STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

Petitioner,

vs.

DEVIN JOHNSON,

Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals erroneously find that the trial judge denied Johnson a fair trial by instructing the jury on accomplice liability after the jury had begun deliberating because (1) the trial judge erroneously denied the State's request-to-charge thereon and, when properly viewed, the evidence presented at trial supported the requested instruction; (2) a question from the jury (*Court's Ex. 2, R. p. 687*) rendered a supplemental instruction on accomplice liability appropriate based upon the evidence presented; (3) the trial judge gave Johnson an opportunity to present authority holding that the trial judge's proposed ruling was improper but he did not present any authority; (4) Johnson was given the opportunity for further argument after the supplemental charge but declined this offer; (5) the trial judge could not have simply answered the jury's question by instructing that there was no evidence supporting an instruction on accomplice liability because this would have violated the South Carolina Constitutional provision prohibiting a trial judge from commenting upon the facts; (6) giving a supplemental jury charge on accomplice liability and allowing defense counsel an opportunity for further argument after this instruction was the only viable alternative to the disfavored remedy of granting a mistrial based upon the trial judge's original error; (7) this Court's decision in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) did not require reversal; (8) and Johnson clearly was not prejudiced by the instruction, since the trial judge's ruling would not have required Johnson to "shift theories" in argument because he had suggested that the State failed to prove actual presence during his closing argument and the charge given precluded the jury from convicting him based upon a finding that he was merely present.

STATEMENT OF THE CASE

Respondent, Devin Jamel Johnson, # 359432 (Johnson) is confined in the South Carolina Department of Corrections (SCDC) as the result of his Charleston County murder conviction and sentence for murdering Akeem Smalls. The Charleston County Grand Jury indicted him in September 2011 for murder (2011-GS-10-5207) and possession of a firearm during the commission of a violent crime (2011-GS-10-5208). *R. pp. 694-695; 697-698.* Beattie Butler and Rhett Dunaway, of the Charleston County Public Defender's Office, represented him in the trial court.[1] On March 31 - April 3, 2014, Johnson received a jury trial before the Honorable R. Markley Dennis, Jr. The jury convicted him of both charges. *R. pp. 583-584.* Judge Dennis imposed concurrent sentences of thirty-six years for murder and five years for possession of a firearm during the commission of a violent crime. *R. pp. 685;. 696; 699.*

Johnson timely served and filed a notice of appeal. Of relevance to this Petition, the fourth issue in his October 13, 2015 Final brief of Appellant was that:

> Violating Appellant's right to due process of law, the trial judge erred in instructing the jury concerning "the hand of one is the hand of all" after the jury began deliberating where the timing of the instruction prevented Appellant from addressing the theory in his closing argument rendering his trial fundamentally unfair.

Petitioner (the State) raised an additional sustaining ground in its October 13, 2015 Final brief of Respondent:

> Did the trial judge err by initially denying the State's request-to-charge on accomplice liability because that theory was supported by the record?

Following briefing and oral argument, the Court of Appeals reversed Johnson's convictions on November 16, 2016. *State v. Johnson*, 2016-UP-206 (S.C. Ct.App., May 11,

[1] Assistant Solicitors Chad Simpson and Drew Evans, of the Ninth Circuit Solicitor's Office, prosecuted him.

2016). *App. 1-11.* This decision is published as *State v Johnson*, ___ S.C. ___, 795 S.E.2d 171 (Ct. App. 2016). The Court denied the State's timely Petition for Rehearing and Suggestion for Rehearing En Banc (*App. 12-28*) on January 20, 2017. *App. 33-36.*[2]

STATEMENT OF FACTS

In June 2011, Johnson lived with Tenika Elmore in Orangeburg, South Carolina. She was gainfully employed in Charleston, but he was unemployed. Johnson's sister, Charmaine Johnson, lived in a Charleston apartment complex. The victim, Akeem Smalls, was her boyfriend. Johnson spent time there when he and Tenika were broken up. Also, Johnson had loaned the victim roughly $400.00, in April or May of 2011. *R. pp. 118-124; 125; 234.*

