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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2014-000766

THE STATE,

Respondent,

vs.

DEVIN JOHNSON,

Appellant.

OPINION NO. 5456

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC PURSUANT TO RULES 219 AND 221, SCACR

INTRODUCTION

On November 16, 2016, this Court filed a published opinion reversing Appellant's Charleston county convictions for murder and possession of a weapon during the commission of a violent crime based upon the trial judge's supplemental instruction on accomplice liability. *See State v. Devin Johnson*, Op. No. 5456 (S.C. Ct.App., Nov. 16, 2016). [1] The Respondent (the

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[1] Because the Court reversed Appellant's convictions based upon the trial judge's giving of the supplemental instruction was error, it found that it did not need to address Appellant's remaining issues. *Id.* at p. 3 & n.1 (citing "*State v. Crisp*, 362 S.C. 412,420, 608 S.E.2d 429, 434 (2005) (holding appellate courts need not address remaining issues when the resolution of a prior issue is dispositive)." While this Court did not address the other two issues presented by Appellant, the State submits that the trial judge's rulings on those issues was correct for the reasons set forth on pages 5-44 of the Final Brief of Respondent.

State) would respectfully ask this Court to grant a petition for rehearing pursuant to Rule 221, SCACR, with a suggestion for rehearing en banc pursuant to Rule 219, SCACR, based upon the following facts or points of law which this Court may have overlooked, misapprehended or misconstrued:

I.

First, in concluding that the trial judge's decision to give a supplemental instruction and permitting additional argument was error because Appellant had already made his closing argument and the jury had begun deliberating before he gave this instruction, this Court may have overlooked that the trial judge's actions were in accordance with state law, where the only alternative to the course chosen was to declare a mistrial, and declaring a mistrial is greatly disfavored as a remedy:

> The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Simpson,* 325 S.C. 37, 479 S.E.2d 57, *cert. denied,* 520 U.S. 1277, 117 S.Ct. 2460, 138 L.Ed.2d 217 (1997); *State v. Wasson,* 299 S.C. 508, 386 S.E.2d 255 (1989). **A mistrial should not be granted unless absolutely necessary.** *State v. Wasson,* 299 S.C. 508, 386 S.E.2d 255 (1989). **Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial.** *Id.*

State v. Council, 335 S.C. 1, 12–13, 515 S.E.2d 508, 514 (1999) (emphasis added). *See also State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("the court should not grant a mistrial based on a juror's concealment of information "unless absolutely necessary"); *State v. Stanley*, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct.App.2005) (noting a trial court should grant a mistrial only when "absolutely necessary").

II.

Specifically, Respondent submits that this Court may have overlooked that the trial

judge's response to the jury's question (*R. p. 529; Court's Ex. 2, R. p. 687*) – *i.e.*, giving a supplemental jury charge on accomplice liability and allowing defense counsel an opportunity for further argument after this instruction, which defense counsel refused for strategic reasons, was a reasonable (if not the only viable) alternative to granting a mistrial based upon an error committed by the trial judge. *Id.*

Respondent concedes that the trial judge erred by initially failing to grant the State's request to charge on accomplice liability, to which Appellant objected (see *R. pp. 461-65*), since the requested instruction was supported by the evidence presented at trial. *See State v. Rivera*, 389 S.C. 399, 404, 699 S .E.2d 157, 159 (2010) ("The law to be charged must be determined from the evidence presented at trial"); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (The trial judge "has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence"). *See also Kelly v. South Carolina*, 534 U.S. 246, 256, 122 S.Ct. 726, 733 (2002) ("A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part").

