STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
R. Markley Dennis, Circuit Court Judge

THE STATE,

PETITIONER,

V.

DEVIN JOHNSON,

RESPONDENT

APPELLATE CASE NO 2017-000390

RETURN TO PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

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PETITIONER'S 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[?]

COUNTER QUESTION PRESENTED

Did the Court of Appeals correctly hold the trial judge erred in instructing the jury concerning an alternative theory of liability - "the hand of one is the hand of all" - *after* the jury began deliberating where the timing of the instruction prevented Respondent from addressing the theory in his closing argument rendering his trial fundamentally unfair in violation of Respondent's right to due process of law?

STATEMENT OF THE CASE

Tenika Elmore and Respondent lived together in Orangeburg in June 2011. R. 118, line 19 – R. 120, line 16. At that time, Respondent's sister, Charmaine Johnson, lived at Georgetown Apartments in Charleston. R. 121, lines 6-19; R. 234, lines 10-18. Charmaine's boyfriend was Akeem Smalls. R. 122, lines 13-24. Respondent had loaned Smalls money, approximately $400, in April or May of 2011. R. 122, line 25 – R. 123, line 25; R. 125, lines 7-15. However, Respondent insisted he had made no efforts to collect the debt and there was no animosity or bad blood between the two concerning the debt. R. 123, lines 14-16; R. 125, lines 19-24; R. 145, line 16.

On June 8, 2011, DeAngelo Buncum went to Georgetown Apartments to hang out with friends. While there, he saw Smalls on the second floor. The two were talking and drinking while Smalls worked on a music CD. R. 419, lines 7-16. At some point, Buncum left Smalls's apartment and went to another apartment to visit other friends. R. 420, lines 1-5. Sometime after Buncum left Smalls's apartment, Buncum saw flashlights moving around outside of the apartments and went out to investigate. He saw police officers, who informed him that Smalls had been shot. R. 420, lines 9-22; R. 421, lines 9-14; R. 426, lines 6-9.[1]

On that same day, Respondent, who had dreadlocks, drove Elmore to her place of work in North Charleston around 11 a.m. in Elmore's car, a 2008 blue Toyota Camry with a specialty license plate, "L-1207." R. 126, line 20 – R. 129, line 17; R. 132, lines 2-8; R. 149, lines 9-16. Respondent kept Elmore's car that day. R. 129, line 24 – R. 130, line 2. During his interrogation,

[1] Petitioner emphasized that DeAngelo Buncom, who voluntarily surrendered and gave a statement to police, cooperated with the police investigation "because he was not involved in the murder." Cert. at 4 n. 5. However, the police arrested Buncom for Akeem Smalls' murder – the police had probable cause to believe Buncom killed Smalls. Buncum remained in jail for three months until the charges were dropped. R. 424, lines 3-8.

Respondent stated that he went to Georgetown Apartments to get some of his clothing from his sister. He was accompanied by a friend, whom he knew only as "Creep." While walking to his sister's apartment, Respondent saw a dark-skinned black male in the area. Respondent heard gunshots. Scared, he and Creep ran back to the car and left. R. 262, lines 3-13; R. 282, line 11 – R. 285, line 23; State's Exhibit #56. Respondent dropped off Creep, and then went to pick up Elmore from work. State's Exhibit #56. However, at trial, Respondent maintained that he was *not* at Georgetown Apartments on the night of the shooting. R. 466, line 18 – R. 480, line 18. Specifically, in closing argument, it was made clear that Respondent "didn't see a murder. He didn't participate in a murder. He wasn't there." R. 471, lines 1-4.

Elmore got off from work at 11 p.m., but Respondent did not arrive until 11:15 p.m. to pick her up. She was upset with Respondent for being late yet again. R. 132, line 21 – R. 133, line 25. The two then went to Summerville to pick up Respondent's daughter from his mother's house, stopped for gas, and then went home to Orangeburg. R. 135, line 16 – R. 136, line 18.

Meanwhile, the Charleston City Police responded to Georgetown Apartments concerning gunshots fired and a man saying he had been shot, but he did not know where he was. Officers found Smalls, wearing only boxer shorts and socks, in a lot next to the apartment complex. He had been shot, but was conscious. R. 165, line 9 – R. 166, line 10. Officers found shell casings and blood drops in the hallway of Building C at Georgetown Apartments. The blood drops went through the apartment complex common areas to an air conditioning unit adjacent to the vacant lot where Smalls was found. Based on the location of the shell casings and the blood drops, the police surmised the shooting occurred on the first level of Building C. R. 172, line 25 – R. 187, line 10; R. 234, line 19 – R. 235, line 3.