On the morning of June 8th, Johnson drove Tenika to work in North Charleston before 11 a.m., in her 2008 blue Toyota Camry. Her car had the specialty license plate, "L-1207," and was missing a hubcap. After he dropped her off at work, he had the car for the rest of the day.[3] He did not return to pick her up, until 11:15 p.m. He was fifteen minutes late, and this upset Tenika. Johnson was wearing a white "wife beater" or tank top shirt and dark jeans. He did not appear shaken, upset or rattled, but was "his same old jokey self." *R. pp. 126-41. State's Ex.s 67-68.*[4]

On the night of June 8th, DeAngelo Buncum went to visit friends in Building E of the apartment complex in question. Upon arriving at the complex, he saw his close friend, the

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[2] Initially, the Court issued an Order denying rehearing on January 6, 2017. *R. pp. 29-30.* However, the Court notified the State on January 11th that this Order had been erroneously entered because "the Court is still ruling on the en banc petition." *R. p. 32.*

[3] Tenika did not know where he would go when he dropped her off, but he often went either to Charmaine's apartment in Charleston, or to either Walterboro or Summerville. *R. p. 130.*

[4] From there, they drove to Summerville and picked up Johnson's daughter. After stopping to buy gas, they went to their Orangeburg home. In the hour that it took them to get home, Johnson did not tell her of anything startling that happened that day. When Tenika learned about the victim's murder on June 9th, Johnson acted as if this was the first time he heard about it. *R. pp. 139-42.*

victim, on the second floor of Building C. The two talked and drank for three or four minutes on the porch, while the victim worked on a music CD. Eventually, Buncum left Smalls' apartment and went to visit other friends in an apartment in Building E. Sometime later, Buncum saw flashlights moving around outside of the apartments and went out to investigate. He saw police officers, who told him that the victim had been shot. *R. pp. 169-71; 416-21; 425-26.*[5]

Robert Holmes, another close friend of the victim, testified that Johnson contacted him approximately two days before the murder, which was after the victim had stolen "his stash." Holmes corroborated that to "wet somebody up" meant to kill them. *R. pp. 155-59.* Contrary to Tenika's testimony at trial, she also told Sgt. Osborne that the expression "to wet someone up" meant to shoot or kill someone. *R. pp. 152-55.*

Charleston City Police Department Officer Matt Jahngen, who responded to the dispatch for gunshots fired on the night of the 8th, found the victim lying on his back on a table, in a lot near the apartment complex. Although still conscious, he had obviously been shot,[6] and he was unresponsive to questions. He had a "significant amount of blood on his upper body, his face and his arms." Also, he had removed all of his clothing, except for his boxer shorts and socks. *R. pp. 160-66.* The Department's crime scene investigators found four fired 9 mm. Luger shell casings and blood drops in the entrance of the hallway for Building C. In the parking lot outside of the building, they found one of the victim's black Nike sandals under a car door. They ultimately

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[5] Upon learning that police were looking for him in connection with the murder, Buncum voluntarily surrendered and gave a statement. Both he and his mother cooperated with the investigation because he was not involved in the murder. *R. pp. 421-33.*

[6] An autopsy revealed that the victim died from a gunshot wound to his back. The bullet entered the middle of the victim's back, just to the left of center. It then traveled through the posterior aspect of the back side of the left sixth rib and continued through the lobes of the left along before exiting the front of the victim's body through the first rib and collarbone. The bullet exited on the upper, left side of the chest. *R. pp. 211-13.*

found that a trail of blood drops led from the area of the shooting, to and through other Buildings D and E, and into the parking lot. The drops were also on an air conditioning unit outside of E. They found bullet fragments in Building D. *R. pp. 168-86.*

Although the murder was not caught on the apartment complex's surveillance video for the 9th, the videos from "the office, C and D, in between Building C and D and in between Buildings D and E" provided important evidence against Johnson. (*State's Ex. 55*). In reviewing the videos, Sgt. Jeff Osborne discovered that while the videos had consistent time stamps on them, the time stamp was eight minutes slower than real time. Using the videos, police determined that the murder occurred at approximately 10:18 p.m. (or 10:10:30 video time) because the victim is seen running out of Building C shortly after that time. Moments later, another camera shows him running across the parking lot between Buildings D and E, which was consistent with the blood trail that had been found. The office camera shows a car that was missing the rear passenger hubcap backing into a parking space at 10:15:55 p.m., which would enable the driver to make a fast exit.[7] Two men are seen getting out of this vehicle and walking toward the far end of Building C, where the murder occurred. Within fifteen or sixteen seconds of the shooting, both men are seen running back to the car, getting into it and quickly driving out of the complex. The driver was wearing a White tank top and black pants, supposedly over his head. *R. pp. 236-54.*

