Amend. XIV 16, 22

STATEMENT OF THE ISSUES ON APPEAL

- I. Did the lower court properly rule that appellate counsel was ineffective in failing to argue on appeal that there was no evidence to support a jury charge on accomplice liability?
- II. Did the lower court properly rule that appellate counsel was ineffective in failing to argue on appeal that the trial court erred in refusing to instruct the jury on mere presence?

STATEMENT OF THE CASE

Israel Wilds (Wilds), Respondent/Petitioner herein, was indicted for murder and armed robbery at the September 1999 term of the Court of General Sessions in Richland County. A trial held March 26-29, 2001, before the late Honorable Marc H. Westbrook, presiding judge, resulted in conviction. Wilds was sentenced to life imprisonment for murder and 30 years for armed robbery. On direct appeal this Court affirmed. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed Feb. 20, 2003).

Wilds filed an Application for Post-Conviction Relief (PCR) on December 15, 2003. An evidentiary hearing was convened on June 8, 2007 before the Honorable J. Michelle Childs, presiding circuit judge. By written order filed May 14, 2008, the circuit court granted relief in part and denied relief in part. The State, Petitioner/Respondent herein, served notice of appeal on May 29, 2008. Wilds instituted a cross-appeal by serving notice of appeal on June 5, 2008.

This Court granted both parties' petitions on May 7, 2012. This appeal follows.

STATEMENT OF FACTS

Anthony Rumph (Rumph) was fatally shot on Rhett Street in the City of Columbia around nine o'clock at night. Although the shooting took place out in the open on a city street, there were no eyewitnesses. Rumph was found lying on the road, unable to speak or identify any perpetrator before his death. App. p.81, line 8-p.84, line 13; App. p.111, line 20-p.112, line 24; App. p.116, line 12-p.120, line 19; App. p.139, lines 2-8.

A. Evidence Adduced at Trial

Codefendants Isom Simmons (Simmons) and Joseph Dante Dungee (Dungee) testified that Israel Antwan Wilds (Wilds), the Respondent/Petitioner herein, committed armed robbery and murder. Both Simmons and Dungee were age 15 at the time of the incident, considerably younger than Wilds. Both were also charged with armed robbery and murder, Simmons as a juvenile and Dungee as an adult. Their charges were pending when Wilds went to trial. App. p.215, lines 9-14; App. p.234, line 20-p.238, line 3; App. p.258, lines 2-6; App. p.285, lines 6-8; App. p.313, line22-p.314, line 12; App. p.317, lines 16-21.

1. Simmons's Testimony.

On the night in question, Simmons was under a curfew. He and Dungee were walking home when they encountered Wilds, and the trio walked together down Rhett Street. Walking in the opposite direction was a man Simmons did not know. The man spoke as they passed and asked if they had anything for him. Simmons and Dungee walked on, but Wilds stopped to talk to the man—Anthony Rumph. Seeing that Wilds had stopped, Simmons and Dungee waited off

to the side. Wilds had his back to the boys, and Simmons did not know what was said in the conversation. App. p.218, line 22-p.224, line 7; App. p.247, line 3-p.249, line 23.

According to Simmons, Wilds pulled out a gun and pointed it at Rumph's chest. Rumph reached for his back pocket with one hand and grabbed for the gun with the other. They struggled. Rumph pulled his wallet out of his back pocket. Wilds ordered Simmons and Dungee to hit Rumph. Simmons hit him in the back of the head and took his cigarettes out of his pocket. Dungee hit Rumph and took his key chain. Rumph was clutching his wallet to his chest. Wilds shot him in the chest at point blank range. App. p.224, line 3-p.230, line 14.

Immediately afterwards, Simmons and Dungee went to Timothy Myers's house. Simmons was nervous and upset. Myers was a close friend who tried to keep Simmons out of trouble. Myers had told Simmons to let him know if anything went wrong, so Simmons confided to him that "my cousin had just shot somebody." App. p.228, line 21-p.232, line 10; App. p.245, lines 9-19. Myers gave the boys some marijuana and they left. App. p.232, line 16-p.233, line 9; App. p.274, line 5-p.279, line 3.¹

2. Dungee's Testimony.

Dungee had heard Simmons call Wilds "Twan" and say that he was a cousin. According to Dungee, earlier on the day of the incident, Wilds said something about robbing somebody and Simmons seemed to be party to the idea. Dungee saw a gun. They walked around the neighborhood. Then Wilds split off, and Dungee and Simmons went to their friend's house. App. p.291, line 3-p.295, line 7.

¹ It was the excited utterance that led investigators to Simmons. The police focused first on Myers because he and Rumph both appeared in the surveillance video of a neighborhood store shortly before Rumph was shot. Simmons was then questioned. He gave a statement implicating himself and Wilds, though he did not mention Dungee. As a result of that statement, Simmons was charged with armed robbery and with assault and battery with intent to kill, which became murder when Rumph later died. App. p.140, line 2-p.153, line 22; App. p.252, lines 11-21. Myers was not charged in connection with the shooting.

Later, walking near Rhett Street, Dungee and Simmons met up with Wilds again. They walked single file down Rhett Street as a man with a cup was walking in the opposite direction. The man asked Dungee if he knew the bus schedule, but Dungee did not. The man passed Dungee and Simmons. Wilds, last in the file, stopped and asked the man (Rumph) about crack cocaine. Dungee and Simmons stopped a few feet away. App. 295, line 8-p.302, line 20.

Dungee testified that Wilds pointed a gun and appeared to be robbing Rumph. Dungee and Simmons grabbed Rumph, who tried to jerk away. Dungee hit him in the face, Simmons hit him in the back of the head. Wilds hit him in the back of the head with the gun. Dungee took a cigarette lighter and some coins from Rumph's pockets. Simmons took a pack of cigarettes. When Rumph refused to surrender his wallet, Wilds shot him. App. p.320, line 13-p.307, line 22.