The apartment complex had stationary surveillance cameras in various spots, but no camera angle captured the shooting. R. 235, line 22 – R. 241, line 24; State's Exhibit #55. However, the video from the cameras showed Smalls running across the parking lots. R. 243, line 8 – R. 245, line 10. Based on the video, the police estimated the shooting occurred at 10:18 p.m. R. 242, lines 22-24; R. 246, lines 19-20. The police were interested in one camera angle showing a parking lot near the office. That camera showed a car back into a spot at 10:15 p.m. R. 246, line 6 – R. 247, line 14. Two people got out of the car and walked down a breezeway toward Building C. R. 250, lines 2-13. Approximately two minutes later, the two people got back into the car and drove away. R. 252, line 25 – R. 253, line 9.

Robert Watts and Alise Buckner, who were living in Georgetown Apartments at the time, heard the gunshots. Watts called for help while he and Buckner looked outside. R. 439, lines 12-25; R. 440, lines 8-15; R. 454, lines 16-20; R. 455, lines 4-6. Watts saw two men running, and a car that had an "A" in the license plate. R. 441, lines 19-22. Buckner also saw an "A" in the license plate. She further testified the plate was a regular license plate, *not* a specialty plate. R. 456, lines 2-13.

Days later, on June 14, 2011, the police found an unfired 9 mm Luger bullet made by FC in a nightstand drawer in Charmaine's apartment in Building C. R. 199, line 6 – R. 203, line 4; R. 233, lines 2-10; R. 234, lines 10-18. A fingerprint examiner identified a latent lift from the unfired bullet to Respondent. R. 410, lines 8-21.

On September 12, 2011, a Charleston County grand jury indicted Respondent for murder (2011-GS-10-5207) and possession of a firearm during the commission of a violent crime (2011-GS-10-5208). R. 694-695; R. 697-698. On March 31, 2014, the state, represented by Chad Simpson and Drew Evans, called the case to trial before the Honorable R. Markley Dennis and a

jury. Rhett Dunaway and Beattie Butler represented Respondent. R. 1. The jury found Respondent guilty as indicted. R. 583, line 20 – R. 584, line 1. Judge Dennis sentenced Respondent to thirty-six years' imprisonment for murder and to five years' imprisonment for possession of a firearm during the commission of a violent crime. He ordered the sentences to be served concurrently. R. 585, lines 8-14; R. 696; R. 699.

On April 10, 2014, Respondent filed and served a timely notice of appeal. His appeal was perfected by undersigned counsel. On appeal, Respondent raised four issues. In his fourth issue on appeal, Respondent challenged the trial court's instruction to the jury concerning an alternative theory of liability – accomplice liability – after the jury began deliberating.[2] FBOA at 1. Petitioner filed its responsive brief, which re-characterized Respondent's third and fourth issues as a single issue and added an alternate sustaining ground. FBOR at x-xi.

After oral argument on September 8, 2016, a unanimous panel reversed Respondent's convictions and remanded for a new trial. State v. Johnson, 418 S.C. 587, 795 S.E.2d 171 (Ct. App. 2016); App. 1-11. In light of the decision to reverse, the Court of Appeals addressed only one of Respondent's four issues – the fourth issue. Johnson, 418 S.C. at 590 n. 1, 795 S.E.2d at 172-173 n.1; App. 1-11. On December 1, 2016, Petitioner filed a petition for rehearing and suggestion for rehearing *en banc* pursuant to Rules 219 and 221, SCACR. App. 12-28. On January 6, 2017, the Court denied the petition for rehearing. App. 29-30. On January 20, 2017, the Court denied Petitioner's request for rehearing *en banc*. App. 33-34.

On February 21, 2017, Petitioner filed a petition for writ of certiorari asking this Court to review the well-reasoned opinion of the Court of Appeals. Respondent now files this return.

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[2] Respondent also raised (1) an issue regarding his right to privacy in text messages and historical cell service location information, (2) an issue regarding the admissibility of his statement to police, and (3) an issue concerning the propriety of the "hand of one, hand of all" instruction based on the evidence presented. FBOA at 1.

ARGUMENT

The Court of Appeals correctly held the trial judge erred in instructing the jury concerning an alternative theory of liability - "the hand of one is the hand of all" - *after* the jury began deliberating where the timing of the instruction prevented Respondent from addressing the theory in his closing argument rendering his trial fundamentally unfair in violation of Respondent's right to due process of law.