Police spoke with Tenika on the 10th and she was cooperative with them. *R. p. 257.* Police located and arrested Johnson, with the aid of the U.S. Marshal's Task force, in Orangeburg. He gave a statement on June 10th. In the portion of his statement that was played for the jury, he repeatedly denied being in Charleston for several hours. When he finally admitted

[7] The car in the video was consistent with Tenika's car. *R. pp. 249; 258-59.*

that he had gone to the Charleston apartment complex, he claimed that he had gone to get his clothing from his sister.[8] A "friend," whom he identified only as "Creep," was with him. As they walked to his sister's apartment, Johnson claimed that he saw a dark-skinned black man fire gunshots. Scared, he and Creep ran back to the car and left. He dropped Creep off and later picked up Tenika at her job. *R. pp. 262-85, line 23; State's Ex. #56.* On June 14th, a crime scene investigator found a Luger 9 mm. bullet (State's Ex. 53) in a drawer of a nightstand in Charmaine's apartment. It had Johnson's fingerprint on it. *R. pp. 200-02; 207-08; 410.*

Johnson's Verizon Wireless cell phone records (*State's Exs. 57-58*) reflected that he had telephoned Smalls on June 4, 2011, or four days before the murder. He also called Charmaine at 9:30 p.m. on the night of the murder. *R. pp. 369-72; 379.* Additionally, there were a series of text messages between Johnson and a Terry Stevens on June 8th. At 12:08 p.m., a text message from Johnson's phone to Stevens' phone read, "I gonna need that bread today, at least half." At 12:10 p.m., he texts, "I on my ass, bra, bra." At 12:15 p.m., he texts, "When dat go because I'm almost on E and my girl got to get to work rest of the week." At 1:30 p.m., Johnson asks, "What time you get off? I'm whipping. We can cool it." *At 4:37 p.m., he sends a text message, "hey, I go wet dude ass up tonight."*[9] At 4:44 p.m., he says, "Yeah I take you back to the Chuck," or Charleston. At 8:33 p.m., Johnson says, "Just bring your ass down here because I'll come down there before my 5 work." At 8:59 p.m., "I need you. When you gonna be home." Then, at 9:34 p.m., he tells Stevens, "I can't wait on you. *I gotta handle my biz." State's Ex.s 59-60, & 69, R.*

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[8] He could not give a credible explanation for why he did not park near her apartment.

[9] Sgt. Craig Kosarko testified that he had previously heard the terms "wet somebody up" and "wet them up." These phrases meant "[t]o shoot somebody or kill someone." *R. p. 378.* Sgt. Osborne also testified that the phrase means "to shoot somebody. The Urban Dictionary listed five definitions for the phrase, the first three of which refer to killing someone. *R. pp. 291-94. See also* http://www.urbandictionary.com/define.php?term=wet+up.

pp. 589.[10] The Verizon historical cell site location information relating to Johnson's cell phone (*State's Ex.s #71, #72, #73, #74, #75*) reflected that for most of June 8, 2011, his phone used cell sites in the Summerville and North Charleston area. The one anomaly was a call at 10:02 p.m., when the phone used a tower at the interchange of Cosgrove Road and 1-26. *R. pp. 401-02; State's Ex. 74.*

