STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

THE STATE,

Petitioner,

vs.

DEVIN JOHNSON,

Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

ARGUMENT IN REPLY

I. This Court should grant certiorari because the Court of Appeals' conclusion that the trial judge erroneously gave the supplemental instruction after the jury had begun deliberating contravenes this Court's contrary precedent holding that the trial judge can correct an erroneous instruction or the failure to include instructions supported by the evidence, either in response to a jury question or *sua sponte*.

Johnson argues that "the Court of Appeals remained faithful to binding appellate precedent" and that the State "has not offered, and cannot offer, any special and important reason for this Court to grant certiorari." Return p. 6. However, the State submits that this Court should grant certiorari because the Court of Appeals' conclusion that the trial judge erroneously gave the supplemental instruction after the jury had begun deliberating contravenes this Court's contrary precedent holding that the trial judge can correct an erroneous instruction or the failure to include instructions supported by the evidence, either in response to a jury question or *sua sponte*. *See* Rule 242b)(3), SCACR.

The State's position has been that the trial judge's actions were in accordance with state law, since the evidence supported a charge on accomplice liability and 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).

Although the State did not locate this following authority until recently and it was not argued below, the State would point out that the Court of Appeals contravened several of this

Court's prior decisions by concluding 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. Specifically, in *Harrell v. Columbia Electric St. Ry, Light & Power Co.*, 89 S.C. 97, 71 S.E. 97 (1911), the trial judge discovered that he had inadvertently failed to instruct the jury on punitive damages after the jury had been charged and had retired to deliberate. He then called the jury back into the courtroom and gave a punitive damages instruction. On appeal, the appellant challenged this procedure. *Id.* at 98, 71 S.E. at 360. This Court found that there was no error. "On the contrary, it is a proper exercise of the judicial function to cure an omission to give proper instruction, as well as to withdraw an improper instruction, as was done in *State v. Lightsey*, 43 S.C. 114, 20 S.E. 975 [(1895)]." *Harrell*, 89 S.C. at 98-99, 71 S.E. at 360.[1] Simarly, in *State v. Holmes*, 171 S.C. 8, 171 S.E. 440 (1933), the trial judge's original instructions on accomplice liability were erroneous, but he let these instructions stand over objection. After the jury began deliberating, defense counsel presented additional authority to the trial judge demonstrated that the original charge was erroneous. "The jury, desiring to have some of the testimony in the case read to them, were brought into the courtroom." After the testimony had been read to them, the trial judge correctly

[1] In *Lightsey*, the appellant's third exception asserted that the trial erred by " 'erred in recalling the jury from their room after they had retired to deliberate upon the case, and recharging them as to the law of the case, there being no request for such action on the part of the jury.' " 43 S.C. at ___, 20 S.E. at 975. This Court found that there was no error and explained that "[t]he trial of a cause is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal, with proper instructions from the court to disregard it." *Id.* at ___, 20 S.E. at 976.

charged the jury on accomplice liability. *Id.* at 10-11, 171 S.E. at 441.

On appeal, this Court found that while the main charge was wrong, the second instructions "were entirely sufficient to clear up the error committed in the main charge, and they were in accord with the law as has been seen from our references to the cited cases." *Id.* at 14, 171 S.E. at 442. The Court added that "It was not only his right, but it was the duty of the trial judge, when he discovered that he had committed an error in his instructions, to make the necessary correction." *Id.* at 14, 171 S.E. at 442.

The Court of Appeals' decision is also contrary to *Lumpkin v. Mankin*, 136 S.C. 506, 134 S.E. 503 (1926). In *Lumpkin*, the trial judge initially granted the defendant's motion for a directed verdict at the conclusion of all evidence. Following closing arguments by the parties, the trial judge was remined of a statute providing, in pertinent part, that " '[n]o person shall operate any vehicle on the public roads of this state at a rate of speed greater than is reasonable and proper at the time and place ....' " He then submitted both actual and punative damages to the jury. *Id.* at ___, 134 S.E. at 504.