Introduction

In rendering its decision in this case, the Court of Appeals remained faithful to binding appellate precedent, State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), examined foreign authority for its persuasive value, and produced a sound, well-reasoned decision to resolve the matter presented. Respondent's case presented a straight-forward application of this Court's decision in Jones, supra, which the Court of Appeals, in a unanimous opinion, ably conducted. Although the factual scenario presented was unusual - instructing a jury on an alternative theory of liability *during* deliberations in response to a specific jury question *after* defense counsel delivered a closing argument – it was not unique. The state has not offered, and cannot offer, any special and important reason for this Court to grant certiorari in this case. See Rule 242(b), SCACR. Therefore, this Court should deny the petition for writ of certiorari.

Relevant facts

Throughout the trial, the state presented one consistent story of the case – that Respondent shot Smalls. In opening statements, the prosecutor told the jury that when Smalls walked out of his apartment and down the stairs, he was met by two males, one of whom had a nine millimeter handgun. According to the state, Respondent was the male with the handgun and he fired four shots

killing Smalls. R. 105, line 18 – R. 106, line 8. The state claimed Respondent had a motive to kill Smalls – a $400 debt. R. 109, lines 9-22.[3]

The video from the apartment complex showed a small car park in the lot shortly before the shooting. Two people exited the car – a driver and a passenger. R. 250, lines 5-13. The state theorized that Respondent was the driver of the car, but the state presented no evidence of the identity of the passenger. Seconds later, the video showed the same two individuals walk back to the car and leave the parking lot. R. 253, lines 2-5. During the interrogation, Respondent told police that he went to Georgetown Apartments to get some of his clothing from his sister. He was accompanied by a friend, whom he knew only as "Creep." While walking to his sister's apartment, Respondent saw a dark-skinned black male in the area. Respondent heard gunshots. Scared, he and Creep ran back to the car and left. R. 262, lines 3-13; R. 282, line 11 – R. 285, line 23; State's Exhibit #56. Respondent dropped off Creep, and then went to pick up Elmore from work. State's Exhibit #56.

The prosecution presented a series of text messages between Respondent's phone and Terry Stevens on June 8, 2011. At 4:37 p.m., a text message from Respondent's phone to Stevens' phone read: "hey, I go wet dude ass up tonight." Then, at 9:34 p.m., a text message from Respondent's phone to Steven's phone stated, "I can't wait on you. I gotta handle my biz." R. 373, line 1 – R. 378, line 7; R. 588 - 589. A prosecution witness then claimed that he had heard the terms "wet

[3] The state also called Robert Holmes, Smalls' lifelong friend to testify. R. 155, line 13 – R. 156, line 4. Holmes claimed that Respondent called looking for Smalls in the days leading up to Smalls' death. R. 156, lines 18-24. According to Holmes, this conversation took place after Smalls stole Respondent's "stash." R. 156, line 21; Cert. at 4. Petitioner claimed Holmes testified that this communication was after Smalls stole Respondent's "stash." Cert. at 4. According to the state, this was an additional motive Respondent had to kill Smalls.

somebody up" and "wet 'em up" under his experience as a law enforcement officer and the terms meant "[t]o shoot somebody or kill someone." R. 378, lines 17-24.[4]

In his closing, the prosecutor argued Respondent was the driver of the car on the video. The prosecutor claimed Respondent wore a beanie, which was why the person in the video did not have the short dreadlocks that Respondent had at the time. R. 482, line 8 – R. 483, line 6. Just as promised in the opening, the state argued during closing that Smalls saw Respondent as Smalls walked down the stairs of the apartment complex. Smalls was frightened by Respondent and turned to flee. However, Smalls was shot. R. 483, line 20 – R. 484, line 14.

At trial, Respondent maintained that he was not at Georgetown Apartments on the night of the shooting. R. 466, line 18 – R. 480, line 18. Specifically, in argument, it was made clear that Respondent "didn't see a murder. He didn't participate in a murder. He wasn't there." R. 471, lines 1-4. He presented evidence from Watts and Buckner, who were living in Georgetown Apartments and heard gunshots that two men left in a car that had an "A" in the license plate, which was unlike the specialty plate on Respondent's girlfriend's car. R. 439, lines 12-25; R. 440, lines 8-15; R. 454, lines 16-20; R. 455, lines 4-6; R. 441, lines 19-22; R. 456, lines 2-13.