ARGUMENT

The Court of Appeals erroneously found that the trial judge denied Johnson a fair trial by instructing the jury on accomplice liability after the jury had begun deliberating because (1) the trial judge erroneously denied the State's request-to-charge thereon and, when properly viewed, the evidence presented at trial supported the requested instruction; (2) a question from the jury (*Court's Ex. 2, R. p. 687*) rendered a supplemental instruction on accomplice liability appropriate based upon the evidence presented; (3) the trial judge gave Johnson an opportunity to present authority holding that the trial judge's proposed ruling was improper but he did not present any authority; (4) Johnson was given the opportunity for further argument after the supplemental charge but declined this offer; (5) the trial judge could not have simply answered the jury's question by instructing that there was no evidence supporting an instruction on accomplice liability because this would have violated the South Carolina Constitutional provision prohibiting a trial judge from commenting upon the facts; (6) giving a supplemental jury charge on accomplice liability and allowing defense counsel an opportunity for further argument after this instruction was the only viable alternative to the disfavored remedy of granting a mistrial based upon the trial judge's original error; (7) this Court's decision in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) did not require reversal; (8) and Johnson clearly was not prejudiced by the instruction, since the trial judge's ruling would not have required Johnson to "shift theories" in argument because he had suggested that the State failed to prove actual presence during his closing argument and the charge given precluded the jury from convicting him based upon a finding that he was merely present.

"The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer,' *Berger v. United St*ates, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). Johnson's trial satisfied both of these aims. Nevertheless, the Court of Appeals relied upon this Court's decision

[10] In addition to the prosecution's evidence, Johnson introduced a series of still photographs (*Defendant's Ex.s 5-10*) that had been taken from the apartment's video, which depict someone holding a cell phone less than two minutes before the victim was murdered. The State's theory was this was Johnson, but he argued that it was someone else because 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. 321-25; 466-80.*

in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001), and held that the trial judge's supplemental instruction on accomplice liability after initially refusing to give the charge "rendered the trial fundamentally unfair." *Johnson*, 795 S.E.2d at 174. This Court should grant certiorari to correct this erroneous grant of relief because (1) the trial judge erroneously denied the State's request-to-charge on accomplice liability and, when properly viewed, the evidence presented at trial supported the requested instruction; (2) a question from the jury (*Court's Ex. 2, R. p. 687*) rendered a supplemental instruction on accomplice liability appropriate based upon the evidence presented; (3) the trial judge gave Johnson an opportunity to present authority holding that the trial judge's proposed ruling was improper but he did not present any authority; (4) Johnson was given the opportunity for further argument after the supplemental charge but declined this offer; (5) the trial judge could not have simply answered the jury's question by instructing that there was no evidence supporting an instruction on accomplice liability because this would have violated the South Carolina Constitutional provision prohibiting a trial judge from commenting upon the facts; (6) giving a supplemental jury charge on accomplice liability and allowing defense counsel an opportunity for further argument after this instruction was the only viable alternative to the disfavored remedy of granting a mistrial based upon the trial judge's original error; (7) this Court's decision in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) did not require reversal; (8) and Johnson clearly was not prejudiced by the instruction, since the trial judge's ruling would not have required Johnson to "shift theories" in argument because he had suggested that the State failed to prove his actual presence during his closing argument and the charge given precluded the jury from convicting him based upon a finding that he was merely present

A. How the issue developed in the lower courts.

The State requested an accomplice liability jury instruction because two men were involved and it had not "been able to identify a co-defendant." The trial judge interrupted the State. He stated that "the whole testimony in this case is [Johnson's] the shooter" and he found that the requested instruction was not supported by the record because the State had not claimed that the passenger with Johnson on the night of June 8th was involved in the crime. *R. pp. 461-63.* In the trial judge's jury instructions, after closing arguments by the parties, he did not charge on accomplice liability. R. pp. 500-26. The jury began deliberating at 4:07 p.m. *See R. pp. 528-529.*

At 5:00 p.m. (*R. p. 529, line 17*), the jury submitted a question asking the trial judge to "define murder again" and asking "if the other individual pulled the trigger can the defendant still be guilty?" (*Court's Ex. 2, R. p. 687*). The trial judge stated "I think by their requests, they've viewed the facts." The trial judge was concerned that Johnson's mere presence did not make him culpable for the murder. *R. pp. 529-30.* Johnson objected to a charge because this was not addressed in his closing argument and because of "the possibility of ineffective assistance of counsel." The trial judge offered to allow him to give further closing argument, but Johnson claimed that this would put him "in a box." The trial judge disagreed and explained that he thought that the jury's question was reasonable because presence at the scene "with some prior involvement does make him responsible." *R. p. 530.*

