ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County
J. Michelle Childs, Circuit Court Judge
Certiorari to the Court of Appeals

2014-001191

RECEIVED
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S.C. Supreme Court

Israel Wilds,

Respondent,

vs.

State of South Carolina,

Petitioner.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

STATEMENT OF ISSUES ON APPEAL

I.

The PCR court erred in finding appellate counsel ineffective for not raising the accomplice liability jury charge issue when the charge was supported by the evidence presented at trial and the issue would not have warranted reversal even if raised.

II.

The PCR court erred in finding appellate counsel was ineffective for failing to raise the issue of the denial of a mere presence instruction on appeal because the accomplice liability charge provided was sufficient under the Austin standard and no evidence was presented that Respondent was merely present for the armed robbery and murder.

STATEMENT OF THE CASE

Respondent 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 case was tried by jury before the Honorable Marc H. Westbrook on March 26, 2001. The jury found Wilds guilty as charged. Judge Westbrook sentenced Wilds to life imprisonment for murder and thirty years imprisonment for armed robbery.

Wilds appealed the conviction and sentence. Joseph Savitz, Esquire, represented Wilds for his appeal. The South Carolina Court of Appeals affirmed Wilds' convictions and sentences. State v. Wilds, Op. No. 03-UP-152 (S.C. Ct. App. filed Feb. 20, 2003.)

Wilds subsequently filed an application for post-conviction relief on December 15, 2003, and amended it on May 11, 2006. An evidentiary hearing was convened on June 8, 2007, at the Richland County Courthouse before the Honorable J. Michelle Childs. Wilds was present and represented by Tara Shurling, Esquire. Following the hearing, both parties submitted proposed orders; Judge Childs granted relief by order dated May 12, 2008, and filed May 14, 2008. The State appealed on May 29, 2008. Wilds filed a cross-appeal on June 5, 2008.

The State 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 for both parties on May 7, 2012.

The State filed its Brief of Petitioner as Petitioner/Respondent on October 30, 2012. The State also filed its Brief of Respondent is response to the cross-appeal on November 29, 2012. The Court of Appeals heard oral argument on November 5, 2013. On February 5, 2014, the Court of Appeals affirmed the grant of relief as to issues raised by the State and the denial of relief as to issues raised by Wilds. Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014).

The State petitioned for rehearing on February 20, 2014. Wilds did not petition for rehearing. The Court of Appeals denied the State's petition for rehearing by order dated April 24, 2014.

The State petitioned this Court for writ of certiorari. This Court granted certiorari on November 20, 2014. This Brief of Petitioner follows.

STATEMENT OF FACTS

On March 29, 1999, Respondent Israel "Antwan" Wilds (Wilds) and his two co-defendants robbed and shot Anthony Rumph (Victim). Wilds 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, Wilds' 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. App. pp. 214-17. Simmons described the events of March 29, 1999. App. pp. 219-41. Simmons was walking along Clarendon Street with Dungee and Wilds and saw Victim. App. pp. 222-24. Wilds stopped to talk to Victim as Simmons and Dungee kept walking. App. p. 223. Simmons saw Wilds pull out a gun and point it towards Victim's chest. App. p. 224. Simmons testified 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. Simmons testified that Wilds then "ordered me and Dante to hit [Victim]" and they complied. App. p. 226. Simmons testified he took cigarettes out of Victim's pocket.[1] App. p. 226. Victim still held on to his wallet as Wilds put the gun to Victim's chest and shot him at point-blank range. App. pp. 226-28. Simmons claimed he ran off after the shooting. App. p. 228. After the three reached a Shell Station, Wilds, who took the wallet and discarded it, handed money to Simmons and Dungee and then left. App. pp. 228-29.

[1] Accordingly, Wilds' contention that Simmons claimed to be merely present for the robbery and murder is incorrect. See Ret. to pet. p. 3.

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. Counsel pointed out differences between Simmons' 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 currently housed as an adult in the Richland County Detention Center. App. p. 285. Dungee testified that before the incident he asked Wilds and Simmons "what they were up to, and they said something about robbing somebody." App. pp. 292-93. He explained Wilds 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 Wilds talk about crack cocaine with Victim. App. pp. 301-303. When he saw Wilds pull out a gun, he and Simmons grabbed Victim. App. p. 303. Dungee testified he and Simmons both hit Victim and went through his pockets "[be]cause we was robbing the man." App. pp. 299-307 (direct quote p. 305, line 19).[2] Dungee testified that Wilds tried to get Victim's wallet, threatening to "blast" him if he did not give it to him. Wilds then shot Victim. App. p. 307. Dungee fled after the shooting. App. pp. 307-08. Dungee saw Wilds take money from the wallet and give some of it to Simmons, who later gave Dungee some of the money. App. pp. 308-12.