The State's evidence, including the evidence of motive, tended to prove that Appellant was the shooter. However, there were no eyewitnesses to the shooting, there was evidence that he sought to enlist the aid of another man, another man was present, and the apartment complex video does not depict the shooting. Additionally, Appellant introduced a series of still photographs taken from the apartment complex surveillance video as Defendant's Ex.s 5-10. He later argued to the jury that these photographs depicted someone other than him because the person depicted was on a cell phone but records of his cell phone activity did not reflect him making or receiving any phone call at that time of the night. See *R. pp. 321-25; 466-80.*

While the trial judge stated that he did not believe that there was evidence to support the instruction (*R. p. 461, lines 16-17; p. 462, line 8 – p. 463, line 9; p. 465, lines 13-15*), it is clear that his review of the evidence was erroneously limited to the State's theory of the case and did not include a consideration of the evidence offered by the defense or what Appellant's trial counsel would argue that the defense's evidence showed. *See R. p. 464, line 23 – p. 465, line 9* ("No, I'm sorry, because you could have gone with that theory from the get-go, and you haven't done that. .... That's just, boot-strapping, man. And you've presented this case, 'I've got my shooter. I let this guy go' ").

Thus, the trial judge's initial refusal to grant the requested instruction was controlled by an error of law because he was only viewing the evidence of the State's theory, instead of all of the evidence presented at trial and its reasonable inferences. *See R. pp. 461-65. See Fernanders v. Marks Constr. of South Carolina, Inc.*, 330 S.C. 470, 499 S.E.2d 509 (Ct.App.1998) (ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence); *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (when a party requests the trial judge charge a correct and applicable principle of law, the court must charge it) (citation omitted); *Brown v. Smalls*, 325 S.C. 547, 481 S.E.2d 444 (Ct.App.1997) (a trial judge is required to charge the current and correct law, and ordinarily has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence; when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and the issues involved, refusal to give a requested charge is reversible error).

III.

The record demonstrates that trial judge thereafter recognized that he had utilized the

wrong standard when the jury - after deliberating for roughly an hour - returned with the question, "if the other individual pulled the trigger can the defendant still be guilty?" *R. p. 529; Court's Ex. 2, R. p. 687.* At this point, he found that an accomplice liability charge should have been given because the evidence could support the jury returning a guilty based upon this theory, which the State had requested. *R. p. 530-37. See also R. p. 542, line 1 – p. 543, line 24.* Specifically, the State's theory was that Appellant was the shooter and that he was the person depicted in Defendant's Exs. 5-10. However, Appellant argued that these photographs depicted someone else, since the records of his cell phone activity do not reflect him making or receiving any phone call at that time of the night. *R. pp. 321-325; 466-480.* If jurors found that the other person had shot the victim while acting in concert with and as an accomplice to Appellant, then he could be convicted under a theory of accomplice liability. *Cf. State v. Gibson*, 390 S.C. 347, 701 S.E.2d 769-70 (Ct.App. 2010) (explaining theory of accomplice liability or "hand of one is the hand of all"). Accordingly, the trial judge gave a supplemental instruction on accomplice liability, or "the hand of one is the hand of all." R. pp. 557-560.

Contrary to the position Appellant asserted in the trial court (*R. p. 531, lines 1-9*), the trial judge correctly recognized that he could not have simply answered the jury's question by charging them "on the evidence we have, the answer to that is no in this case" or "you have all the evidence and you have all of the law'" because these responses would have violated the state constitutional provision barring judges from charging on matters of fact. *R. p. 531, lines 4-11; p. 533, lines 11-23; p. 537, line 25 – p. 538, line 10; p. 543, lines 11-20. See also* S.C. Const. art. v, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law"); *State v. Bagwell,* 201 S.C. 387, 23 S.E.2d 244 (1942) (A judge cannot express in his charge, or intimate any opinion as to the weight or the sufficiency of testimony without violating the prohibition of the

Constitution as to charging upon the facts); *State v. Hartley*, 307 S.C. 239, 241, 414 S.E.2d 182, 184 (Ct. App. 1992) ("[T]he trial court may not instruct the jury what weight should be given [to the evidence], or even that any particular evidence is or is not entitled to receive weight or consideration from them") (quoting 75A Am.Jur.2d *Trial* § 1203, at 693 (1991); *State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016), *reh'g denied* (July 15, 2016).

IV.