3. Other Evidence.

Tiny spots of blood were subsequently found on a shoe owned by Wilds. The mitochondrial DNA extracted from this blood was profiled and compared to DNA extracted from blood on fabric cut from Rumph's shirt. They were found to match. App. p.351, line 22-p.354, line 7; App. p.359, line 10-p.360, line 16; App. p.366, lines 13-15; App. p.369, line 17-p.375, line 22; App. p.376, line 22-p.380, line 5; App. p.387, line 20-p.395, line 25; App. p.402, line 24-p.405, line 13; App. p.419, lines 14-15; App. p.427, line 21-p.451, line 3.

Items of Wilds' clothing were also examined for the presence of blood. The results were negative: no blood was found. App. p.376, lines 1-16.

4. Alibi Defense.

Wilds lived in the neighborhood where the crime occurred. However, his cousin, his aunt and her fiancé all testified that Wilds was in his room watching a particular basketball game on the night in question. App. p.481, line 2-p.535, line 24; App. p.557, line 2-p.558, line 12.

B. How the Issues Arose at Trial

After deliberating approximately two hours, the jury sent a note asking “*if we say [Wilds is] guilty of murder, are we saying he of the three actually pulled the trigger?*” App. p.615, line 22-p.616, line 6. Understanding the note to suggest that the jury did not believe that Wilds was the shooter, the solicitor changed his theory of the case.

The solicitor submitted that a defendant indicted for murder as a principal could nevertheless be convicted on a theory of accomplice liability—the hand of one is the hand of all. App. p.616, lines 10-15; App. 617, line 9-p.618, line 9. Defense counsel countered, “The theory of hand of one, hand of all, has to have some basis in fact, and Your Honor is required to charge the law applicable to the evidence. ...[F]or Your Honor to go ahead and answer the question in the negative, you would have to charge [the jury] on the law that is not applicable to the facts of this case.” App. p.616, line 17-p.617, line 7.

The trial judge initially observed that there had been no testimony that anyone else pulled the trigger: “It seems to me the only way the jury could have gotten to this is to speculate. ...[T]he proper way to answer this is to advise this jury that they’ve got to base their verdict on the evidence, and they can’t—the verdict can’t be the result of any sort of speculation on their part.” App. p.618, lines 13-23.

The solicitor then pointed out that the evidence regarding the stain on Wilds’ shoe suggested that it was Rumph’s blood, “deposited after [he] was bleeding at the location where

the crime occurred, that would certainly be inconsistent with the alibi defense, and consistent under the law of South Carolina with [Wilds] being guilty of murder." App. p.620, lines 4-11.

Against defense counsel's staunch position that the facts of the case did not warrant an accomplice liability instruction, the trial judge determined that he would deliver it. In the trial judge's view, the jury's approach to the facts had made accomplice liability an issue, and the trial judge considered that he had no choice but to instruct the jury accordingly. Defense counsel's motion for a mistrial was denied. App. p.620, line 12-p.623, line 1.

When the jury returned to the courtroom, the trial judge delivered this supplemental instruction:

I further charge you that the law in South Carolina is that if a crime is committed by two or more persons who are acting together in the commission of a crime, the act of one is the act of all.

Two people 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 law says that under those circumstances, the act of one is the act of all. In other words, the hand of one is the hand of all.

Of course, the situation I've presented to you must be proven by the State beyond a reasonable doubt. They 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 a crime.

App. p.624, lines 2-16.

Defense counsel had no opportunity to review the supplemental instruction before it was delivered. Immediately afterward, defense counsel specifically reserved his previous objection that the instruction was not warranted by the evidence, and further objected to the absence of a charge on mere presence in the supplemental instruction as given. App. p.625, line 1-p.627, line 10.

The trial judge initially agreed that a mere presence charge was appropriate. In the end, the trial judge declined to give a further charge because the supplemental instruction as given included the requirement that the State prove guilt beyond a reasonable doubt: "If the jury were to make the determine that [Wilds] was merely present, then based on my charge they would find the State had not proven he was assisting and acting together with the others, so I think the charge is appropriate and I decline to add to it." App. p.625, lines 16-18; App. p.627, lines 11-25.

Less than an hour after receiving the supplemental charge on accomplice liability, the jury sent yet another note advising the Court that they were in agreement on one charge and not on the other. An Allen² charge was delivered over defense counsel's objection. The jury deliberated for another hour before sending a third note with a further question about accomplice liability. Over defense counsel's objection, the trial judge gave a second supplemental instruction:

I've been over this with the attorneys. You have sent this and have underlined certain language, and the language you underlined is, and I quote, if both are together, acting together and assisting each other in the commission of the offense, and then the question after that is, are all three underlined conditions necessary by law in order for the jury to find the Defendant guilty of hand of one, hand of all, or does only one of the conditions need to exist[?]

Let me note that the gist of the law of hand of one is the hand of all means that all must be together, acting together, assisting each other, in the commission of the offense.

Now, these are not separate elements, each of which [has] to be proven. Rather, they refer to a continuous course of action by the participants. The gist of it is they must be present and aiding or abetting in the commission of the offense.

Obviously, aiding means to aid or assist, and abetting means to be inciting or agitating. A common term may be to egg on or something along those lines.

² Allen v. United States, 164 U.S. 492 (1896).

That's the gist of what it is. It refers to a continuous course of conduct, not simply elements which must be proven separately.

App. p.628, line 9-p.635, line 21. The jury shortly returned a verdict of guilty on both counts.

C. Direct Appeal

On direct appeal, appellate counsel did not raise any issue concerning the jury instruction on accomplice liability or the omission of a charge as to mere presence. Instead, appellate counsel argued that the trial judge improperly and unconstitutionally limited the cross-examination of Wilds' codefendants. See Supp. App. pp.11-20. This Court affirmed on the ground that the issue was not preserved. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed Feb. 20, 2003), Supp. App. pp.9-10.

D. Post-Conviction Relief

At the post-conviction relief (PCR) hearing, Wilds asserted that appellate counsel was ineffective in failing to raise the accomplice liability and mere presence issues on direct appeal. App. p.680, line 16-p.684, line 11. The PCR court ruled that appellate counsel was ineffective in failing to argue on appeal that (1) the evidence adduced at trial did not support an instruction on accomplice liability; (2) the accomplice liability instruction as given was insufficient in that it allowed a finding of guilt if Wilds and his codefendants were merely assisting each other without the requisite intention or common design; and (3) the trial judge erroneously refused to give a charge on mere presence. Finding that appellate counsel's performance in failing to raise these issues on appeal fell below an objective standard of reasonableness, the PCR court granted Wilds a new trial. App. pp. 732-757.

