

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal From Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2017-000390

S.C. SUPREME COURT

THE STATE,

Petitioner,

vs.

DEVIN JOHNSON,

Respondent.

APPENDIX

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ATTORNEYS FOR PETITIONER

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

The State, Respondent,

v.

Devin Johnson, Appellant.

Appellate Case No. 2014-000766

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5456
Heard September 8, 2016 – Filed November 16, 2016

REVERSED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Donald J. Zelenka, and Senior
Assistant Attorney General W. Edgar Salter, III, all of
Columbia; and Solicitor Scarlett Anne Wilson, of
Charleston, for Respondent.

GEATHERS, J.: Devin Johnson appeals his convictions for murder and possession of a weapon during the commission of a violent crime, arguing the trial court erred in (1) admitting text messages and historical cell service location information obtained from his cellular service provider by a search warrant, (2) admitting his statement to a police officer, (3) instructing the jury concerning "the

hand of one is the hand of all" because the evidence did not support the instruction, and (4) rendering the trial fundamentally unfair because the timing of the hand of one instruction prevented Appellant from addressing the theory in his closing argument. We reverse.

FACTS/PROCEDURAL HISTORY

In June 2011, two males entered the courtyard breezeway of Georgetown Apartments in Charleston and shot and killed Akeem Smalls (Victim). At the time of the crime, Charmaine Johnson, Appellant's sister, whom he visited regularly, lived in Georgetown Apartments. Victim was Charmaine's boyfriend. At some point prior to the shooting, Appellant had loaned Victim \$420.00, and Victim refused to pay him back.

Two days after the murder, officers interrogated Appellant regarding the crime. During the interrogation, Appellant initially denied being in Charleston at the time of the crime; however, he eventually admitted to being at the scene of the crime with another individual identified as "Creep" around the time the crime occurred. Subsequently, a magistrate issued the search warrant at issue in this case, and officers proceeded to obtain Appellant's cell phone records, including his historical cell site location information. Thereafter, a grand jury indicted Appellant for murder and possession of a weapon during the commission of a violent crime, and he proceeded to trial.

At trial, Tenika Elmore testified that at the time of the crime, she and Appellant lived together in Orangeburg. She stated she worked in North Charleston and Appellant would occasionally drive her to work in her car. Elmore owned a blue 2008 Toyota Camry that was missing a rear passenger-side hubcap. On the day of the crime, Appellant dropped her off at work in the afternoon and picked her up at 11:15 that evening. Appellant and Elmore stopped at a gas station in Summerville on the way back to Orangeburg from Charleston. Based on the video surveillance from the gas station and Elmore's testimony, Appellant had dreadlocks and wore a white tee shirt and dark blue jeans on the evening of the crime.

Investigator David Osborne testified officers were interested in one portion of the video surveillance from Georgetown Apartments, which showed a blue Toyota Camry backing into a parking spot with two men exiting the vehicle and walking toward Building C. Investigator Osborne opined backing into a parking space indicated "someone trying to get out in a hurry." He testified the two individuals walked toward the scene of the murder, which occurred outside of the camera's view, ran back to the car a few seconds later, and fled the complex. He explained

the vehicle depicted in the surveillance video was consistent with the color, make, and model of Elmore's car, and the vehicle in the surveillance video and Elmore's car were missing a rear passenger hubcap. According to Investigator Osborne, the driver of the car wore a white tank top and black pants. The individuals in that car were the only two individuals of interest on the video surveillance because everyone else appeared to be "just normally walking around their apartment."

The jury convicted Appellant as indicted, and the trial court sentenced him to concurrent sentences of thirty-six years' imprisonment for murder and five years' imprisonment for possession of a firearm. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in finding the magistrate had probable cause to issue the search warrant for Appellant's cell phone?
2. Did the trial court err in admitting Appellant's statement to investigators?
3. Did the trial court err in charging "the hand of one is the hand of all" because the evidence did not support the instruction?
4. Did the timing of the "the hand of one is the hand of all" jury charge render the trial fundamentally unfair?

LAW/ANALYSIS

Because we find Appellant's fourth issue dispositive, it is the only issue we will address.¹ Appellant argues that in crafting his closing argument, he relied on the trial court's assurance that it would not instruct the jury on "the hand of one is the hand of all." He contends the court's subsequent reversal of its earlier ruling and charging "the hand of one is the hand of all" rendered the trial fundamentally unfair. We agree.

