

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
The Honorable J. Michelle Childs, Circuit Court Judge

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**S.C. Supreme Court**

Appellate Case No. 2014-001191

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ISRAEL WILDS,

Respondent.

v.

STATE OF SOUTH CAROLINA,

Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**ATTORNEY FOR RESPONDENT/PETITIONER.**

# INDEX

Index .....	1
Statement of the Issues on Appeal.....	2
Statement of the Case .....	2
Statement of Facts.....	3
Standard of Review.....	11
Argument .....	12
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 .....	12
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 .....	17
Conclusion .....	24
Certificate of Service .....	25

## 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.

The Court of Appeals granted both parties' petitions on May 7, 2012. Following the submission of briefs by both sides, the Court of Appeals issued its decision on February 5, 2014, affirming the decision of the PCR Court granting relief in reference to the issues appealed by the State and affirming the denial of relief on the issues raised by Petitioner in his cross-appeal. The

State filed a Petition for Rehearing on February 20, 2014, which was thereafter denied by Order dated April 24, 2014. Petitioner did not file a Petition for Rehearing on the issues addressed by him in his cross-appeal. The State filed its Petition for Writ of Certiorari challenging the decision of the Court of Appeals on July 25, 2014. Petitioner now prays that this Honorable Court would deny the writ and affirm the decisions of the Court of Appeals and the circuit court in this matter.

### **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 with the exception of co-defendants Isom Simmons (Simmons) and Joseph Dante Dungee (Dungee) who claimed to have been merely present when Petitioner robbed and killed the victim and thereafter gave them some of the money he had stolen. 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.<sup>1</sup>

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<sup>1</sup> 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

## **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.

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

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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 was upgraded to 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.

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. Petitioner's fiancée did admit to briefly leaving to go to the store during the evening in question. She plainly testified that Petitioner was there before she left for the store and was still there when she returned. 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 Allen<sup>2</sup> 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.

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-

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<sup>2</sup> Allen v. United States, 164 U.S. 492 (1896).

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. Those findings were affirmed by the Court of Appeals in its decision entered on February 5, 2014.

## 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).*

Petitioner/Respondent has asserted that the ruling of the PCR Court, and indeed the Court of Appeals, should not be afforded deference where Respondent/Petitioner relied on "a cold record" below on the questions addressed herein. Specifically, the State puts forth a decision from the Eleventh Circuit Court of Appeals for the proposition that the decision of the PCR Court is not entitled to deference where Petitioner did not introduce testimony from appellate counsel. Pet for Writ of Cert, pg. 6, citing *Hardy v. Commissioner, Alabama Dept. of Corrections, 684 F.3<sup>rd</sup> 1066, 1075 (11<sup>th</sup> Cir. 2012, as well as, Williams v. Dettore, 901 N.E.2d 1023 (Ill. App. Ct. 2009).* While Petitioner is accurate in noting that this Honorable Court has held that questions of law *may be* decided with no deference to the trial court, the exact quote is, "Questions of law, however, *may be* decided with *no particular deference* to the lower court." Citation omitted. (Emphasis added). *Neely v. Thomasson, 365 S.C. at 350, 618 S.E.2d at 886*

920050. Petitioner asserts that this Honorable Court may give such deference as it sees fit to the well reasoned decisions of both the PCR judge and the Court of Appeals. The Court of Appeals in fact gave deference to the findings of the circuit court in its decision wherein the Court found,

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).

*Wilds v. State*, 407 S.C. 432,437, 756 S.E.2d 387, 389 (Ct. App. 2014).

Respondent did not challenge the application of a deferential standard by the lower court, or the Court of Appeals, in its Certiorari Petition, the Brief of Petitioner/Respondent or in their Petition for Rehearing. Accordingly, Petitioner submits they should not be permitted to do so now.

## 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**

##### **In the PCR Court**

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.

### **In the South Carolina Court of Appeals**

As previously noted, "*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). The Court of Appeals noted that while 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.*" *Wilds v. State*, 407 S.C. 432,440, 756 S.E.2d 387, 391 (Ct. App. 2014). The Court of Appeals ruled that because there was no evidence that anyone other than Petitioner was the shooter, the PCR Court correctly found that the trial court erred in charging Petitioner's jury on the law as it relates to accomplice liability.