STANDARD OF REVIEW

A defendant is entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); U.S. Const. amend. VI. Under the two-pronged standard for establishing a claim of ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, the defendant must show first that counsel's performance "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). Then, the defendant must show that, but for counsel's deficient representation, the outcome of the proceeding would have been different. *Id.* On appeal from an order denying post-conviction relief (PCR), the PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

ARGUMENT

I. The lower court properly ruled that appellate counsel was ineffective in failing to argue on appeal that there was no evidence to support a jury charge on accomplice liability.

At the time Israel Wilds was tried as a principal for murder and armed robbery, the law was settled that a jury charge on an alternative theory of accomplice-liability could not be given if there was no evidence to support it. The evidence here is unequivocal: Wilds was either guilty as a principal or he was not guilty at all. The State's argument, that the accomplice liability instruction was proper because the jury could believe a portion of the State's evidence while disbelieving that Wilds was the shooter, is contrary to precedent. For these reasons, the lower court properly ruled that appellate counsel was ineffective in failing to challenge the accomplice liability instruction on direct appeal.

A. How the Issue Arose Below

The following is a summary of the evidence and procedural history, all of which are set forth in detail with specific citation to the record in the Statement of Facts, supra.

At Wilds' trial, the State presented a narrative of an armed robbery and murder in which Wilds was unequivocally the principal in the crimes and, specifically, the shooter. Wilds called witnesses to establish an alibi. After approximately two hours of deliberations, the jury sent a note asking "*if we say [Wilds is] guilty of murder, are we saying he of the three actually pulled the trigger?*" App. p.615, line 22-p.616, line 6.

The trial judge and counsel interpreted this note as suggesting that the jury did not believe Wilds was the shooter. After discussion, the trial judge delivered, for the first time, an instruction on accomplice liability. Defense counsel objected that the evidence did not support this instruction. Appellate counsel did not raise this issue on direct appeal.

At the post-conviction relief (PCR) hearing, Wilds asserted that appellate counsel was ineffective in failing to raise the accomplice liability issue on direct appeal. App. p.680, line 16-p.684, line 11. The PCR court agreed. Finding that appellate counsel's performance in failing to raise this issue on appeal fell below an objective standard of reasonableness, the PCR court granted Wilds a new trial. App. pp. 732-757.

B. Discussion

Indictment as a principal does not in itself preclude a finding of guilt on an alternative theory of accomplice liability. State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010). "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Id. at 479, 697 S.E.2d at 584.

However, an instruction on the alternative theory of accomplice liability must be supported by the evidence. State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) (accomplice liability charge was proper when there was evidence that the defendant and a second person planned the murder and the second person was the shooter). "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 v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) (citing State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976) (lesser-included offense charge properly refused where no evidence supported it), and Dickman, *supra*). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); State v. Foxworth, 269 S.C. 496, 238 S.E.2d 172 (1977); State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003).

Taken in the light most favorable to the State, the evidence adduced at trial shows the following:

1. Dungee heard Wilds say something about robbing somebody earlier on the day of the incident and saw that Wilds had a gun. Simmons may have been in on the plan. Dungee did not join the plan.
2. Shortly before the incident, before they met Wilds, before they encountered Rumph, Simmons and Dungee were walking home. Simmons's plan was to be home by his curfew.
3. When Wilds decided to rob Rumph, both Simmons and Dungee had passed Rumph and were walking down the street. The robbery was well underway before either Simmons nor Dungee became a participant.
4. Simmons and Dungee only began to participate in the robbery after Wilds, wielding a gun, ordered them to join in.
5. Only Wilds shot Rumph.
6. There was no evidence that anyone but Wilds had a gun.

Thus, even if Wilds had planned a robbery in advance, the evidence in the case is unequivocal as to every integral fact of principal liability. The State, which at all times bears the burden of proving guilt beyond a reasonable doubt, had presented a case devoid of any evidence that Wilds was guilty as an accomplice.

In asserting that the accomplice liability instruction was not erroneous, the State offers a retreaded version of an argument that failed long ago in the context of lesser-included offenses: that the jury, disbelieving the State's evidence that Wilds was the shooter, was properly given the option to find him guilty as an accomplice because the evidence showed that all three men were acting together and one of them must have been the shooter. See Brief of Petitioner-Respondent at 11. This argument defies precedent. To warrant an alternative theory instruction, the "mere contention that the jury might accept the State's evidence in part and might reject it in part will

not suffice.” State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) (citation and internal quotation marks omitted).

The State’s assertion that the alibi evidence supports the necessary inference, that one of the codefendants was the shooter instead of Wilds, borders on the absurd. There is no evidence that Wilds was involved in the crime in any capacity other than as shooter. By contrast, in Barber v. State, supra, which also involved murder in the course of an armed robbery, the perpetrators’ faces were masked and more than one was armed with the type of weapon in question. Because the evidence as to the identity of the shooter was equivocal, the jury in Barber was properly charged on the alternative theory of accomplice liability.

The Supreme Court’s decision in Barber v. State is controlling here. The equivocal evidence that was present in Barber is utterly missing in this case. Accordingly, applying the principles set forth in Barber, and in State v. Dickman, supra, Wilds would have prevailed on direct appeal but for appellate counsel’s unreasonable omission.

Moreover, the unwarranted accomplice liability instruction effectively diluted the State’s burden of proof in violation of the Due Process Clause. U.S. Const. Amend. XIV. It allowed the jury to convict on the basis of sheer speculation.

The trial judge committed reversible error, and appellate counsel was ineffective in failing to raise the issue on direct appeal. For these reasons, the lower court’s ruling should be affirmed.

- II. The lower court properly ruled that appellate counsel was ineffective in failing to argue on appeal that the trial court erred in refusing to instruct the jury on mere presence.**

As argued in Issue I above, the evidence presented at trial did not support any instruction on accomplice liability. Assuming without conceding that giving the accomplice liability instruction was somehow not reversible error, the instruction as given was deficient because it failed to instruct the jury that Wilds could not be found guilty if he were merely present at the scene. Appellate counsel's failure to raise either issue on direct appeal was objectively unreasonable and deprived Wilds of his Sixth Amendment right to effective assistance of counsel. For the reasons set forth below, the trial judge's erroneous refusal to give the requested charge on mere presence was prejudicial and would have resulted in reversal on direct appeal.