After the defense rested, the State requested the "the hand of one is the hand of all" jury charge because it "ha[d not] been able to identify a co-defendant." The court denied the request, stating it did not "buy" the State's rationale that the evidence

¹ See *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).

showed two individuals were involved in the crime. The court stated, "The whole testimony in this case is [Appellant was] the shooter." Further, the court stated,

There's got to be some evidence that somebody else other than -- there's no evidence of anything that either one of them shot, to be candid. There's evidence that [Victim] was shot. But if you take [Appellant's] statements, his inconsistent statements, which the jury can consider, and his possibly being the person driving the car, pull all of those together, there's probably substantial circumstantial evidence to support a verdict, but there is no evidence to support that he was a -- that someone else shot, other than him if he shot at all. So, thank you, I decline to give that.

Thereafter, the following exchange occurred between Appellant and the trial court:

THE COURT: All right. I assume you object to that being charged?

[APPELLANT]: Yes, sir.

THE COURT: Well, I think, a review of the record, there's not any evidence to support that charge at all.

Subsequently, after a lunch break, the following occurred between the State and the trial court:

[THE STATE]: They haven't raised -- there's one quick issue. I'm concerned that -- [Appellant] can let me know if he believes I'm overthinking i[t]. When we had the charge conference[,] he knows that that charge conference could be reopened, specifically. You know, that that charge conference would be reopened specifically to the hand of one charge?

....

THE COURT: Let me tell you something. I thought about it at lunch. You know what that says to me? 'Judge, I don't give [sic] feel good about my case.'

[THE STATE]: Well, Judge, I---

THE COURT: No, I'm sorry, because you could have gone with that theory from the get-go, and you haven't done that.

[THE STATE]: Okay.

THE COURT: That's just bootstrapping, man. And you've presented this case, "I've got my shooter. I let this guy go." But listen, if there's evidence of that -- the reason I'm not charging that is I find that there is absolutely no evidence to warrant it. I don't know what the evidence may be after he testifies.²

Thereafter, in his closing arguments, defense counsel argued, "He didn't see a murder. He didn't participate in a murder. He wasn't there." Defense counsel further argued Appellant lied when he told officers he was at Georgetown Apartments when the crime occurred. He also argued Appellant lied when he stated he drove Elmore's car to the crime scene because "that car [in the surveillance video] is not [Elmore's] car." Thereafter, the trial court instructed the jury without including an instruction on accomplice liability.

After an hour of deliberations, the jury asked, "[I]f the other individual pulled the trigger, can the defendant still be guilty?" Because of this question, the trial court apologized to the State, determining it was required to charge "the hand of one is the hand of all" and that its prior decision not to give the charge was incorrect. Appellant asked the court to respond to the question by either stating "the answer to that is no in this case" or "you have all the evidence and you have all the law." Instead, in order to cure the error, the trial court offered Appellant the opportunity to reargue his closing argument before the court recharged the jury. The trial court considered declaring a mistrial because of the error but stated it first wanted to find a case that said a trial court cannot give a supplemental jury charge after deliberations began and offer additional closing arguments to cure the error.

² Appellant did not testify at trial.

Appellant rejected the trial court's offer, asserting that rearguing the charge would "waive" the issue on appeal. Further, Appellant objected to the charge and moved for a mistrial, arguing (1) he would have addressed the charge in closing had he known it would become an issue, (2) giving the charge in response to a question after deliberations began was a judicial comment on the facts, (3) the charge would "constitute a premature deliberation after the fact because [the jury was] not supposed to deliberate until the case ha[d] been submitted, which include[d the trial court's] charge," and (4) the charge would require Appellant to "shift[] theories" in front of the jury 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. Thereafter, the trial court charged the jury on "the hand of one is the hand of all" and mere presence. After the jury returned to the jury room, Appellant argued the evidence did not support the charge. The trial court responded as follows:

And in response of the rationale, my reasoning for it, how the evidence does, because the evidence as presented supports -- we had two leaving the car, walking towards where the shooting occurred, the shooting, and two people come back, running, leaving, and identified by eyewitnesses as two people. A person is shot, cartridges are found, all of that is as to who was the shooter. For those reasons, I did it and I understand your objections.

We conclude the trial court's decision to give the charge after confirming it would not give the charge rendered the trial fundamentally unfair. The circumstances of this case are similar to those in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001). During the charge conference in *Jones*, the trial court indicated it planned to charge that reasonable doubt is a doubt that would cause a reasonable person to hesitate to act. *Id.* at 576, 541 S.E.2d at 820. Defense counsel specifically incorporated the "hesitate to act" language in his closing argument, telling the jury that "when you go through this testimony and this evidence in this case, you're gonna hesitate." *Id.* at 576–77, 541 S.E.2d at 820–21. Subsequently, the trial court, upon request from the State, removed the "hesitate to act" language from the jury charge. *Id.* at 577, 541 S.E.2d at 821. On appeal, our supreme court held, "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.