[2] Accordingly, Wilds' contention that Dungee was claiming he was merely present for the robbery and murder is incorrect. See Ret. to pet. p. 3.

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. Dungee claimed 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 thoroughly about his statements. App. pp. 315-27.

Mitochondria DNA testing revealed that Victim's blood was located on Wilds' 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, lines 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. 616-23. 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 Wilds pulled the trigger. App. pp. 616-17; p. 619. The trial court pointed out defense counsel had argued that law enforcement did not search for guns on the co-defendants. 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:

> 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, lines 13-25.

Ultimately, the jury found Wilds guilty as charged, and Judge Westbrook sentenced him to life imprisonment for murder and thirty years imprisonment for armed robbery. App. pp. 636-37; p. 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).

However, both issues upon which relief was granted concern the question of ineffective assistance of appellate counsel. Appellate counsel did not testify. Accordingly, the PCR court granted relief on the same cold record that this Court has before it – the trial transcript. See

Hardy v. Commissioner, Alabama Dept. of Corrections, 684 F.3d 1066, 1075 (11th Cir. 2012) (Where in review of the denial of a habeas corpus petition, the Court found as follows: "The District Court ruled on a cold record, the record compiled in the Alabama Courts. We rule on the same cold record, meaning that we afford the District Court's judgment no deference."); McWilliams v. Dettore, 901 N.E.2d 1023 (Ill. App. Ct. 2009) ("When a trial judge bases [her] decision solely on the same 'cold record' that is before the court of review, it is difficult to see why any deference should be afforded to that decision." (citation omitted)). Since, no facts are in dispute in this case, the issues in this petition are matters of pure law. Neely v. Thomasson, 365 S.C. 345, 618 S.E.2d 884 (2005) (questions of law may be decided with no deference to the trial court).

The substantive issues involved in this case concerns the instructions provided by the trial court to the jury. An appellate court will not reverse the trial court's decision regarding a jury charge absent an abuse of discretion. State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583-84 (2010).

ARGUMENTS

I.

The PCR court erred in finding appellate counsel ineffective for not raising the accomplice liability jury charge issue when the charge was supported by the evidence presented at trial and the issue would not have warranted reversal even if raised.

The PCR court erred in finding that appellate counsel was ineffective for failing to raise the issue of whether the trial court erred in instructing the jury on accomplice liability. Evidence was equivocal as to whether Wilds or one of his co-defendants shot Victim, so evidence supports the instruction. Accordingly, since the trial court did not err, appellate counsel was not ineffective as the issue would not be successful on appeal.

"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). 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); Strickland v. Washington, 466 U.S. 668 (1984). 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), SCRCP.

Without any testimony concerning the strategic choices of appellate counsel, the question is the likelihood of success on appeal, had this issue been raised, and whether counsel was deficient for passing over the issue raised. For both prongs of Strickland, the focus turns to the strength of the substantive issue, based on the same cold record the PCR court necessarily

viewed to determine Wilds' entitlement to relief.

The pertinent case for examination is Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011), which the Court of Appeals discussed in its opinion. This Court opined in Barber that: "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 (emphasis added). In Barber, this 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 owned three other guns. Further, the jury might have felt uncomfortable

believing the testimony of accomplices making self-serving declarations that Wilds was the shooter.

The same jury could reasonably conclude Wilds still was a participant in the robbery: the victim's blood on Wilds' shoe,[3] along with Wilds' fraudulent alibi defense[4] and Wilds' denial and subsequent admission that he knew co-defendant Simmons,[5] all serve to confirm Wilds' participation in the robbery, which was established by the co-defendant's testimony.[6] But the co-defendants' testimony was uncorroborated as to Wilds' role as triggerman.[7] 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").

If the grant of relief stands, Wilds gains a windfall – a new trial on a charge for which he was resolutely proved guilty. The distinction between the actor and abettor is irrelevant under South Carolina law, as discussed by this Court:

> All persons present, aiding and abetting a murder, are regarded as principals, and equally guilty. The actual perpetrator is regarded as

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[3] App. pp. 437-38.
[4] App. pp. 529-34.
[5] App. pp. 169-71.
[6] The PCR court further erred in 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 evidence indicated the three co-defendants acted in concert regardless of the existence of an express agreement. "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." State v. Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010).
[7] Note the standard jury charge correctly allowed the jury to believe portions and disregard portions of the testimony of any witness. App. p. 607, lines 11-13.

> 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)).

In Barber, this Court understandably began its analysis with comparison of the accomplice liability instruction to the determination of when lesser included offenses are included. However, in Barber, as the analysis progressed this Court clearly departed from a true lesser included offense analysis; this Court determined the accomplice liability instruction is warranted when evidence establishing the defendant as the principal is **equivocal**. Barber. This differs from the analysis of when a lesser included offense instruction should be given to the jury, because a lesser included instruction is only required when evidence is provided that the defendant is guilty of the lesser included offense to the exclusion of the greater offense. See e.g. State v. Atkins, 293 S.C. 294, 299, 360 S.E.2d 302, 305 (1987) ("It is not error to refuse to charge the lesser included offense unless there is evidence tending to show the defendant was guilty *only* of the lesser offense." (emphasis added)) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

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

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

II.