A. How the Issue Arose Below

Over defense counsel's objection that it was unwarranted, the trial judge delivered this supplemental instruction:

I further charge you that the law in South Carolina is that if a crime is committed by two or more persons who are acting together in the commission of a crime, the act of one is the act of all.

Two people 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 law says that under those circumstances, the act of one is the act of all. In other words, the hand of one is the hand of all.

Of course, the situation I've presented to you must be proven by the State beyond a reasonable doubt. They 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 a crime.

App. p.624, lines 2-16. Defense counsel had no opportunity to review the supplemental instruction before it was delivered. Immediately afterward, defense counsel further objected to the absence of a charge on mere presence in the supplemental instruction as given. App. p.625, line 1-p.627, line 10.

The trial judge initially agreed that a mere presence charge was appropriate. In the end, the trial judge declined to give a further charge because the supplemental instruction as given included the requirement that the State prove guilt beyond a reasonable doubt: "If the jury were to make the determine that [Wilds] was merely present, then based on my charge they would find the State had not proven he was assisting and acting together with the others, so I think the charge is appropriate and I decline to add to it." App. p.625, lines 16-18; App. p.627, lines 11-25.

Less than an hour after receiving the supplemental charge on accomplice liability, the jury sent yet another note, in response to which an Allen³ charge was delivered over defense counsel's objection. The jury deliberated for another hour before sending a third note with a further question about accomplice liability. Over defense counsel's objection, the trial judge gave a second supplemental instruction:

I've been over this with the attorneys. You have sent this and have underlined certain language, and the language you underlined is, and I quote, if both are together, acting together and assisting each other in the commission of the offense, and then the question after that is, are all three underlined conditions necessary by law in order for the jury to find the Defendant guilty of hand of one, hand of all, or does only one of the conditions need to exist[?]

Let me note that the gist of the law of hand of one is the hand of all means that all must be together, acting together, assisting each other, in the commission of the offense.

Now, these are not separate elements, each of which [has] to be proven. Rather, they refer to a continuous course of action by the participants. The gist of it is they must be present and aiding or abetting in the commission of the offense.

Obviously, aiding means to aid or assist, and abetting means to be inciting or agitating. A common term may be to egg on or something along those lines.

³ Allen v. United States, 164 U.S. 492 (1896).

That's the gist of what it is. It refers to a continuous course of conduct, not simply elements which must be proven separately.

App. p.628, line 9-p.635, line 21.

At the post-conviction relief (PCR) hearing, Wilds asserted that appellate counsel was ineffective in failing to argue on appeal that the trial judge erroneously refused to give a charge on mere presence. App. p.680, line 16-p.684, line 11. The PCR court agreed. Finding that appellate counsel's performance in failing to raise this issue on appeal fell below an objective standard of reasonableness, the PCR court granted Wilds a new trial. App. pp. 732-757.

B. Discussion

As a threshold matter, the State's assertion that the issue is not preserved is utterly without merit. Defense counsel made his objection at the first possible moment. The record is clear that he had no advance notice that the trial judge would fail to include a mere presence charge, when even the trial judge acknowledged that such a charge is standard in an accomplice liability situation.

Turning to the merits, the State has failed to show why post-conviction relief should not be granted. Under a theory of accomplice liability, "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." State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2010) (quoting State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999), and State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). An accomplice "must be chargeable with knowledge of the principal's criminal conduct." Id. (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)).

Thus, there are three requirements to establish guilt under a theory of accomplice liability. An accomplice (1) must be present and (2) aid, abet or assist in the commission of the

crime through some overt act (3) intentionally, or through a common design. The absence of any one requirement is fatal.

For example, assistance rendered unknowingly does not make a person guilty of a crime. It is possible for two or more persons to act together by accident, without a common design. On the other hand, prior knowledge that a crime is going to be committed, without more, is insufficient to establish guilt. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976). Likewise, mere presence at the scene of a crime is insufficient to convict. Leonard, 292 S.C. at 137, 355 S.E.2d at 272; State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002).

In refusing defense counsel's request to give a mere presence charge, the trial judge committed reversible error. In arguing to the contrary, the State relies on State v. Austin, *supra*. In Austin, an outright refusal to give a mere presence charge was affirmed only because the jury was instructed clearly that the accomplice must have rendered assistance by acting with a common design or common intent. In other words, the instruction given in Austin was sufficient to forestall a conviction based on mere presence.

Here, however, the trial judge's supplemental instructions were silent as to the intention requirement. The State has not argued otherwise.⁴ The PCR court ruled that this silence constituted an infirmity in the instruction, one of three bases for its conclusion that appellate counsel was ineffective; however, the State failed to address this particular ruling in its Petition for Writ of Certiorari. Therefore, it is now the law of the case. See generally State v. Gregorie, 339 S.C. 2, 528 S.E.2d 77 (2000); State v. Sampson, 317 S.C. 423, 454 S.E.2d 721 (Ct. App. 1995).

⁴ The State argues only that "the instructions were similar to those in Austin," without specifying why the instructions should pass muster. Brief of Petitioner-Respondent at 18.

Perhaps the State has attempted to remedy its oversight by arguing in its Brief that “[t]he PCR court also erred in finding appellate counsel was ineffective for failing to raise the issue that no instruction on pre-arrangement was included in the jury instructions on accomplice liability.” Brief of Petitioner-Respondent at 11. However, the argument fails to address the substance of the PCR court’s ruling. The State does not assert that appellate counsel’s decision was reasonable because the instructions as given were a correct statement of the law. Instead, the State asserts that there was sufficient evidence of an agreement to commit a crime, disregarding the fact that the charge as given was incomplete.⁵ Brief of Petitioner-Respondent at 11-12. The challenge is not only procedurally barred, it crumbles on substantive grounds.