In response to Johnson's claim that the trial judge could simply tell the jury that "on the evidence that we have, the answer to that is no in this case," the trial judge stated that this solution would be "commenting on the weight of the evidence, unfortunately and I can't do that." He also rejected Johnson's suggestion that he instruct jurors they had heard all the evidence in the case and they had been charged law. He noted Johnson's objection, but he

thought that the error was curable and that Johnson was entitled to further argument on the instruction. However, Johnson thought that he would waive the issue if he accepted the trial judge's offer to further argue the case. So, he objected to the instruction because the jury had already begun deliberating. *R. pp. 531-33.*

Although the trial judge understood Johnson's objection, he noted that "you have to believe he was there and you'd have to believe he was involved under the evidence." He, again, stated that he could not simply tell the jury there was no evidence to support such an instruction because that would be charging on the facts, which the state constitution prohibits. *R. pp. 533-34.*

After further discussion, the trial judge stated that his initial reaction was to tell jurors he had already instructed them on the law and that they had to decide the case based on the law that had been charged. He added, "the other [alternative] that occurred to me is to declare a mistrial based on my error in not charging the hand of one being the hand of all." He again explained that it was possible for the jury to conclude under the evidence presented that both Johnson and the other person present were acting in concert, and that the jury could infer that Johnson was not the shooter. When Johnson said that he would prefer a mistrial instead of a supplemental instruction, the trial judge stated that Johnson would have to present the trial judge with case law indicating that it was inappropriate to give a supplemental instruction. *R. pp. 534-37; 540-43.* Ultimately, the trial judge explained that his rationale was that "we've consistently... been [concerned] about educating the jury, making sure they understand the law and applied the law." He stated that he was restricted from charging on the facts, and that he was concerned he could not simply fail to answer the jury's question. *R. p. 543.*

He later addressed the issue again, following a brief recess. He observed that in *Wilds v. State*, 407 S.C. 432, 439-40, 450 SE2d 387, 390-91 (Ct.App. 2014), the Court had found 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. However, he found that the facts of this case were distinguishable and that the instruction was appropriate. *R. pp. 548-49.* When the jury returned, the trial judge gave an instruction on accomplice liability, or "the hand of one is the hand of all." *R. pp. 557-60.* Once the jury had left the courtroom, he stated that he intended to send a printed copy of his instructions for murder and accomplice liability to the jury. He also reiterated that he felt the evidence supported an accomplice liability instruction. *R. pp. 565-67; Court's Ex. 4, R. pp. 690-92.* He changed his mind and did not submit printed charges after the foreperson of the jury stated that the charge given had answered the jury's questions,. *R. pp. 567-68.*

B. Discussion.

The Court of Appeals erroneously found that the trial judge abused his discretion. The doctrine of accomplice liability was explained in *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 769-70 (Ct.App. 2010):

> Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.
>
> *State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (internal quotations and citations omitted).
>
> "Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " *See State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (quoting *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98,

> 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *Id.* at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime).

Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70. "[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).

First, the State submits that the Court of Appeals erroneously concluded that the trial judge's decision to give a supplemental instruction and permitting additional argument was error because Johnson had already made his closing argument, which - the Court found - was devised based on the assurance the accomplice liability charge would not be given, and because the jury had begun deliberating before he gave this instruction, *Johnson*, 795 S.E.2d at 174-75. This conclusion ignored that the trial judge's actions were in accordance with state law, since the only alternative to the course chosen by the trial judge was the **greatly** disfavored remedy of declaring a mistrial:

> 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").

Specifically, 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 very reasonable (if not the only viable) alternative to granting a mistrial based upon an error committed by the trial judge. *Id.*

The State agrees that the trial judge erred by initially failing to grant the State's request-to-charge on accomplice liability,[11] 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").