We recognize 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.³ While this is a novel issue in South Carolina—allowing counsel to present additional closing arguments after the jury has already begun deliberating in order to cure a defective jury charge—it is not necessarily prohibited. Nonetheless, we conclude South Carolina jurisprudence does not favor rearguing after deliberation has begun because of its potential invasion into the province of the jury. Moreover, 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. *See id.* at 578, 541 S.E.2d at 821 ("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."). 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. *See id.* ("Appellant's attorney told the jury that the [court] would charge them reasonable doubt meant a doubt which would cause a reasonable person to 'hesitate to act.' The effect of the [court's] after the fact decision to excise the hesitate to act language from his charge was to diminish appellant's attorney's credibility in the eyes of the jury."). Furthermore, the colloquies between the trial court and the parties and the court's suggestion of a mistrial reveal the court recognized the magnitude of its decision with regard to its initial refusal to give the charge and its subsequent decision to give the charge.

Courts in other jurisdictions have reached the same conclusion. In *People v. Clark*, 556 N.W.2d 820, 822–23 (Mich. 1996), a trial court—after the parties made their respective closing arguments—changed its mind regarding jury charges and decided it would not give a specific modified instruction. Defense counsel objected, arguing he had relied on the modified instruction in formulating his closing argument. *Id.* at 823. The trial court, "acknowledging the predicament that had been created, offered the defense the opportunity to reopen the closing

³ The opinion in *Jones* does not suggest the trial court offered an opportunity for additional closing arguments.

argument." *Id.* "Defense counsel declined this invitation, stating that in his opinion[,] the modified instruction was not a misstatement of the law and that to reargue would only accentuate issues that should not be accentuated and create credibility problems with the jury." *Id.* He also argued "he could not prepare a new argument on such short notice." *Id.*

The Supreme Court of Michigan affirmed the court of appeals' reversal of the defendant's conviction, holding:

We agree with the Court of Appeals that reargument would be inappropriate. This would have accentuated the issue and impaired defense counsel's credibility with the jury. Because this error affected the jury's result, it is prejudicial error requiring reversal because it affirmatively calls into question the validity of the jury's decision.

Id. at 827.

The court cautioned:

Under no circumstances do we conclude, advocate, or imply that a trial [court] has a duty to instruct the jury incorrectly, nor do we say that the [court] erred by refusing to give the erroneous instruction.

The prejudice to the defendant in this case was incurred by virtue of defense counsel's argument in reliance on one instruction and the [court's] subsequent decision to instruct the jury on a different one. This misled defense counsel in formulating his closing argument.

Id.; see also *United States v. Oliver*, 766 F.2d 252, 254 (6th Cir. 1985) ("When the trial court determined that the jury should be re-instructed, it presented the attorneys the option of rearguing their respective positions in light of the revised instructions or, in the alternative, the court proposed to explain the reason for the modification of the instruction to the jury. . . . [D]efense counsel expressly tailored his closing argument upon the alleged failure of the government to prove a critical element of the crime . . . as directed by the original jury charge. When the court subsequently omitted that element as a prerequisite for conviction, the defense

attorney was left with the impossible task of rearguing to the jury points which he had conceded during his first argument."); *Cruz v. State*, 963 A.2d 1184, 1192 (Md. 2009) ("We are not persuaded that a supplemental closing argument would have cured the problem created by the court's eleventh hour insertion of this new theory of culpability."); *Murray v. State*, 857 S.W.2d 806, 811 (Tex. Crim. App. 1993) ("Without notice that the court would submit this instruction, Murray's counsel could not fulfill his function of intelligently arguing the defenses actually available to Murray. Further, the court's repudiation of the very argument it allowed caused the trial to lose its character as an adversary proceeding, greatly jeopardizing Murray's ability to receive a fair trial. Murray would have been better off without closing argument."); *Moore v. State*, 848 S.W.2d 920, 922–23 (Tex. Crim. App. 1993) (holding defense counsel relied on the trial court's original charge, stating, "Counsel made a legitimate argument that was based entirely on the trial [court's] written instructions, and it is one the jury may have found persuasive if it followed those instructions, as it was bound by oath to do," and the trial court's offer of five more minutes of additional argument did not cure the error).