### **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, in the Court of Appeals 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* on the facts of Petitioner's case. 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. Petitioner now asserts that the Court of Appeals correctly affirmed the decision of the PCR Court. For these reasons, the Court of Appeals' decision 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 Allen<sup>3</sup> 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.

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.

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<sup>3</sup> Allen v. United States, 164 U.S. 492 (1896).

## In the South Carolina Court of Appeals

The Court of Appeals declined to reach this issue, instead finding that their finding on the fact that the trial court erred in giving an accomplice liability instruction was dispositive of the case. *Wilds v. State*, 407 S.C. 432,443, fn. 4, 756 S.E.2d 387, 393, fn.4. (Ct. App. 2014).

### 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.<sup>4</sup> 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).

In the Court of Appeals the State 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

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<sup>4</sup> The State continues to argue that "the instructions were similar to those in *Austin*," without specifying why the instructions should pass muster. *Petition for Writ of Certiorari*, p. 15.

accomplice liability.” Brief of Petitioner-Respondent at p.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 asserted that there was sufficient evidence of an agreement to commit a crime, disregarding the fact that the charge as given was incomplete.<sup>5</sup> 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). The State attributes significance to the fact that trial counsel did not ask for a mere presence charge until after the trial court charged Petitioner’s jury on the law as it relates to accomplice liability. This argument ignores the fact that a charge of mere presence became necessary after the jury was charged on accomplice liability least the jury at Petitioner’s trial conclude from the presence of a tiny amount of blood on his shoe, that he was guilty under the theory of accomplice liability on which they had just been instructed for the first time.

Finally, the State further argues that a mere presence charge was not warranted by the facts of this case. Petition for Writ of Certiorari, p. 13. The State correctly cites *State v. Dennis*,

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<sup>5</sup> 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.

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.

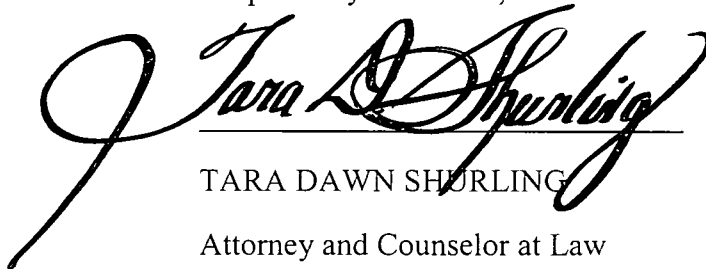
Without a charge to clarify that more than presence was required, the jury was allowed to convict based solely on the blood stain evidence—and it is quite likely that it did so. The jury's note suggested that it disbelieved evidence that Wilds was the shooter. If the jury rejected the evidence that Wilds 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**

Based upon the reasons and authorities submitted herein, the PCR Court's order granting relief should be affirmed. Petitioner's case should be remanded to the Court of General Sessions for a new trial.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT/PETITIONER

September 15<sup>th</sup>, 2014

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLANDCOUNTY  
Court of Common Pleas

The Honorable J. Michelle Childs, Circuit Court Judge

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Appellate Case No. 2014-001191

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ISRAEL WILDS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

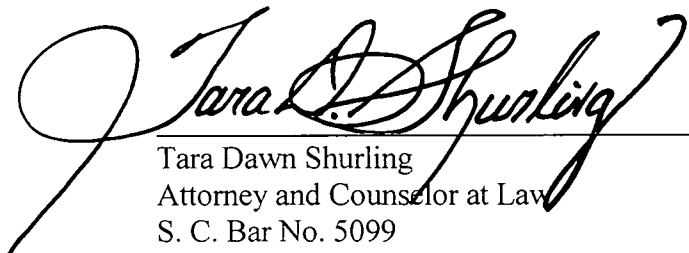
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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that one copy each of the Respondent's Return to Petition for Writ of Certiorari in the above-entitled cause have been served upon opposing counsel, David Spencer, Senior Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 15<sup>th</sup> day of September, 2014 addressed as follows:

David Spencer  
Senior Assistant Attorney General  
Office of the Attorney General  
P O Box 1549  
Columbia, SC 29211.



Tara Dawn Shurling  
Attorney and Counselor at Law  
S. C. Bar No. 5099

SWORN TO BEFORE me this 15<sup>th</sup> day  
of September, 2014.

Sharon A. McAllister (L.S.)  
Notary Public for South Carolina

My Commission Expires: Jan 15, 2017