While the State's evidence, including the evidence of motive, tended to prove that Johnson was the shooter, there were no eyewitnesses to the shooting; there was evidence that he sought to enlist the aid of another man; another man was present at the time of the shooting; and the apartment complex video does not depict the shooting. Additionally, Johnson 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.*

[11] Johnson objected to this request. *See R. pp. 461-65.*

Although 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 unerringly clear that his review of the evidence was myopically and erroneously focused solely upon the State's theory of the case and that he failed to include a consideration of the evidence offered by the defense or what Johnson'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 (*See R. pp. 461-65*) was controlled by an error of law because "[t]he law to be charged must be determined from the evidence presented at trial." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007); *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) ("If there is any evidence to support a charge, the trial court should grant the request"). *See also 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).

The record further demonstrates that trial judge only 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.* If jurors found that the other person had shot the victim while acting in concert with and as an accomplice

to Johnson, then he could be convicted under a theory of accomplice liability. *Cf. Gibson*, 390 S.C. at 354, 701 S.E.2d at 769-70. Accordingly, the trial judge gave a supplemental instruction on accomplice liability, or "the hand of one is the hand of all." *R. pp. 557-60.*

Contrary to the position that Johnson asserted at trial (*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 either "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 prohibition against trial judges charging jurors on matters of fact. *R. pp. 531; 533; 537-38; 543. See* 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).

Johnson's proposed answers to the jury's inquiry would have also been both legally and factually misleading, since there was a legal answer to the question asked, in light of the facts presented: *i.e.*, the law as subsequently charged by the trial judge. Moreover, the jury's question clearly reflected that there was, at least, the possibility that some juror(s) was (were) discussing whether he could be guilty based upon his presence at the scene, and such a finding would not support a conviction. *See Reid*, 408 S.C. at 473, 758 SE.2d at 910.

If the trial judge had not answered the jury's question in a manner that prevented jurors from convicting Johnson based upon his mere presence at the crime scene, without more, Johnson 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 by the trial judge.[12] 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. *Cf. State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) ("Inasmuch as the appellant obtained the only relief he sought, this court has no issue to decide") (citing *State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979)).

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

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[12] Indeed, the State submits that once the jury returned with the question at issue, Johnson's counsel 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 his chosen course of action, over the objection made by counsel and counsel's refusal of 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 Johnson could have potentially receive relief in PCR. Contra *United States v. Donovan*, 242 F.2d 61, 63 (2nd Cir. 1957) ("One charged with crime may not thus lay a trap for the trial judge and then seek a new trial because the trial judge fell into the trap"); *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 535 (9th Cir. 1991) ("Trials are still adversary proceedings in which counsel may not lay traps for a trial judge and then expect relief from an appellate court").

(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"); *State v. Stanley*, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (2005) (trial court should grant a mistrial only when "absolutely necessary"). Accordingly, rather than abusing his discretion by not granting a mistrial, the trial judge properly "exhaust[ed] other methods to cure possible prejudice before aborting [Johnson's] trial." *Accord Council*, 335 S.C. at 13, 515 S.E.2d at 514.

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). Accomplice liability is not an alternative theory of liability. *See State v. Jenkins*, 48 S.C.L. (14 Rich.) 215, 226, 1867 WL 2730 (S.C.Const. App. 1867) ("All who are present concurring in a murder are principles therein, and the death, and the act which caused it, is, in the law, the act of each and of all. There is no distinction in the regard of the law, *in the degrees of their guilt*, or the measure of their punishment, *or the nature of their offence, founded upon the nearness or remoteness of their personal agency* respectively") (emphasis added).[13] Moreover, like the conflicting evidence in

[13] The reference in *Barber* implying that a charge on accomplice liability is a different theory of liability was necessarily *dicta*, since the Court held that "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted." *Barber*, 393 S.C. at 236, 712 S.E.2d at 439. As further support for the position that this language was *dicta*, the State would point out that S.C. Code Ann. § 14-1-50 (2003) provides that the English common law applies in this state where it is not inconsistent with the laws of this state. Also, "the common law will not be impliedly changed, but only by clear and unambiguous legislative enactment will the settled rules of the common law be changed." *State v. Carson*, 274 S.C. 316, 319, 262 S.E.2d 918, 920 (1980); *accord Page v. Winter*, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962) ("It is not for this court to repudiate the common law rule because we may think it illogical or undesirable"). *But see Russo v. Sutton*, 310

Barber, 393 S.C. at 236-37, 712 S.E.2d at 438-39, the State did not have proof as to whether Johnson or his accomplice fired the fatal shots, only that one of them did so.