In sum, having failed to adequately charge the intention requirement, the trial judge erred in refusing altogether to give a charge on mere presence. Cf. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (jury was expressly charged that mere presence at the scene is insufficient to prove someone guilty of a crime).

Finally, the State further argues that a mere presence charge was not warranted by the facts of this case. Brief of Petitioner-Respondent at 18-19. The State correctly cites State v. Dennis, 321 S.C. 431, 486 S.E.2d 674 (Ct. App. 1996), for the proposition that mere presence generally applies when there is some doubt as to whether a person is guilty of a crime by virtue of accomplice liability. Contrary to the State’s assertion, however, there is ample doubt in this case, arising not from the alibi evidence, but from the prosecution’s blood stain evidence.

⁵ Indeed, the intention requirement was not even implied by the definition of abetting (meaning inciting or agitating) in the second supplemental instruction, because “aiding” and “abetting” were stated in the alternative:

[T]he law of hand of one is the hand of all means that all must be together, acting together, assisting each other, in the commission of the offense. ...[T]hey must be *present and aiding or abetting* in the commission of the offense.

App. p.635, lines 9-15 (emphasis added).

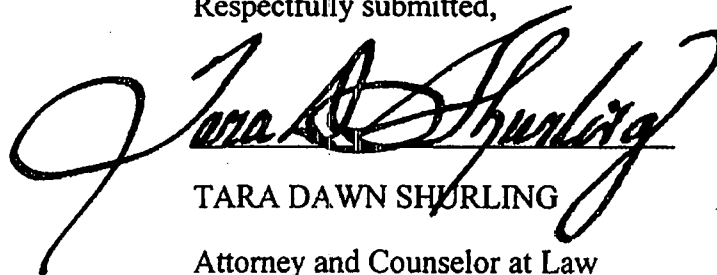
Without a charge to clarify that more than presence was required, the jury was allowed to convict based solely on the blood stain evidence—and it is quite likely that it did so. The jury's note suggested that it disbelieved evidence that Wilds was the shooter. If the jury rejected the evidence that Wilds was the shooter, the State's case was reduced to little more than a shoe with a tiny spot of blood tied to a crime on a Columbia street. The problem is that the tiny spot of blood alone does not prove guilt. At best, it tends to establish that Wilds was present at the street scene, either at the time Rumph was shot or thereafter. The jury could only speculate whether the shoe was stained at the time Rumph was shot or thereafter. And the jury could only speculate as to Wilds' actions—whether he participated in the robbery, or whether he stood nearby without participating, or whether he arrived on the scene after the shooter had fled. Based solely on the blood stain, none of these scenarios is more plausible than another—yet, under two of the scenarios Wilds is innocent of any crime. As correctly noted by the lower court, while “a charge on mere presence ordinarily would not have been warranted” the unique facts of this case clearly necessitated the instruction. App. P. 747. Under these circumstances, the giving of an incomplete accomplice liability instruction without a mere presence charge effectively diluted the State's burden of proof in violation of the Due Process Clause. U.S. Const. Amend. XIV. The prejudice arising from the failure of the trial court to charge mere presence was exacerbated by the Court's failure to adequately charge the intention requirement for accomplice liability. The trial judge committed reversible error, and appellate counsel was ineffective in failing to raise the issue on direct appeal.

For these reasons, the lower court's ruling should be affirmed.

CONCLUSION

For the reasons stated, the PCR court's order should be affirmed. Wilds' convictions and sentences should be reversed and his case remanded for a new trial.

Respectfully submitted,

A large, stylized handwritten signature in black ink, reading "Tara Dawn Shurling". The signature is written over the printed name.

TARA DAWN SHURLING

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ATTORNEY FOR RESPONDENT/PETITIONER

February ^{28th}, 2013

STATE OF SOUTH CAROLINA
In the Court of Appeals

ISRAEL WILDS, #274010,

RESPONDENT/PETITIONER,

v.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT.

Appellate Case No. 2008-092411

J. Michelle Childs, Circuit Court Judge
Richland County
Trial Case No. 03-CP-40-5973

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Brief of Respondent by Respondent/Petitioner in the above-entitled case has been served upon opposing counsel, Jennifer Ellis Roberts, Assistant Attorney General, Office of the Attorney General, P. O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 28th day of February, 2013.

Sharon McCollister

Sharon McCollister
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 28th day
of February, 2013.

Dunanne Graham (L.S.)
Notary Public for South Carolina

My Commission Expires: 3/12/2013

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Israel Wilds, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2008-092411

ON WRIT OF CERTIORARI

Appeal From Richland County
Marc H. Westbrook, Trial Judge
J. Michelle Childs, Post-Conviction Relief Judge

Opinion No. 5193
Heard November 5, 2013 – Filed February 5, 2014

AFFIRMED

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney
General Salley W. Elliott, and Assistant Attorney
General Jennifer Ellis Roberts, all of Columbia, for
Petitioner/Respondent.

Tara Dawn Shurling, of Columbia, for Respondent/
Petitioner.

SHORT, J.: In this cross-appeal involving an action for post-conviction relief (PCR), the State argues the PCR court erred in finding Israel Wilds' appellate counsel was ineffective for failing to raise the issues of accomplice liability and mere presence on appeal. In his cross-appeal, Wilds argues the PCR court erred in finding his trial counsel was not ineffective for failing to assert at trial that the trial court's ruling prohibiting him from cross-examining his co-defendants about their potential sentences violated his Confrontation Clause rights. We affirm.

FACTS

On March 29, 1999, at approximately 9:30 p.m., Anthony Rumph was robbed and shot while walking down Rhett Street in Columbia, South Carolina. Wilds was charged with armed robbery and murder following Rumph's death on July 8, 1999.¹ A trial was held on March 26-29, 2001.