On appeal, the defendant argued both that the trial judge erroneously submitted punitive damages to the jury and that the timing of the trial judge's action deprived the defendant's attorneys "of the right to argue punitive damages to the jury. *Id.* As to the first exception, this Court found that "the jury should have passed upon the question of punitive damages." *Id.* at ___, 134 S.E. at 504. The Court rejected the second exception as follows:

> *After the trial judge decided that he had erred in his first holding, and decided to submit to the jury the question of punitive damages, there was no request on the part of counsel for defendant to be allowed to make further argument to the jury.* It appears also that attorneys for the plaintiff in their arguments to the jury did not touch upon the question of punitive damages. Usually the last argument to the jury, especially when punitive damages is discussed, is considered a great advantage to the plaintiff; and ordinarily we would think that it was in defendant's

> favor if none of the attorneys, who made speeches, referred to the right of a party to punitive damages. It appears, too, that there was no withdrawal from the jury as to the punitive damages claimed by the defendant. *No doubt the judge would have granted request for further argument, if such request had been made.*
>
> In *State v. Ballew*, 83 S. C. 82, 63 S. E. 688, 64 S. E. 1019, 18 Ann. Cas. 569 [(1909)], it was held that, generally, a party cannot take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment in the result.
>
> We do not think there was error on the part of the trial judge in changing his ruling as to the matter of directing a verdict in favor of the defendant on the ground of punitive damages. To the contrary, *when a judge has overlooked a statute, or act of the General Assembly, and during the trial he discovers his error, we think it is proper for him to change his holding.*

Id. at ___, 134 S.E. at 504. (Emphasis added).[2]

Here, the judge recognized that he had erroneously failed to instruct the jury on accomplice liability because the record supported the requested charge. Before giving the supplemental charge, he offered to permit Johnson to have further argument but Johnson declined. Because the trial judge's actions were in accordance with this Court's precedent and

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[2] *State v. Day*, 341 S.C. 410, 418-19, 535 S.E.2d 434, 435-36 (2000) is thus inapposite because it, unlike the trial judge here, it does not appear that the trial judge offered to permit additional argument by Day's counsel after the supplemental instruction was given, even though *Lumpkin*, 136 S.C. at ___, 134 S.E. at 504, supports the trial judge's authority to do so.

Further, Johnson asserts in footnote 5 of his Return that he was not required to submit authority supporting his objection when the trial judge 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.* Yet, the above authority clearly supports the trial judge's ruling and it was incumbent upon Johnson to provide authority to the contrary. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (stating imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments, and noting that the purpose of an appeal is to determine whether the trial court erroneously acted or failed to act, and when appellant's contentions are not presented or passed upon by the trial court, such contentions will not be considered on appeal).

the Court of Appeals' decision below is contrary to this Court's precedent, this Court should grant certiorari, vacate the Court of Appeals' decision and reinstate the judgment of conviction. Otherwise, an injustice will go unremedied because Johnson was not entitled to relief.[3]

2. Johnson is wrong in asserting that accomplice liability is an "alternative theory of liability" and errs by relying on the Court of Appeals' prior decision in *Wilds v. State*, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014).

Implicit in the Court of Appeal's reversal is a finding that accomplice liability is an "alternative theory of liability," as the analogy to this Court's decision in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) makes clear. *See State v. Johnson*, 418 S.C. 587, 592-94, 795 S.E.2d at 174-75 (2016). Johnson continues to advance the same argument. The State submits that this assertion, which is based on the Court of Appeals' prior decision in *Wilds v. State*, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014), is legally erroneous.[4]

In *Wilds*, the Court of Appeals relied upon *dicta* from this Court's decision in *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011), which implied that a prosecution of a defendant under principles of accomplice liability was an "alternate theory of liability." *See Wilds*, 407 S.C. at 438-39, 450 SE2d at 390.[5] The Court then found that appellate counsel was

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[3] See *Berger v. United St*ates, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935) ("The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.' ").

[4] The State discusses *Jones*, its relation to this case, and how this case is distinguishable on pp. 18-22 of the Petition. The State did not concede in the Initial Brief of Respondent that accomplice liability is an inconsistent theory but argued that the facts in the record had supported the charge when requested by the prosecutor.

[5] 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*, Respondent would point out that S.C. Code Ann. § 14-1-50 (2003) provides that the common law of England applies in this state where it is

ineffective in failing to raise a challenge to the trial judge's accomplice liability instruction on appeal because there was no dispute that the defendant was the trigger man in the murder and armed robbery. *Wilds*, 407 S.C. at 439-40, 450 SE2d at 390-91. However, the *dicta* in *Barber* relied upon in *Wilds* did not support the conclusion reached in *Wilds*.