Yet, we note other courts have required the trial court to allow counsel to reargue should the court introduce new law after closing arguments. In *People v. Ardoin*, 130 Cal. Rptr. 3d 1, 24 (Cal. Ct. App. 2011), the court stated, "To prevent unfair prejudice, if a supplemental instruction introduces new matter for consideration by the jury, the parties should be given an opportunity to argue the theory." Further, the court held, "If supplemental or curative instructions are given by the trial court without granting defense counsel an opportunity to object, and if necessary, offer additional legal argument to respond to the substance of the new instructions, the spirit of [a state statute] and the defendant's right to a fair trial may be compromised." *Id.*; see also *United States v. Horton*, 921 F.2d 540, 547 (4th Cir. 1990) (holding that when "a new theory is presented to the jury in a supplemental instruction after closing argument, the court generally should give counsel time for additional argument"); *United States v. Gaskins*, 849 F.2d 454, 460 (9th Cir. 1988) ("[I]nstructing the jury that it could convict [the defendant] as an aider or abettor without allowing additional argument to address this theory requires reversal of both counts.").

However, some courts, although not requiring additional closing arguments, found either no error when the trial court offered additional arguments after a supplemental jury instruction or no prejudice to the appellant when the appellant failed to request the opportunity for additional closing arguments after the supplemental jury instruction. See *State v. Bircher*, 132 A.3d 292, 302, 304–06

(Md. 2016) (holding the trial court did not err in determining a supplemental instruction on transferred intent was proper and "offering additional closing time" for the parties to give additional closing arguments); *Commonwealth v. Melvin*, 103 A.3d 1, 50 (Pa. Super. Ct. 2014) (noting the appellant "arguably waived this claim by failing to request the opportunity to offer additional argument to the jury to address the supplemental charge after being informed that it would be given"); *State v. Calvin*, 316 P.3d 496, 507 (Wash. Ct. App. 2013) (finding no prejudice when "[d]efense counsel was given the opportunity to reargue the case but declined"), *review granted in part, cause remanded*, 353 P.3d 640 (Wash. 2015); *see also United States v. Welbeck*, 145 F.3d 493, 497 (2d Cir. 1998) ("The initiative for the supplemental instruction came from the jury itself, precluding the possibility that the timing of the charge was unfairly suggestive on the court's part. Nor is there any indication that [the defendant] was unfairly prejudiced by the late instruction.").

Although appellate courts in some jurisdictions have determined the trial court's decision to allow counsel to reargue an issue after the trial court changed its jury charge does not require an automatic reversal, they have also acknowledged the decision, while not forbidden, "should be made only with extreme caution" and will result in a mistrial if the defendant suffered prejudice as a result. *See Clark*, 556 N.W.2d at 826 ("A change in jury instructions at the eleventh hour, as occurred here, should be made only with extreme caution."); *see also United States v. Scheffer*, 463 F.2d 567, 574 (5th Cir. 1972) ("[A] trial [court's] failure to inform counsel of an instruction which is subsequently given to the jury, or omitted from their consideration, does not require that the conviction be reversed in every case. Rather, the test is whether the instruction, considered as a whole, was fundamentally prejudicial to the rights of the defendant."); *Clark*, 556 N.W.2d at 823 ("Reargument would only be appropriate if it would not prejudice the defendant.").

Based on the foregoing, we find the trial court's decision was fundamentally prejudicial to Appellant because 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. *See Jones*, 343 S.C. at 578, 541 S.E.2d at 821 ("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."); *see also Oliver*, 766 F.2d at 254 (stating that although the trial court presented the attorneys with the option of rearguing their respective positions after the court determined the jury should be reinstructed, "defense counsel expressly tailored his closing argument upon the alleged failure of the

government to prove a critical element of the crime . . . as directed by the original jury charge" and omitting that element as a prerequisite for conviction left the defense attorney "with the impossible task of rearguing to the jury points which he had conceded during his first argument"); *Moore*, 848 S.W.2d at 922–23 (holding defense counsel relied on the trial court's original charge, stating, "Counsel made a legitimate argument that was based entirely on the trial [court's] written instructions, and it is one the jury may have found persuasive if it followed those instructions, as it was bound by oath to do," and the trial court's offer of five more minutes of additional argument did not cure the error). Accordingly, we reverse the trial court's decision to provide the additional jury charge after trial counsel relied on the court's statement that it would not give the charge.

REVERSED.

WILLIAMS and THOMAS, JJ., concur.

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.

RECEIVED

DEC 01 2016

SC Court of Appeals

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

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

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

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.