In reversing the trial judge's ruling, the Court of Appeals analogized what occurred here to this Court's decision in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001). *See Johnson*, 795 S.E.2d at 174-75. *See also Id.* at 174 ("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). However, *Jones* does not support, much less mandate, reversal of the trial judge's ruling.

The Court of Appeals 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, [Johnson] rejected the trial court's offer to reargue his closing argument in order to correct the error." *Id.* And, the Court did an admirable job of discussing 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. 175-76. 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.* at 174.

S.C. 200, 204, 422 S.E.2d 750, 753 (1992) (the Supreme Court has the authority under extremely rare circumstances and for compelling need to substantially change the common law). Because the *Barber* Opinion did not address the common law rule abolishing the distinction between principles in the first degree and principles in the second degree, discussed, *infra*, the language at issue must be considered *dicta*. *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, this 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.

The State submits that this case is distinguishable from *Jones* 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 Johnson's counsel the opportunity to cure the error, but 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 Johnson'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 State submits that this refusal eliminated the opportunity to cure any perceived prejudice to Johnson that resulted from the trial judge's ruling. Either way, Johnson 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).

As discussed, the Court of Appeals correctly recognized that there are some cases from other jurisdictions holding that it is error to allow further argument by counsel after the jury has begun deliberating. *Johnson*, 795 S.E.2d at 175-76. Yet, the Court ignored that the trial judge - recognizing the relatively unique circumstances of this case - gave Johnson's trial counsel an opportunity to provide him with authority holding that it would be improper for him 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.* Counsel did not present such authority. Because counsel did not provide the Court with any such additional authority, Johnson was 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); *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").

More importantly, the Court of Appeals found that "here, as in *Jones*, [Johnson] 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*, 795 S.E.2d at 174. The Court additionally found that:

> We agree with [Johnson'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 [Johnson] that this shifting of theories could have potentially diminished his credibility with the jury.

Id. at 175.

However, it is respectfully submitted 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) counsel's 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 introduced by the defense, counsel argued that the prosecution had failed to prove that Johnson was present when the crime occurred and suggested that these photographs depicted someone other than Johnson because the person depicted in the photographs was on a cell phone. However, the records of his cell phone activity, introduced by 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* (cross-examination of Sgt. Osborne re: photos); *466-80* (closing argument).

Johnson'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 and the Court of Appeals erred by finding that the trial judge's ruling required any different argument by counsel. *Johnson*, 795 S.E.2d at 175. Johnson's position 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 argument, 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 suggest that the accomplice liability theory did not support Johnson's conviction, since there was no proof that he was present at the scene. Thus, the Court of Appeals erroneously found 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, the Court of Appeals' grant of relief ignored that the trial judge's supplemental instructions on accomplice liability included a clear and lengthy explanation of

mere presence. This "mere presence" charge ensured that Johnson 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)); *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"). "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).[14]

Accordingly, the "mere presence" instruction and the other language in the accomplice liability instruction, which the jurors were bound to and presumptively did follow, *id.*, precluded a jury finding of guilt based upon a finding that Johnson was merely present. This is 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 and death sentence). *See Kelly v. South Carolina*, 534 U.S. 246, 257, 122 S.Ct. 726, 733-34 (2002) (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

[14] See also *Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n.9 (1985) ("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").

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").

Finally, " '[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. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998). Because the Court of Appeals granted relief where the trial judge's supplemental instructions precluded conviction based upon a finding of mere presence and Johnson 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, the Court of Appeals must be reversed because Johnson received a fair, albeit imperfect, trial and, accordingly, was not entitled to relief.

CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari, reverse the Opinion of the Court of Appeals and reinstate the judgment of conviction and Johnson's sentence.

Respectfully submitted,

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February 22, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED
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SC Court of Appeals

THE STATE,

Petitioner,

vs.

DEVIN JOHNSON,

Respondent.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Petitioner, certify that I have served the within Amended Petition for Writ of Certiorari and Appendix on the Respondent 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 22nd day of February, 2017.

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