Prior to the closing arguments, the judge entertained a charge conference. The prosecution requested "the hand of one charge" because the state had not "been able to identify a co-defendant." R. 461, lines 5-11. To support the request, the prosecutor agreed "all the circumstances certainly – suggest he was the shooter and certainly proved that he was involved in the shooting. We just don't

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[4] According to Tenika Elmore, the phrase "wet up" meant to shoot someone or get drunk. R. 144, lines 1-8. However, Holmes testified "wet up" meant to kill someone. R. 157, line 21 – R. 158, line 5. Osborne found multiple definitions for the term "wet up" in the Urban Dictionary, including to shoot or stab someone and to take shots or drink any alcoholic beverage until at least tipsy. R. 291, line 18 – R. 294, line 3.

have anything certain saying it was the other guy that pulled the trigger. I don't think it was." R. 462, lines 12-19.

The judge rejected the request because "the whole testimony in the case [had been] he's the shooter," referring to Respondent. The judge elaborated that all of the evidence presented by the state was that Respondent was the person with the gun. R. 461, lines 12-23. The judge acknowledged that the state's evidence showed there was a passenger in the car, but the state presented no evidence or even allegation that the "passenger had anything to do with it." As a result, the judge concluded there was no evidence to support the theory of "hand of one is the hand of all." R. 461, line 25 – R. 462, line 12.

Rejecting the request-to-charge based on the lack of evidence to support instructing the jury on the alternative theory of liability, the judge explained:

> But if you take his 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.

R. 462, line 25 – R. 463, line 8. During the exchange between the judge and the prosecutor, defense counsel noted only that he objected to the charge, and this occurred after the judge had decided the evidence did not support the charge. R. 463, lines 11-13.

After the closing arguments, the judge instructed the jury concerning the presumption of innocence, reasonable doubt, circumstantial evidence, and criminal intent. He defined murder and malice for the jury and instructed the jury regarding the permissible inference of malice from the use of a deadly weapon. R. 500, line 21 – R. 529, line 4.

About an hour into the deliberations, the jury sent a note asking the judge to define murder again and asking "if the other individual pulled the trigger can the defendant still be guilty?" R.

529, lines 15-25; R. 688. When the judge indicated that he was now going to instruct the jury concerning the "hand of one is the hand of all," Respondent objected. Respondent explained he had been unable to address the theory in closing argument. R. 530, lines 1-7. Respondent requested the judge instruct the jury as follows: "you have all the evidence and you have all the law." R. 531, lines 1-9. The judge offered the opportunity to present an additional closing argument to the jury based on the alternative theory of liability now being presented to the jurors, but Respondent declined. When Respondent explained that argument may waive the issue for appeal, the judge responded that "it's curable if, in fact, you're entitled to an argument about the charge." R. 530, line 10 – R. 531, line 22; R. 533, lines 1-3; R. 534, lines 3-6. Respondent emphasized the prejudicial nature of the charge in light of the jury having started deliberations; further Respondent cited State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) to support his position. R. 532, lines 1-23.

During this discussion, the judge, defense counsel, and the state struggled with how to respond to the jury's question. When the judge proposed allowing additional argument, defense counsel and the judge candidly stated this issue had *never* come up before. R. 533, line 24 – R. 534, line 6. After a brief recess, the judge stated he had started doing some research and asked defense counsel if he had found anything. R. 538, lines 19-21. Noting the lateness of the hour, defense counsel explained he was trying to contact someone for assistance. R. 538, lines 22-24. When defense counsel expressed his preference for a mistrial rather than the charge on an alternative theory of liability coupled or uncoupled with additional closing arguments, the judge responded that before he would grant a mistrial he would need to "find a case that says you can't do that." R. 542, lines 17-23. He noted he was "in the gray area" and that if the state was

willing to move forward with the additional charge and arguments, then he was "willing to go" as well. R. 543, lines 1-2.[5]

The judge explained that he considered declaring a mistrial based on his "error in not charging the hand of one being the hand of all" initially.[6] He explained the facts supporting the theory where that "two people go back. There are shots fired. ... [U]nder the theory that two people are leaving that car and there's evidence that they are on a mission, they could conclude that's circumstantial evidence that they conclude they were acting in concert." R. 542, lines 1-16. At this, Respondent expressed his preference for a mistrial, not the jury charge. R. 542, lines 17-19; R. 553, lines 17-19. Respondent objected to the instruction on an alternative theory of liability during deliberations because it would "constitute premature deliberation after the fact" when the jury had started deliberating and would receive an additional theory of liability after deliberations had begun. R. 552, lines 6-13. Regarding the opportunity to re-argue based on the hand of one instruction, Respondent explained he would worry that he would be "shifting theories" on the jury. Essentially, he had argued to the jury that Respondent was not present at Georgetown Apartments