Appellant's proposed answers to the jury's inquiry would have been both legally and factually misleading, as well. Moreover, the jury's question clearly reflected that there was, at least, the possibility that some juror(s) that was (were) discussing whether Appellant could be guilty based upon his presence at the scene. "[P]roof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct. .... If 'a person was present abetting while *any* act necessary to constitute the offense [was] being performed through another,' he could be charged as a principal – even 'though [that act was] not the whole thing necessary.' " *State v. Reid*, 408 S.C. 461, 473, 758 SE.2d 904, 910 (2014).

If the trial judge had failed to answer the jury's question in a manner that prevented jurors from convicting Appellant based upon a conclusion that his mere presence at the crime scene, without more, permitted jurors to convict him, Appellant most assuredly would have filed a Post-Conviction Relief Application pursuant to S.C. Code Ann. § 17-27-10, et seq. (2003), asserting counsel's ineffectiveness in failing to object to an obvious error of the trial judge.[2]

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[2] Indeed, the State submits that once the jury returned with the question at issue, Appellant took advantage of the trial judge's original error in failing to instruct on accomplice liability to lay a clever trap. When the trial judge followed the chosen course of action over the objection made by counsel and counsel refused the offer of additional argument, counsel sought to preserve an error for direct appeal. Yet, if the trial judge had agreed with counsel and not given the requested charge, then Appellant could potentially receive relief in PCR.

Accordingly, the trial judge was required to charge on both accomplice liability and mere presence, in order to properly answer the jury's inquiry. Indeed, this was the underlying concern in the trial judge's reasoning: he could not honestly and properly answer the jury's inquiry without charging both principles. *See R. p. 535, line 24 – p. 536, line 11; p. 541, lines 1-18.* Also, he allowed for possible additional argument by the defense but defense counsel declined this offer.

V.

The only alternative course that the trial judge could have followed was to grant a mistrial. However, mistrials are greatly disfavored. "A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." *Wasson*, 299 S.C. at 510, 386 S.E.2d at 256 (citing *State v. Prince,* 279 S.C. 30, 301 S.E.2d 471 (1983)); *see also State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct.App.2009) ("A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial"); *Stanley*, 365 S.C. at 34, 615 S.E.2d at 460 (noting a trial court should grant a mistrial only when "absolutely necessary"). Accordingly, this Court may have overlooked that rather than abusing his discretion by not granting a mistrial, the trial judge properly "exhaust[ed] other methods to cure possible prejudice before aborting [Appellant's] trial." *Accord Council*, 335 S.C. at 13, 515 S.E.2d at 514.

VI.

Nor was the decision to give the supplemental instruction erroneous because it resulted in the submission to the jury of an alternative theory of liability. "[A]n alternate theory of liability may ... 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). Like the conflicting

evidence in *Barber*, 393 S.C. at 236-37, 712 S.E.2d at 438-39, the State did not have proof as to whether Appellant or his accomplice fired the fatal shots, only that one of them did so. This Court's decision in *Wilds v. State*, 407 S.C. 432, 439-40, 450 SE2d 387, 390-91 (Ct.App. 2014) (finding that appellate counsel was ineffective in failing to object to the accomplice liability instruction, where there was no dispute that the defendant was the trigger man in the murder and armed robbery), is therefore distinguishable.

VII.

In reversing the trial judge's ruling, the Court analogizes what occurred here to the South Carolina Supreme Court's decision in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001). *See Johnson*, at pp. 6-7 *See also Id.* at 7 ("if we were to decide this case under *Jones*, the decision to give the charge after the jury began deliberating was prejudicial because here, as in *Jones*, Appellant crafted his closing argument in reliance on the trial court's adamancy that it would not charge "the hand of one is the hand of all" during the charge conference because, at that time, the court believed the evidence did not support the charge). In doing so, the Court may have overlooked that *Jones* is does not support reversal of the trial judge's ruling.