During the trial, two of Wilds' co-defendants, Isom Simmons and Joseph Dante Dungee, testified that on the afternoon of March 29, 1999, they and Wilds were walking down Rhett Street when they saw Rumph walking toward them. In his original statement given to police after his arrest, Simmons stated that as they approached Rumph, Wilds said, "I bet this dude has some money." In addition, Dungee testified Wilds told them before they saw Rumph, "I'm going to stick somebody or jack somebody – something like that," and Dungee could see he had a pistol. When they met Rumph, Wilds stopped to talk to him, and Simmons and Dungee continued walking. Simmons and Dungee both testified that after talking to Rumph for a few minutes, Wilds suddenly pulled out a gun and pointed it at Rumph's chest. Rumph pulled his wallet out of his back pocket, and Wilds ordered Simmons and Dungee to hit Rumph. Simmons and Dungee proceeded to hit Rumph in the back of the head and his face, and Simmons pulled a pack of cigarettes out of Rumph's back pocket. Dungee retrieved a lighter and some change from Rumph's pocket. When Rumph refused to let go of his wallet, Simmons testified Wilds said, "My man, you going to make me shoot you,"² and shot Rumph in the chest.

¹ Rumph died from complications secondary to a gunshot wound of the abdomen.

² Dungee testified Wilds said, "If you don't give me the wallet, I'm going to blast you."

After Wilds shot Rumph, Wilds, Simmons, and Dungee ran, but stopped across the street from the scene of the shooting. Wilds went through Rumph's wallet, handed Simmons and Dungee some money from the wallet, and told them not to say anything.³ Simmons told Wilds he should get rid of the gun. Simmons and Dungee then went to Timothy Myers' home, and Simmons told him that his "cousin had just shot somebody." Simmons testified that he called Wilds "cousin" because Wilds' aunt was a longtime friend of his family.

In addition to the above testimony from Wilds' two co-defendants, Investigator Mark Vinson of the Columbia Police Department removed Wilds' shoes during his interrogation because they matched a description of the shoes worn by him during the shooting. A swab of material on one of the shoes tested positive for human blood, and mitochondrial DNA testing matched Rumph's DNA. Detective Gertrude Burns, of the Columbia Police Department, testified Wilds initially denied having a gun, but then bragged about having a shotgun, a .38, and a nine millimeter.

In his defense, several of Wilds' relatives testified he was at home watching television the night of the shooting. The murder weapon was never found, and an unfired .22 caliber bullet collected at the scene was not subjected to any test for identification. Additionally, none of the other items found around the crime scene that were processed revealed any fingerprints suitable for identification.

During jury 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?" In response to this question, and over Wilds' objection, the trial court instructed the jury on accomplice liability, noting, "[I]t appears the only appropriate thing I can do at this point is to give a charge on hand of [one], hand of all. I don't know any other way around it." After instructing the jury on accomplice liability, Wilds requested a charge on mere presence; however, the trial court declined to give an additional instruction regarding mere presence.

The jury found Wilds guilty of armed robbery and murder. The trial court sentenced Wilds to thirty years' imprisonment on the armed robbery conviction and life imprisonment for the murder conviction. Wilds filed a direct appeal, and this court affirmed his conviction and sentence. *See State v. Wilds*, Op. No. 2003-UP-152 (S.C. Ct. App. filed Feb. 20, 2003). Wilds filed an application for PCR, which

³ Simmons testified he received \$10.

the PCR court granted in part and denied in part. Specifically, the PCR court found Wilds' appellate counsel was ineffective for failing to appeal the trial court's accomplice liability jury charge. Accordingly, the PCR court granted Wilds' PCR application on that ground, vacated his conviction and sentence, and remanded his case for a new trial. However, the PCR court found Wilds' trial counsel was not ineffective. Wilds and the State filed petitions for certiorari with this court. On May 7, 2012, this court granted the petitions for certiorari and ordered the parties to file their briefs.

STANDARD OF REVIEW

This court gives great deference to the PCR court's findings of fact and conclusions of law. *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). When matters of credibility are involved, this court gives deference to the PCR judge's findings because this court lacks the opportunity to directly observe the witnesses. *Lee v. State*, 396 S.C. 314, 319, 721 S.E.2d 442, 445 (Ct. App. 2011). "The existence in the record of 'any evidence' of probative value is sufficient to uphold the PCR judge's ruling." *Caprood v. State*, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000).

"A defendant is constitutionally entitled to the effective assistance of appellate counsel." *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). "The PCR applicant has the burden of proving both prongs." *Caprood*, 338 S.C. at 109, 525 S.E.2d at 517. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

LAW/ANALYSIS

I. The State's Appeal

The State argues the PCR court erred in finding Wilds' appellate counsel was ineffective for failing to raise the issues of accomplice liability and mere presence on appeal.

At the PCR hearing, Wilds testified he believed the trial court's accomplice liability charge was in error because no evidence supported such a charge and his appellate counsel was ineffective for failing to raise this issue on appeal. In addition, Wilds testified that, even if the trial court did not err in instructing the jury on accomplice liability, the court erred in failing to give a "mere presence" charge as part of that instruction, and his appellate counsel was ineffective for failing to raise this issue on appeal as well.

The PCR court found appellate counsel was ineffective for failing to challenge the trial court's accomplice liability charge on appeal, particularly when the issue raised on appeal was unpreserved. In addition, the PCR court found Wilds' appellate counsel was ineffective for failing to raise on appeal that the trial court improperly denied his request for a charge on mere presence.

Our supreme court has noted that "[l]ike 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 v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In *Barber*, as in the instant case, four men committed an armed robbery, and, during the robbery, one of the men shot two of the victims. *Id.* at 234-35, 712 S.E.2d at 437-38. Three of the robbers pled guilty and all testified at Barber's trial that Barber shot the two victims during the robbery. *Id.* at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. *Id.* at 438. Our supreme court noted "[t]o 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.* at 237, 712 S.E.2d at 439. Under this test, the court ultimately found the trial court did not err in instructing the jury on accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter." *Id.* at 236, 712 S.E.2d at 439. In making this finding, the supreme court relied upon evidence presented at trial indicating three of the robbers were armed, two with .380 handguns, which was the type of weapon forensic experts testified fired all the shots during the robbery. *Id.* at 237, 712 S.E.2d at 439.