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[5] In his petition for rehearing, Petitioner argued for the first time that Respondent was barred from asserting error on appeal because Respondent did not provide the trial judge with any additional authority in support of his objection. Pet. at 10; Cert. at 20. Petitioner's position is untenable and must be rejected. Respondent was not required to submit additional authority to the judge in support of his argument as Respondent had objected to the judge's proposed course of action on numerous grounds. See State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-596 (2010)(re-iterating that "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review" and that "a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue").

[6] According to Petitioner, the only alternative to granting a mistrial in this situation was to instruct the jury concerning the accomplice liability. Cert. at 12-13; Cert. at 16-17. To the contrary, the judge's additional instruction to the jury was erroneous as it was unsupported by the evidence. The judge rejected the proper alternative, which was to answer the jury's question as defense counsel proposed, informing the jury that it had all the evidence and the law necessary to resolve the case.

on the night of the shooting, and now he would be forced to argue that Respondent was "merely present." This change in the argument and defense theory would divest Respondent of credibility with the jury.[7] R. 552, lines 15-24.

Thereafter, the judge charged the jury as follows concerning the hand of one is the hand of all:

> 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 [a] crime, it does not matter who actually commits the crime. All will be guilty.

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[7] In his petition for rehearing, Petitioner argued for the first time that Respondent's "failure to accept the offer of additional argument was a waiver of [Respondent]'s right to complain on appeal." Pet. at 9; see also Cert. at 19. Petitioner cited no authority for this proposition – as none exists. Instead, Petitioner relied on case law stating that in order to preserve an error when a judge issues a curative instruction, one must object to the sufficiency of the curative instruction as well. Pet. at 9; Cert. at 19-20. There was no requirement that Respondent re-argue his case to the jury in order to preserve this error for appeal. He objected to the instruction and moved for a mistrial. Nothing more was required.

> 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. 558, line 3 – R. 560, line 12; R. 690.

Respondent renewed his objection to this charge and reiterated the lack of evidence to support giving the charge. R. 565, lines 24-25. The judge explained his changed position that the evidence supported the charge: "[W]e 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." R. 566, lines 2-16.

Discussion

After initially determining the evidence did not support a jury instruction on the alternative theory of liability of accomplice liability, the trial judge reversed course in response to a jury question, and concluded he would give the jury such an instruction and permit additional argument from the parties to the jury on the additional instruction. The trial judge erred, as the Court of Appeals correctly held, in providing the jury with an instruction regarding an alternative theory of liability during the deliberations because the timing of the instruction denied Respondent a fundamentally fair trial. By instructing the jury regarding an alternative theory of liability during deliberations, Respondent was unable to respond to the instruction. Further, Respondent would have been greatly harmed by arguing again to the jury on that specific instruction because he had

crafted his closing argument relying on the judge's earlier decision that he would not instruct on accomplice liability. In his closing argument, defense counsel maintained Respondent was not present – not even "merely present" – during the murder. Any attempt to incorporate and dispel the notion of accomplice liability would have resulted in a complete discrediting of defense counsel with the jury.

Alternative theory of liability – "hand of one is the hand of all"

An analysis of the theory accomplice liability – "the hand of one is the hand of all" – assists in understanding the gravity of the trial judge's error.[8] The Court of Appeals conducted such an analysis in its well-reasoned opinion. "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2022)(citing State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999)). "[O]ne 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." Langley, 334 S.C. at 648, 515 S.E.2d at 101.

"Under 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.'" Id. at 648-649, 515 S.E.2d at 1010 (quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). Mere association with admitted members of a conspiracy or an admitted perpetrator of a crime is insufficient to

[8] Respondent challenged the trial judge's decision to instruct the jury on accomplice liability because the evidence failed to support the charge. This issue was not decided by the Court of Appeals. While Petitioner included a discussion of the propriety of the charge due to the evidence, the issue is not squarely before this Court. Some discussion of the nature of accomplice liability is necessary to resolution of the question on appeal, however, a decision on the propriety of the charge in light of the evidence presented is not.

constitute the guilt of the defendant on trial. See State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Mouzon, 326 S.C. 191, 485 S.E.2d 918 (1997). Further, "[p]rior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime." Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995); see also State v. Thompson, 347 S.C. 257, 647 S.E.2d 702 (Ct. App. 2007). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." State v. Mattison, 388 S.C. 469, 480, 697 S.E.2d 578, 584 (2010)(quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)) 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. Hill, 268 S.C. 390, 395-396, 234 S.E.2d 219, 221 (1977).

In Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011), this Court examined the propriety of an accomplice liability charge. This Court explained that "an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." Id. Resolving the issue of whether the "hand of one" charge was correct, this Court asked whether there was any evidence that another co-conspirator was the shooter and the defendant was acting with him when the robbery took place. Id. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 295-296, 534 S.E.2d 268, 269 (2000); see also State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). The evidence showed the robbers were clothed in black and wrapped shirts around their heads, that the defendant was involved in the planning and execution of the robbery, and that one of the robbers other than the defendant may have been the shooter. Id.

The Court of Appeals concluded the trial judge correctly charged the jury concerning "the hand of one is the hand of all" where the evidence revealed the defendant and his co-defendant were with a large group of people during a confrontation, the co-defendant used language indicating the two were acting together, the defendant and co-defendant got into a truck that chased after an individual in a car, and witnesses claimed the defendant shot his gun toward the car. State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007). This evidence supported the theory that the defendant and his co-defendant joined together to accomplish an illegal purpose. Id.

Recently, the Court of Appeals affirmed a grant of post-conviction relief where appellate counsel failed to raise on appeal the trial judge's error in instructing the jury on accomplice liability and mere presence where the evidence failed to support the charge. Wilds v. State, 407 S.C. 432, 435, 756 S.E.2d 387, 388 (Ct. App. 2014), *cert. dismissed as improvidently granted*, Wilds v. State, 414 S.C. 341, 778 S.E.2d 112 (2015). On the afternoon of March 29, 1999, Wilds was walking down the street with two companions when they saw Rumph approaching them. Wilds commented to the others that he thought Rumph had some money. Id. Wilds stopped to talk to Rumph while his companions continued walking. Id. at 436, 756 S.E.2d at 388. Wilds unexpectedly pulled out a pistol. Rumph handed over his wallet. Id. at 436, 756 S.E.2d at 389. Wilds ordered his companions to hit Rumph and they complied. Wilds' companions took items from Rumph, including a cigarette lighter and change. Wilds then shot Rumph. Id. After the shooting, Wilds and his companions ran. When they stopped, Wilds gave the companions money from Rumph's wallet and told them to stay quiet. Id. One of the companions told Wilds to get rid of the gun. Id.

Wilds was charged with armed robbery and murder of Rumph. During the deliberations, the jury sent a note asking if the jury found Wilds guilty of murder, would that be a finding that Wilds

alone pulled the trigger. Id. at 437, 756 S.E.2d at 389. Over Wilds' objection, the judge instructed the jury on accomplice liability, but refused to instruct the jury concerning mere presence. Id.

The Court explained that "no evidence ... indicated anyone other than Wilds was the shooter." Id. at 439, 756 S.E.2d at 390. "The only evidence presented was that Wilds was the shooter, and [his companions] joined in the robbery after Wilds pulled the gun on Rumph." Id. The Court recognized that the jury may have had doubts about the companions' testimony; however, those doubts failed to support a charge on the alternate theory of liability, such as accomplice liability. An alternative theory "'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" Id. (quoting Barber, 393 S.C. at 236, 712 S.E.2d at 438). The Court found prejudice to Wilds "[b]ecause the instruction was given in response to the jury's question regarding whether a conviction meant it found Wilds actually pulled the trigger, and because the jury returned guilty verdicts after receiving the instruction." Id. at 439, 756 S.E.2d at 390-391.

South Carolina jurisprudence in this area is clear – and the Court of Appeals recognized this legal concept in arriving at its conclusion. Accomplice liability is an alternative theory of liability in criminal cases, and in order to instruct the jury on such an alternative theory, there must be evidence in the record to support the instruction. Utilizing accomplice liability theory, a jury may convict a person for the conduct of his confederate where the prosecution can prove beyond a reasonable doubt the person joined with another to accomplish an illegal purpose and that the confederate's conduct was incidental to the common purpose of the two.

Jury instruction during deliberations

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), 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.2d 372 (1991). Manning defined a reasonable doubt as 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. In closing argument, counsel for Jones focused on the evidence tending to exonerate him and inculpate another person. Id. Additionally, Jones told the jury that the judge would define a reasonable doubt as kind of doubt that would cause a reasonable person to hesitate to act. Jones then argued the evidence would cause the jury to hesitate. He crafted an entire section of his argument around the jury hesitating. He asked the jury to listen carefully to the judge's instruction about reasonable doubt. Id. at 576-577, 541 S.E.2d at 820-821. Following the closing argument, the judge decided not to charge the "hesitate to act" language. Id. at 577, 541 S.E.2d at 821.