ALAN WILSON
Attorney General

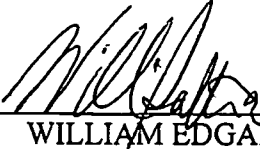
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DONALD J. ZELENKA
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SCARLETT ANNE WILSON
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(843) 958-1900

December 1, 2016.

BY: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

DEC 01 2016

SC 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,

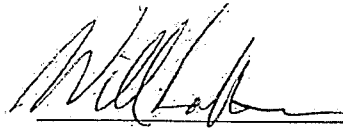
Appellant.

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.



WILLIAM EDGAR SALTER, III
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

The State, Respondent,




v.

Devin Johnson, Appellant.

Appellate Case No. 2014-000766

ORDER

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

	J.
	J.
	J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Susan Barber Hackett, Esquire
W. Edgar Salter, III, Esquire
Scarlett Anne Wilson, Esquire

FILED

January 6, 2017

John W. McIntosh, Esquire
The Honorable R. Markley Dennis, Jr.



ALAN WILSON
ATTORNEY GENERAL

January 9, 2017

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
Attention: Jacklyn

Re: *The State v. Devin Johnson*
Appeal from Charleston County
Appellate Case No. 2014-000766

Dear Ms. Kitchings:

Respondent has received the Court's Order dated January 6, 2017 denying the Respondent's Petition for Rehearing regarding the above matter.

Please stay the Remittitur in this matter as Respondent will be filing a Petition for Writ of Certiorari to the South Carolina Supreme Court on or before February 6, 2017.

By copy of this letter I am notifying Appellant's counsel and all interested parties.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd

cc: The Honorable Daniel E. Shearouse, South Carolina Supreme Court
Susan B. Hackett, Esq.
The Honorable Scarlett Wilson, Solicitor, Ninth Judicial Circuit
Trisha Allen, Victim Services

Donna D'Alessio

From: Orr, Jacklyn <jorr@sccourts.org>
Sent: Wednesday, January 11, 2017 4:34 PM
To: Donna D'Alessio
Subject: RE: The State vs. Devin Johnson (Appellate Case No. 2014-000766)

Hey!

We did receive the letter. The remittitur will not be sent yet. The order denying the petition for rehearing was sent in error, as the Court is still ruling on the en banc petition.

Thank you,

Jacklyn

From: Donna D'Alessio [<mailto:DDAlessio@scag.gov>]
Sent: Wednesday, January 11, 2017 4:32 PM
To: Orr, Jacklyn <jorr@sccourts.org>
Subject: The State vs. Devin Johnson (Appellate Case No. 2014-000766)

Dear Jacklyn:

I am just making sure that you received our letter asking to stay the remittitur in the above matter. I have attached a copy hereto.

Thank you.

Donna D'Alessio, Legal Assistant
Capital Litigation
Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549
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## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

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January 20, 2017

Mr. Donald J. Zelenka, Esquire  
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Columbia SC 29211-1549

Ms. Susan Barber Hackett, Esquire  
Division Of Appellate Defense  
PO Box 11589  
Columbia SC 29211-1589

Mr. W. Edgar Salter, III, Esquire  
PO Box 11549  
Columbia SC 29211

Re: The State v. Devin Johnson  
Appellate Case No. 2014-000766

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

cc: Alan McCrory Wilson, Esquire  
Scarlett Anne Wilson, Esquire  
John W. McIntosh, Esquire

# The South Carolina Court of Appeals

The State, Respondent,

v.

Devin Johnson, Appellant.

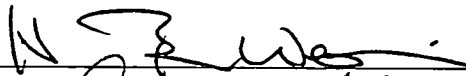
Appellate Case No. 2014-000766

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## ORDER

---

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



J.



J.



J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

Susan Barber Hackett, Esquire

W. Edgar Salter, III, Esquire

Scarlett Anne Wilson, Esquire

**FILED**

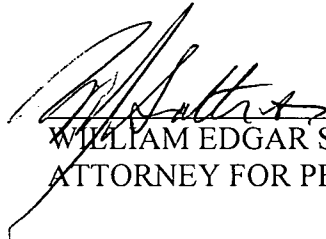
January 6, 2017

John W. McIntosh, Esquire  
The Honorable R. Markley Dennis, Jr.

## CERTIFICATE OF COUNSEL FOR PETITIONER

Counsel for the Petitioner certifies that this Appendix contains all material proposed to be included by any of the parties and not any other material and that this Appendix complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

February 22, 2017.



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WILLIAM EDGAR SALTER, III  
ATTORNEY FOR PETITIONER