In contrast, no evidence in the instant case indicated anyone other than Wilds was the shooter. The only evidence presented was that Wilds was the shooter, and Simmons and Dungee joined in the robbery after Wilds pulled the gun on Rumph. Although the jury may have had doubts about Simmons' and Dungee's testimony, an alternate theory of liability, such as accomplice liability, "may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." *Id.* at 236, 712 S.E.2d at 438. In addition, Wilds was prejudiced by the trial court's instruction on accomplice liability and, consequently, by the failure of his appellate counsel to raise the issue on appeal. Because the instruction was given in response to the jury's question regarding whether a conviction meant it found Wilds actually pulled the trigger, and because the jury returned guilty verdicts after receiving the instruction, the circumstances indicate the instruction enabled it to unanimously render verdicts of guilty.

Accordingly, because no evidence in the instant case indicated anyone other than Wilds was the shooter, we find the PCR court correctly determined the trial court erred in charging the jury on accomplice liability. Furthermore, although appellate counsel is not required to raise every nonfrivolous issue presented in the record, the only issue Wilds' appellate counsel raised on appeal was unpreserved and the State presented no testimony indicating counsel made a tactical decision not to appeal this issue. *See Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (holding appellate counsel is not required to raise every nonfrivolous issue presented in the record, and appellate counsel testified at the PCR hearing she did not raise an exception to the trial judge's failure to charge the jury as requested because she thought the instruction given substantially complied with the law). Therefore, we find the PCR court properly found Wilds' appellate counsel was ineffective for failing to raise the issue of accomplice liability on appeal.⁴

II. Wilds' Appeal

Wilds argues the PCR court erred in finding his trial counsel was not ineffective for failing to assert at trial that the trial court's ruling prohibiting him from cross-

⁴ We decline to reach the issue of mere presence because this issue is dispositive of the appeal. *See Futch 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).

examining his co-defendants about their potential sentences violated his Confrontation Clause rights.

"Generally, a judge may prevent the introduction of evidence which informs the jury of the possible sentence defendants may receive if convicted because it is either irrelevant or substantially prejudicial." *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002). "However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence." *Id.* at 331-32, 563 S.E.2d at 318. "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (internal quotation marks and alterations omitted). Furthermore, "[t]he lack of a negotiated plea . . . creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency." *Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318.

"A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error' if the 'error was harmless beyond a reasonable doubt.'" *Id.* (quoting *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)). Whether an error is harmless depends on the particular facts of each case, including:

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Id. at 333, 563 S.E.2d at 318-19 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

At the time of Wilds' trial, Simmons and Dungee were charged with murder and armed robbery, and both testified for the prosecution that Wilds shot Rumph. The

prosecution did not offer Simmons or Dungee a deal in exchange for testifying against Wilds, but both acknowledged they hoped for something in return. During Wilds' trial, the following exchange took place between Wilds' trial counsel and the trial court just prior to the testimony of Simmons:

The Court: The Co-defendant – As to what they may have gotten, and, as I indicated, certainly you can go into that then and ask, but you can't get into any details about the potential sentences and that sort of thing.

Mr. Strickler: Yes, sir.

The Court: Anything else on that?

Mr. Strickler: With regard to the pending charges as against Mr. Simmons and Mr. Dungee, they are currently, according to the Solicitor, both charged with murder and armed robbery. We would submit to the Court that I should be able to question them not merely about the existence of the charges but what they hope to get as a result of their testimony. Their understanding of the penalties they're facing now and specifics of the fact that they are looking at life in prison on the murder charge, and their hopes in regard to a reduction in sentencing. I understand Your Honor's ruling that I cannot go into that.

The Court: Yes, sir. It's appropriate to ask if they think they're going to get their sentence reduced or if they think they're going to get the charges reduced, but I think you can do that without going into details.

On direct appeal, Wilds asserted the trial judge's ruling was an erroneous application of Rule 608, SCRE, and a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. This court affirmed, finding the argument unpreserved. At the PCR hearing, Wilds argued his trial counsel was ineffective for failing to object that the limitation on cross-examination of the co-defendants violated his Sixth Amendment right to confront adverse witnesses. During the hearing, when asked if in retrospect he should have "federalize[d] that

issue, if you will, and . . . argue[d] it as an express violation of the [C]onfrontation [C]lause to limit your cross-examination," Wilds' trial counsel responded, "Sure." Ultimately, the PCR court found Wilds' trial counsel was not ineffective for failing to object to the trial court's limitation of his cross-examination of Wilds' co-defendants because there was no deal or promise of a lesser offense or lesser sentence, and the trial court allowed full impeachment of the co-defendants regarding their pending charges. Further, the court found that even if trial counsel should have objected, the error was harmless.

Although our supreme court in *Mizzell* found the lack of a negotiated plea creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency, *Mizzell* had not been decided at the time of Wilds' trial, and his trial counsel did not have the benefit of that holding. *Id.* at 333, 563 S.E.2d at 318. Accordingly, we do not believe Wilds' trial counsel was deficient for failing to cite the Confrontation Clause when arguing to the trial court that he should be allowed to cross-examine Wilds' co-defendants. Trial counsel vigorously argued Wilds had the right to cross-examine his co-defendants concerning the potential sentences they faced, and his failure to specifically cite the Confrontation Clause in support of his argument did not rise to the level of deficient performance, especially considering the fact that *Mizzell* had not been decided by our supreme court at the time of trial. We further find trial counsel's error was harmless because additional evidence linked Wilds to the crime, specifically Rumph's blood found on Wilds' shoe and Simmons' statement to Myers that his cousin had just shot someone. *See State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); *id.* ("[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989))).

CONCLUSION

Accordingly, the decision of the PCR court is

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

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/Petitioner,

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’ shoe¹, Wilds’ fraudulent alibi defense², and Wilds’ denial and

¹ App. pp. 437-38.

² App. pp. 529-34.

subsequent admission that he knew co-defendant Simmons³ 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 affirmation 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.

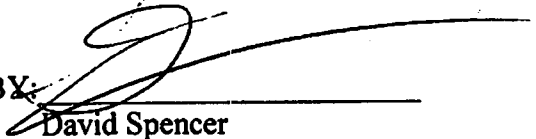
In the instant case, the jury would not convict if it thought Wilds was present but did not participate in the robbery. Further, no evidence was presented that Wilds was merely present -- his defense was alibi. Accordingly, the PCR court erred in granting relief on this basis.

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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Attorney General

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Senior Assistant Attorney General

BY: 

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ATTORNEYS FOR PETITIONER/RESPONDENT

February 20, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

ISRAEL WILDS

RESPONDENT/PETITIONER,

vs.