This Court recognized that "allowing counsel to present additional closing arguments after the jury has already begun deliberating in order to cure a defective jury charge" is "a novel issue in South Carolina." *Id.* The Court also recognized that "this case can be distinguished from *Jones* in one regard. Here, Appellant rejected the trial court's offer to reargue his closing argument in order to correct the error." *Johnson*, at p. 7. And, the Court did an admirable job in its discussion of authority from other jurisdictions on the issue of whether a court may permit further argument after the jury has begun deliberating, observing that a number of jurisdictions allow this practice. *Id.* at pp. 7-10. Nevertheless, the Court "conclude[d] South Carolina

jurisprudence does not favor rearguing after deliberation has begun because of its potential invasion into the province of the jury." *Id.*

In *Jones*, the trial judge informed the parties that he intended to instruct the jury as to reasonable doubt as defined in *State v. Manning*, 305 S.C. 413, 409 S.E.2d372 (1991), *i.e.*, that a "reasonable doubt" was the kind of doubt that would cause a reasonable person to hesitate to act. *Jones*, 343 S.C. at 576, 541 S.E.2d at 820. Defense counsel relied upon this assurance in making his closing argument - telling the jury that the judge would define a reasonable doubt as kind of doubt that would cause a reasonable person to hesitate to act, asking the jurors to place close attention to the trial judge's definition of reasonable doubt and arguing that the evidence would cause the jury to hesitate. *Id.* at 576-577, 541 S.E.2d at 820-821.

However, the trial judge subsequently declined to charge the "hesitate to act" language based on the State's request. *Id.* at 577,541 S.E.2d at 821. On appeal, the Supreme Court held that "Appellant reasonably relied upon the [court's] representation that [it] intended to give that charge to the jury. The decision to alter the charge, after the argument, was fundamentally unfair." *Id.* at 578, 541 S.E.2d at 821.

Also, the Court may have overlooked that *Jones* is distinguishable from Appellant's case because the trial judge's error in *Jones* could not be remedied before the jury determined Jones' guilt or innocence. On the other hand, the trial judge in this case allowed defense counsel the opportunity to cure the error. However, counsel declined this offer for strategic reasons. The Court may have overlooked that counsel's failure to accept the offer of additional argument was a waiver of Appellant's right to complain on appeal. Even if the Court simply considers defense counsel's refusal of the opportunity to have additional argument as a factor in determining whether the trial judge's ruling was prejudicial, the Court may have overlooked that this refusal

eliminated his opportunity to cure any perceived prejudice to Appellant that resulted from the trial judge's ruling. Either way, this Court may have overlooked that he should not be heard to complain of the trial judge's ruling on appeal. *Cf. State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("as the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review"); *State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996) (same); *State v. Logan*, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal") (citing *State v. Sullivan,* 277 S.C. 35, 282 S.E.2d 838 (1981)); *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835 (1962) (a party "cannot complain of an error which his own conduct has induced"); *State v. Needs*, 333 S.C. 134, 152 n.11, 508 S.E.2d 857, 866 n.11 (1998) (a party may not complain about an error induced by the party's own conduct).

VIII.

Furthermore, the Court correctly recognized that there is some authority from other jurisdictions holding that it is error to allow further argument by counsel after the jury has begun deliberating. *Johnson*, at p. 8-9. Yet, the Court may have overlooked that the trial judge - recognizing the relatively unique circumstances of this case - gave Appellant's trial counsel an opportunity to provide him with authority holding that it would be improper for the trial judge to allow additional argument once the jury began deliberating. See R. p. 542, line 17 – p. 543, line 2; see also R. p. 534, line 12 – p. 539, line 12; p. 546, line 12 – p. 552, line 1. However, counsel did not provide the Court with any such additional authority. Therefore, the Court may have overlooked that he is barred from asserting error on appeal. See *State v. Watts*, 321 S.C. 158,

167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, *law*, and arguments") (emphasis added); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review"). *Cf. Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329–30, 730 S.E.2d 282, 285 (2012) ("this is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function. While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved").

IX.

More importantly, this Court found that "here, as in *Jones*, Appellant crafted his closing argument in reliance on the trial court's adamancy that it would not charge 'the hand of one is the hand of all' during the charge conference because, at that time, the court believed the evidence did not support the charge. *Johnson*, at p. 7. The Court additionally found that:

> We agree with Appellant's contention that to reargue his closing would have required him to 'shift theories' because during his closing argument, he contended he was not at the scene, and after the additional jury charge, he would have had to argue he was merely present. We further agree with Appellant that this shifting of theories could have potentially diminished his credibility with the jury.