This Court found the judge's failure to give the "hesitate to act" instruction was fundamentally unfair in light of Jones' reasonable reliance on the judge's representation as to what he would instruct the jury. Id. at 578, 541 S.E.2d at 821. This Court explained that the judge's "after the fact decision" to remove the "hesitate to act" language from his charge, after Jones told the jury what the judge would charge them, diminished the defense's credibility in the eyes of the jury. Id.; see also United States v. Oliver, 766 F.2d 252, 254 (6th Cir. 1985)(finding prejudicial error in a judge's decision to reinstruct a jury despite a judge's offer to the attorneys to reargue where defense counsel "expressly tailored his closing argument" on the government's failure to prove an element listed in the original charge); United States v. Kostoff, 585 F.2d 378 (9th Cir. 1978)(finding prejudicial error in the judge's instructions to the jury that were materially different from those proposed where counsel relied on the judge's initial agreement to give the proposed instructions); People v. Clark, 556 N.W.2d 820, 826-827 (Mich. 1996)(holding the judge's decision "at the eleventh hour" to change the jury instructions regarding the requisite knowledge required by the offence prejudiced the defendant where the defense's closing argument "was tailored to refute" that

element); Cruz v. State, 963 A.2d 1184, 1192 (Md. 2009)(holding additional closing arguments could not cure the error of the judge giving a supplemental jury instruction on a new theory of liability); Murray v. State, 857 S.W.2d 806, 811 (Tex. Crim. App. 1993)(finding counsel ineffective where counsel presented a legally incorrect argument, which was initially allowed by the trial court, but after the jury began deliberating, the judge supplemented the charge in a way to defeat the defense); Moore v. State, 848 S.W.2d 920, 922-923 (Tex. Crim. App. 1993)(holding supplemental jury charge, which discussed "law of parties" for the first time, was prejudicial error that could not be cured by the offer to permit additional argument).

In State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000), this Court found the trial judge's refusal to give a self-defense charge in the initial instructions to the jury was erroneous where there was sufficient evidence at trial entitling Day to the instruction. Further, this Court found the judge's self-defense instruction, which was in response to a jury question asking about the law of self-defense, was inadequate "because defense counsel was unable to present a complete defense during her summation." Id. at 418, 535 S.E.2d at 435. According to this Court, "[p]roviding an 'after-the-fact' instruction was inadequate because the prejudice to Day was incurable" where "Day was unable to adequately assert a complete defense during the trial, and the jury was left with the impression that the trial judge did not think the law of self-defense was applicable to the case." Id. at 419, 535 S.E.2d at 436.

Analysis

There can be no question that Respondent relied upon the trial judge's assurance during the charge conference that he was not going to instruct the jury concerning the alternative theory of the "hand of one." Respondent crafted his closing argument using the theory that he was not present at Georgetown Apartments on the night of the shooting. He completely denied being present at the

scene. Had Respondent known the judge would charge the jury concerning an alternative theory of guilty – the hand of one – Respondent could have crafted his closing argument to incorporate and, more importantly, dispel the alternative theory. Respondent relied upon the judge's assurance during the charge conference that the evidence did not support the alternative theory. The judge was unequivocal during the charge conference that the evidence simply did not support the hand of one charge and as such, he refused to give it. His lack of equivocation assured Respondent that he need not address the hand of one or mere presence in his closing argument to the jury. Respondent's reliance on the trial judge's assurance in the crafting of his closing argument and the judge's subsequent reversal of his earlier ruling and charging of the hand of one to the jury rendered the trial fundamentally unfair.

Petitioner disparagingly argued "that defense counsel did not craft his closing argument on the trial judge's assurance that an accomplice liability instruction would not be given." Cert. at 21. Disdainfully, Petitioner accused defense counsel of being disingenuous when he explained he would have to "shift theories" in order to address the alternative theory of liability given in the supplemental instructions, harming his credibility with the jury. Cert. at 22. On the contrary, defense counsel, an experienced and skilled defense lawyer, could have crafted a closing argument to dispel the theory of "hand of one," and may have chosen to argue "mere presence," instead of denying Respondent's presence at all. However, by arguing initially, quite vigorously, that Respondent was not presence at the scene, any additional argument attempting to characterize Respondent as "merely present" during the murder would have ruined defense counsel's credibility with the jury.