The PCR court erred in finding appellate counsel was ineffective for failing to raise the issue of the denial of a mere presence instruction on appeal because the accomplice liability charge provided was sufficient under the Austin standard and no evidence was presented that Respondent was merely present for the armed robbery and murder.

The PCR court incorrectly found appellate counsel was ineffective for failing to raise the issue that the trial court erred in denying trial counsel's request for a mere presence instruction. No evidence supports a mere presence instruction and the instruction provided sufficiently charged the law, so the issue would not have been successful on appeal, had appellate counsel briefed the issue.

The PCR court erred in finding appellate counsel's performance was deficient and Wilds was prejudiced by appellate counsel's purported deficiency. The Court of Appeals 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). There were 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, line 10 – p. 627, line 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, 331 S.C. 50, 502 S.E.2d 63 (1998).[8] In Kelsey, the issue regarding the jury instruction was not the same as Wilds' 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, 299 S.C. 456, 385 S.E.2d 830 (1989), in which Austin argued the trial court erred in denying his request to charge mere presence. 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 Court found the charges were sufficient as given and covered the substance of the request, finding:

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[8] App. p. 743 n.9.

> 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.

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

The instructions in the instant case 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, lines 2-16. These instructions were given in response to a question from the jury after they began deliberating. App. p. 623, lines 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, lines 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, lines 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, lines 13-25.

Subsequently, responding to another note from the jury, the trial court further instructed the jury as follows:

> 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.

App. p. 635, lines 9-18 (emphasis added).

The PCR court erred in finding the charge did not meet the Austin standard. App. p. 748. The charge properly instructed the jury that Wilds must have **assisted** and **acted** with his confederates, which is by definition, an intentional act, and counter to any contention that Wilds was merely present.[9]

Moreover, no evidence existed to support a mere presence charge on the facts of this case. A mere presence instruction is not warranted absent evidence that the defendant was present at the scene but not a participant in the crime. See State v. Dennis, 321 S.C. 413, 420, 486 S.E.2d 674, 678 (Ct. App. 1996). No testimony alleged Wilds was merely present during the

[9] Wilds' contention that the State did not challenge the PCR court's findings regarding intent in the petition for writ of certiorari is without merit, relief was granted on the absence of a mere presence charge and the State challenged the need for additional charges in its petition, noting the provided instructions were sufficient under Austin. Note that the trial court did not make any separate ruling as to required intent. "Our law is clear that a party must make a contemporaneous objection **that is ruled upon** by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011) (emphasis added). Additionally, the Court of Appeals decision, like the PCR court's order, clearly framed the grounds for relief as two questions, whether it was error to instruct on accomplice liability and whether it was error to not instruct on mere presence. Wilds, supra.

robbery and shooting. In defense counsel's opening statement, counsel said Wilds was not at the scene at all. In his closing argument, defense counsel specified that alibi was Wilds' defense. Defense counsel called alibi witnesses to testify Wilds was watching a basketball game at the time of the incident.

Appellate counsel was not ineffective, nor was Wilds 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 raised this issue on appeal, the appellate court would have found the issue without merit. Consequently, Wilds 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 petition for writ of certiorari should be granted, the order granting post-conviction relief be vacated, and the application for post-conviction relief be denied.

Respectfully submitted,

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November 26, 2014

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
The Honorable J. Michelle Childs, Circuit Court Judge
Certiorari to the Court of Appeals

Appellate Case No. 2014-001191

Israel Wilds,.....Respondent,

v.

State of South Carolina,.....Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Petitioner** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Tara Dawn Shurling, Esquire
Law Office Of Tara Dawn Shurling, PA
3614 Landmark Drive, Suite A
Columbia, SC 29204

This 26th day of November, 2014.

DAVID SPENCER #68571
ATTORNEY FOR PETITIONER

SWORN to before me this 26th day of November, 2014.

Ashley Hallock

Notary Public for South Carolina.
My Commission Expires: 3-18-2023

ALAN WILSON
ATTORNEY GENERAL

November 26, 2014

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Israel Wilds v. State of South Carolina
Appellate Case No. 2014-001191

Dear Mr. Shearouse:

Enclosed for filing are the original and fifteen (15) copies of Petitioner's Brief of Petitioner and thirteen (13) additional copies of the Appendix and Supplemental Appendix.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No. 68571

DS/sm
Enclosures

cc: Tara D. Shurling
Trisha Allen, Victim's Services