Id.

In so finding, the Court may have overlooked that defense counsel did not craft his closing argument on the trial judge's assurance that an accomplice liability instruction would not be given. Instead, his closing argument was based upon (1) the absence of any video actually showing the murder and who shot the victim and (2) the introduction of the series of still photographs taken from the apartment complex surveillance video as Defendant's Ex.s 5-10. Relying upon the photographs, counsel argued that the prosecution had failed to prove that Appellant was present when the crime occurred: counsel suggested to the jury that these photographs depicted someone other than Appellant because the person depicted in the photographs was on a cell phone but records of his cell phone activity, which the State had introduced, did not reflect him making or receiving any phone call at that time of the night. See *R. pp. 321-25; 466-80.*

The Court may have likewise overlooked that Appellant's contention that trial counsel would have been required to "shift theories" if he had accepted the offer of additional argument was, *at the very best*, disingenuous. Appellant's position, as expressed in closing argument, was that the State failed to prove his actual presence. The supplemental instruction on accomplice liability did not create a need to change anything about this position in order to address the evidence to the contrary because that evidence was already before the jury when counsel gave his closing argument.

At most, he could merely conceivably suggest that the accomplice liability theory did not support Appellant's conviction, since there was no proof that he was present at the scene. In other words, it is hollow posturing to contend that the supplemental jury charge would have required a different argument on the part of defense counsel. However, the trial judge's supplemental charge

fairly and properly addressed the jury's question, which was based upon the evidence and argument that had been presented to it.

Moreover, in granting relief, this Court may have overlooked that the trial judge's supplemental instructions on accomplice liability, which included a clear explanation of mere presence, ensured that Appellant could not be convicted based upon a jury finding that he was merely present:

> *If a crime is committed by* ***two or more people*** *who are* ***acting together*** *in committing a crime, the act of one is the act of all.* ***A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person, which occurs as a natural consequence of the acts done in carrying out the common plan and purpose.*** *If* ***two or more people*** *are together,* ***acting together, assisting each other, committing the offense,*** *the act of one is the act of all or as is sometimes said, the hand of one is the hand of all.*
>
> *Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime.* ***Mere knowledge that another person is going to commit a crime, even if the Defendant is present when the crime is committed, is not sufficient to convict the Defendant as a principal.***
>
> *Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore,* ***a finding of a prior arranged plan or common scheme is necessary for finding of guilt as a principal.*** *The State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all.*
>
> ***A principal*** *in a crime is one who* ***either actually commits the crime or*** *who* ***is present aiding, abetting, or assisting in committing the crime.*** *When a person does an act in the presence of, and* ***with the assistance of another,*** *the act is done by both.* ***When two or more are acting with a common plan or intent*** *are present at the commission of crime, it does not matter who actually who commits the crime. All will be guilty.*
>
> *Present at the commission of a crime means to be sufficiently near to aid and abet and assist in the commission of a crime.* ***However,*** *as I have previously stated,* ***mere presence at the scene of a crime alone is not sufficient to convict one as a principal on the theory of aiding and abetting. It is a necessary element, for there must have been a common scheme or intent to commit the crime. And the crime must have been committed pursuant thereto with the person aiding and abetting by sole overt act.***

> ***Intent means intending the result which actually occurs****, not accidentally or involuntarily. Intent may be shown by acts and conduct of the Defendant and other circumstances, from which you may naturally and reasonably infer the intent. The State must prove these elements, each one, beyond a reasonable doubt."*