Not only was the supplemental instruction damaging to Respondent due to trial counsel's reliance on the judge's prior determination that the instruction was unsupported by the evidence, but

the instruction permitted the jury to consider an alternative theory of liability not previously presented or discussed by the parties. As the trial judge noted, there was no evidence of an agreed upon criminal enterprise involving Respondent prior to the shooting. In fact, the evidence presented was that either Respondent was guilty as a principal or not at all – either Respondent and an unknown passenger arrived at the apartment complex, walked in the direction where the shooting occurred, Respondent shot Smalls due to a debt, then Respondent and the passenger ran back to Respondent's car, or Respondent was not involved at all.

In his petition for writ of certiorari, Petitioner argued for the first time that accomplice liability is *not* "an alternative theory of liability." Cert. at 17. According to Petitioner, this Court's characterization of accomplice liability as an alternative theory of liability in Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) was *dicta*. Cert. at 17 n. 13. Quoting an 1867 case, Petitioner maintained that under the common law, accomplice liability was not considered an alternative theory of liability because the common law provided for no distinction regarding "[a]ll who are present concurring in the murder" as all are "treated as principles." Cert. at 17. Petitioner is correct that the common law provided for no distinction for individuals who were accomplices to a murder – this is the genesis of accomplice liability, an alternative theory of liability. It is an alternative theory of liability because it permits societies to hold accomplices to the same liability as principles. At the Court of Appeals – in both the brief and petition for rehearing, Petitioner seemed to agree that accomplice liability was an alternative theory of liability as the quoted language from Barber, supra, expressed this notion and no umbrage was taken at that point. See FBOR at 48; Reh Pet. at 7-8.

Petitioner's argument that the judge would have violated the state constitutional prohibition against trial judges charging on matters of fact by responding to the jury's question

by stating, "[Y]ou have all the evidence and you have all of the law" as defense counsel requested is meritless. See Cert. at 15. The statement in no way offends the state constitution as it treads carefully away from any comment on the facts. Rather, the judge's response to the jury's question was a comment on the facts. While the judge's response appears to be a mere recitation of law, when read in conjunction with the jury's question, the "comment on the facts" is apparent. Previously, the judge had instructed the jury only as to one theory of liability. However, when the jury questioned whether Respondent were the shooter, the judge presented them with an alternative theory of liability – one that would permit conviction of a non-triggerman. Presenting an alternative theory of liability in response to the jury's question was a comment on the facts. Furthermore, Respondent's suggested response was not "both legally and factually misleading" as characterized by Petitioner. See Cert. at 15. Rather, based on the evidence presented, and discussed more fully in the brief presented at the Court of Appeals where this issue was squarely presented, a jury instruction on the alternative theory of liability – accomplice liability – was not warranted.

The Court of Appeals correctly held that Respondent would have had to "shift theories" and lose credibility with the jury had he taken advantage of the trial judge's offer to argue his closing again to the jury on the issue of "hand of one." The Court of Appeals correctly held that Respondent reasonably relied upon the trial judge's assurance that accomplice liability would not be instructed to the jury in crafting his closing argument. Further, the Court of Appeals adhered to prior precedent issued by this Court, Jones, supra, in rendering its decision. Not only did the Court of Appeals consider persuasive authority from other jurisdictions, but the Court used those opinions coupled with existing South Carolina law to deliver a well-reasoned unanimous decision. The state has not offered, and cannot offer, any special and important reason for this Court to grant certiorari

in this case. See Rule 242(b), SCACR. Therefore, this Court should deny the petition for writ of certiorari.

CONCLUSION

Respondent respectfully requests this Court deny the petition for writ of certiorari. In the event this Court grants the petition for writ of certiorari, Respondent respectfully requests the opportunity to brief fully the issue presented. Further, Respondent requests that if this Court were to reverse the Court of Appeals' ruling, then his case must be remanded to the Court of Appeals for a decision on the remaining appellate issues, which were not ruled upon previously. See State v. Grovenstein, 335 S.C. 347, 354 n. 6, 517 S.E.2d 216, 219 n. 6 (1999)(remanding to the Court of Appeals for consideration of remaining issues on appeal).

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 28th day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
R. Markley Dennis, Circuit Court Judge

THE STATE,

PETITIONER,

V.

DEVIN JOHNSON,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon William Edgar Salter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Devin Johnson, #359432, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of March, 2017.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 28th day of March, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.