The doctrine of accomplice liability can be directly traced to the early common law distinction between principles in the first degree and principles in the second degree. A person is a principle in the first degree if they are the actor or absolute perpetrator of the crime while a principle in the second degree are those who are present, aiding and abetting the *actus reus*. 4 William Blackstone, *Commentaries on the Laws of England* 34. The law has held that those persons who are present at a crime aiding and abetting are as equally guilty as principles since at least the time of King Henry IV. *Id.*[6] In 1809, the Court explained that:

> It is very clear that *a person aiding and assisting another in committing a murder, is to be regarded as a principal*, and that he may be indicted and punished, although the principal who really gave the mortal blow, or was otherwise the immediate instrument by which the murder was effected, had not been taken. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his own; and all are equally criminal. Fost. 351. *The distinction between principals in the first and second degree* has been exploded. It *is now a distinction without a*

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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 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.*

[6] King Henry IV of England reigned 1399-1413.

difference.

State v. Fley, 2 Brev. 338, 345, 1809 WL 338, 6 (S.C.Const. App. 1809) (Emphasis added).[7] *Accord* 1 Bishop, *Commentaries* 470. More recently, the Court held that "[i]t is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). Because South Carolina law does not recognize any distinction between liability as a principal in the first degree and a principal in the second degree, and because an accused indicted as a principal may be convicted under accomplice principles, *id.*, the submission of a jury charge on accomplice liability necessarily and logically cannot create an alternative theory of liability. Yet assuming that the language in *Barber* is not *dicta*[8] and further assuming that *Wilds* was correctly decided, Appellant's reliance thereon is still misplaced in light of the facts adduced at trial. Here, like the conflicting evidence in *Barber*, 393 S.C. at 236-37, 712 S.E.2d at 438-39, and unlike *Wilds*, the State did not have proof as to whether Johnson or his accomplice fired the fatal shots, only that one of them did so.

3. The record refutes Johnson's claim that a decision on the propriety of the trial judge's decision to instruct the jury on accomplice liability because the evidence supported the

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[7] *See also State v. Anthony*, 12 S.C.L. (1 McCord) 285, 287-88 (S.C.Const. App. 1821); *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); *State v. Hunter,* 79 S.C. 73, 73, 60 S.E. 240, 240-41 (1908) (where the defense disputed the State's witness who claimed defendant fired the fatal shot, the Supreme Court affirmed the conviction because the identity of the shooter was irrelevant and that the defendant was properly convicted as a principle since he was an aider and abettor).

[8] Of course, if Respondent is wrong and the language in *Barber* relied upon in *Wilds* was not *dicta*, then, *Barber* also contravenes this well settled South Carolina law.

charge is not properly before this Court.

In footnote 8 of his Return, Johnson contends that the issue of whether an accomplice liability charge should have been given is not preserved for this Court's review. His claim, however, is refuted by the record. The State requested an accomplice liability instruction at the charge conference. The trial judge initially denied this request-to-charge because he improperly looked solely at the State's theory of the case. *R. pp. 461-65.* The trial judge only recognized that he had utilized the wrong legal standard, see *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007) ("The law to be charged must be determined from the evidence presented at trial"), 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 he should have given an accomplice liability charge 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. State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70 (Ct.App. 2010). 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.*

Thus, the trial judge found that the evidence supported this instruction and the Court of Appeals did not reverse based upon the absence of evidence to support a charge on accomplice liability. Thus, the law of the case is that an accomplice liability charge is supported by the evidence and that decision is properly before this Court.

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. Alternatively, the State would ask the Court to grant certiorari, vacate the Coourt of Appeals' decision and remand the case for further proceedings before it in light of this Court's Opinions in *Harrell v. Columbia Electric St. Ry, Light & Power Co.*, 89 S.C. 97, 71 S.E. 97 (1911), *State v. Lightsey*, 43 S.C. 114, 20 S.E. 975 (1895), *State v. Holmes*, 171 S.C. 8, 171 S.E. 440 (1933), and *Lumpkin v. Mankin*, 136 S.C. 506, 134 S.E. 503 (1926).

Respectfully submitted,

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April 6, 2017.

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CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Petitioner, certify that I have served the within Reply to Return to Petition for Writ of Certiorari 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 6th day of April, 2017.

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