R. p. 558, line 3 – p. 560, line 12 (italics in original, bold emphasis added).

"[It is] the almost invariable assumption of the law that jurors follow their instructions." *United States v. Olano*, 507 U.S. 725, 740, 113 S.Ct. 1770, 1781 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 1707 (1987)); *Old Chief v. United States*, 519 U.S. 172, 196 (1997); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984) ("a court should presume ... that the judge or jury acted according to law").[3] Accordingly, the Court may have overlooked that the "mere presence" instruction and the other language in the accomplice liability instruction emphasized above precluded a jury finding of guilt based upon a finding that Appellant was merely present, something that further argument by trial counsel could not have accomplished. *See State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (defense counsel's argument that life in prison meant life in prison did not satisfy defendant's entitlement to jury charge on his ineligibility for parole during penalty phase of capital murder trial, in light of fact that trial judge expressly precluded defense counsel from directly informing jury of defendant's parole ineligibility and gave instruction only on plain and ordinary meaning of life imprisonment

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[3] ""The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n.9 (1985). "Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed." *Parker v. Randolph*, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139 (1979). This rule "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson*, 481 U.S. at 211, 107 S.Ct. at 1709.

and death sentence). *See Kelly*, 534 U.S. at 257, 122 S.Ct. at 733-34 (finding argument of counsel did not sufficiently convey a clear understanding to the jury of defendant's parole ineligibility in absence of instruction specifically addressing parole ineligibility); *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006) (rejecting State's argument that questioning by parties on voir dire and explanation that a life sentence meant without parole remedied trial judges failure to instruct on parole ineligibility). *Cf. Cole v Arkansas*, 338 U.S. 345, 352, 70 S. Ct. 172, 175, 94 L. Ed. 155 (1949) ("We do not find any such disparity between the instructions and the opinion of the Supreme Court as is suggested. At most, the appellate court spelled out what is implicit in the instructions of the trial court, and both were agreed that the statute authorized no conviction for a mere presence in an assemblage at which unplanned and unconcerted violence was precipitated by another"); *Butler v. State*, 294 Ga. App. 540, 544, 669 S.E.2d 525, 529 (2008) ("... the trial court did not err in failing to charge the jury that mere spatial proximity to contraband is insufficient to establish constructive possession beyond a reasonable doubt. ... [where] ... the jury instruction as a whole adequately covered the principle of law that Butler's request sought to invoke").

X.

Finally, the Court may have overlooked that " '[a] defendant is entitled to a fair trial but not a perfect one.' " *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627 (1968) (quoting *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 490 (1953)). *See also State v. Mizell*, 332 S.C. 273, 285, 504 S.E.2d 338, 345 (Ct.App.1998). By granting relief where the trial judge's supplemental instructions precluded conviction based upon a finding of mere presence and Appellant was given the opportunity to further argue the evidence and law as his counsel saw fit, but counsel declined to have further argument for strategic reasons, this Court may have overlooked that Appellant received a fair, albeit imperfect, trial and, accordingly, was not

entitled to relief.

CONCLUSION

Based upon the foregoing, Respondent would ask the Court to grant the Petition for Rehearing, with a suggestion for rehearing *en banc* pursuant to Rule 219, SCACR.

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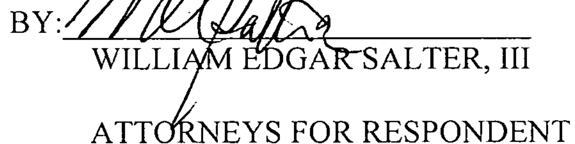
December 1, 2016.

BY: 
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

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THE STATE,

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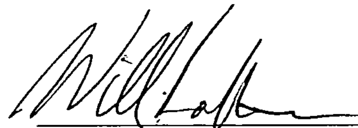
CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Petition for Rehearing on the Appellant by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Susan B. Hackett, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, South Carolina 29201.

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

This 1st day of December, 2016.



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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

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DEC 01 2016
SC Court of Appeals

December 1, 2016

Via Hand Delivery
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Devin Johnson*
Appeal from Charleston County
Appellate Case No. 2014-000766
[Opinion No. 5456 – filed November 16, 2016]

Dear Ms. Kitchings:

Enclosed for filing in your office are the originals and six (6) copies of the Petition for Rehearing in the above-referenced case, together with Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures
cc: Susan B. Hackett, Esq. (w/two copies of encls.)
The Honorable Scarlett Wilson, Solicitor, Ninth Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Services (w/copy of encls.)

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