STATE OF SOUTH CAROLINA,

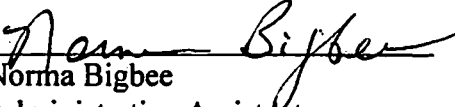
PETITIONER/RESPONDENT.

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
Administrative Assistant
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**STATE OF SOUTH CAROLINA
In The Court of Appeals**

**J. Michelle Childs, Circuit Court Judge
Richland County
Trial Case No. 03-CP-40-5973**

ISRAEL WILDS, #274010,

RESPONDENT/PETITIONER,

v.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT.

Appellate Case No. 2008-092411

RETURN TO STATE'S PETITION FOR REHEARING

**TARA DAWN SHURLING
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S.C. Bar No. 5099**

**ATTORNEY FOR
RESPONDENT/PETITIONER.**

The Respondent/Petitioner submits the following in Response to the State's Petition for Rehearing:

I.

The State's Petition for Rehearing reflects a fundamental misunderstanding of this Honorable Court's decision in this matter. The decision of the Court very clearly distinguished *Barber v. State*, 393 S.C. 232, 712 S.E. 2d 426 (2011), from the case currently before the Court. As plainly put by this Honorable Court, "no evidence in this case indicated that anyone other than Wilds was the shooter." As this Court correctly found, an alternate theory of liability "may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." *Barber* at 712 S.E. 2d 438. As this Court observed, where this instruction clearly lead to the jury reaching a unanimous finding of guilty, the prejudice is obvious. In addition, although not the primary basis for the lower court's ruling, the Respondent/Petitioner would assert that he was additionally prejudiced by the timing of this improper charge. Coming as it did, after all the testimony was over and closing arguments had been made, the improper issuance of this accomplice liability charge deprived the Respondent/Petitioner of his right to be fully heard in his defense in violation of his rights pursuant to both the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the South Carolina Constitution.

The language of the indictments in this case did not charge the Respondent/Petitioner under a theory of accomplice liability and nothing in the testimony presented by the State presented the theory that Simmons and Dungee acted in concert with him in accordance with a plan to commit the crime of armed robbery. The fact that this jury ultimately found him guilty after having been given this charge, and having *not* received a mere presence charge, certainly is

not, as the State argues, dispositive of the real question which is whether "there is a reasonable probability that result of the trial would have been different" but for this error. *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989).

II.

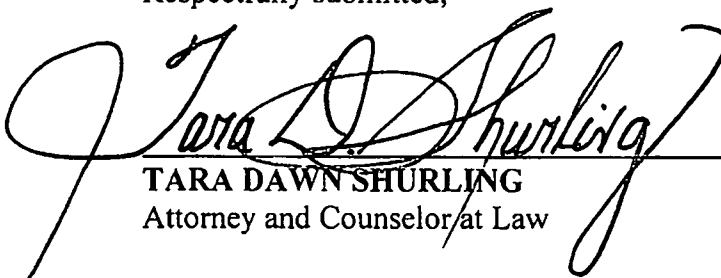
As noted by the State, the lower court also granted relief on the ground that appellate counsel was ineffective for failing to raise the issue of the trial court's failure to grant a request to charge mere presence. This Honorable Court did not address that issue finding that its ruling on the accomplice liability issue was dispositive of the appeal. Inasmuch as the State has chosen to address this issue in its Petition for Rehearing, the Respondent/Petitioner would briefly note the following.

This crime happened outdoors on Rhett Street in Columbia, South Carolina. Testimony from state witnesses established that DNA belonging to the victim was found on a swab taken from the shoes removed from the Respondent/Petitioner during his interrogation by law enforcement. Given the nature of the crime scene, there existed any number of alternate explanations for the presence of this blood on these shoes. The importance of this evidence, coupled with the nature of the crime scene, clearly necessitated a mere presence charge. The Respondent/Petitioner asserts that such a charge was crucial to his ability to receive a fair trial. He once again respectfully submits that Judge Childs correctly found that Appellate Counsel was ineffective for failing to raise this issue on direct appeal.

CONCLUSION

For all these reasons, the Respondent/Petitioner submits that the State's Petition for Rehearing should be denied.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT/PETITIONER

This 21st day of March, 2014.

STATE OF SOUTH CAROLINA
In the Court of Appeals

ISRAEL WILDS, #274010,

RESPONDENT/PETITIONER,

v.

STATE OF SOUTH CAROLINA,

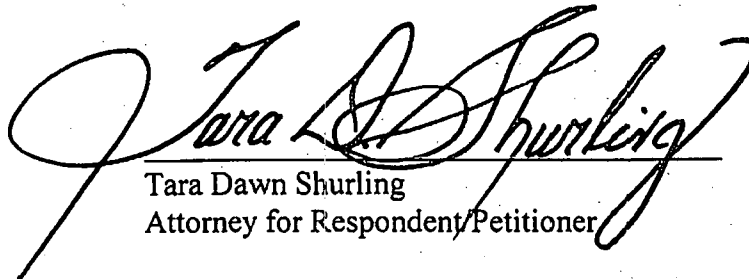
PETITIONER/RESPONDENT.

Appellate Case No. 2008-092411

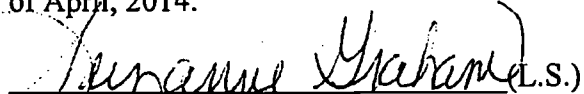
J. Michelle Childs, Circuit Court Judge
Richland County
Trial Case No. 03-CP-40-5973

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to State's Petition for Rehearing in the above-entitled case has been served upon opposing counsel, Jennifer Ellis Roberts, Assistant Attorney General, Office of the Attorney General, P. O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 21st day of April, 2014.


Tara Dawn Shurling
Attorney for Respondent/Petitioner

SWORN TO BEFORE me this 21st day
of April, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/28/2024

The South Carolina Court of Appeals

Israel Wilds, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

Appellate Case No. 2008-092411

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

H B W J.

Paul W. Thomas J.

Columbia, South Carolina

cc:

Tara Dawn Shurling, Esquire
David A. Spencer, Esquire

FILED

April 24, 2014