South Carolina Law Review

Volume 50
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 5

Summer 1999

Criminal Law

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Recommended Citation

Susannah Rawl Cole, Criminal Law, 50 S. C. L. Rev. 901 (1999).

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SEWING UP THE LOOPHOLE IN ACCESSORY AFTER THE FACT CRIMES

I. INTRODUCTION

In January of 1998, the South Carolina Supreme Court suggested that Russell Collins would be the last to slip through a small loophole created by South Carolina common law in the charge of accessory after the fact.[1] Eight years earlier on July 25, 1990, Collins and his friend Keith Houston stopped at a convenience store ostensibly to buy snack food for work the following morning.[2] Houston pulled a gun on the clerk, demanded money, and shot him.[3] Collins first told the police that he and his friend heard shots when they arrived at the store and saw a man with a gun running away.[4] He said that after they found the injured clerk inside, Collins ran next door to his uncle's house to get help.[5]

Later, Collins admitted that Houston was the gunman, but maintained that he had no idea his friend was planning to rob the store or shoot the clerk.[6] He claimed he had not collaborated in the commission of the crime, but initially covered for his friend because Houston had threatened, "'[I]f you don't, then you gone go to jail too, cause you know they gone say you helped me do it. I'm a say you helped me do it.'"[7]

At the end of the State's case, the trial court granted a directed verdict for Collins on the charges of attempted armed robbery, murder, and possession of a weapon during a violent crime because the only evidence of his guilt was his physical presence in the store during the shooting.[8] However, the jury sentenced Collins to fifteen years on the accessory after the fact charge.[9] On appeal Collins argued that he could not be convicted as an accessory after the fact because he was present at the scene of the crime.[10] The South Carolina Supreme Court agreed with Collins based on several earlier decisions which held that absence at the time of the crime's commission was an essential component of the charge of accessory after the fact.[11] The court then overturned

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1. State v. Collins, 329 S.C. 23, 28, 495 S.E.2d 202, 205 (1998).
2. *Id.* at 25, 495 S.E.2d at 203.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 25, 495 S.E.2d at 204.
8. *Id.* Traditionally, mere presence at the commission of the crime is insufficient to support accomplice liability. *See infra* note 86.
9. *Collins*, 329 S.C. at 25, 495 S.E.2d at 204.
10. *Id.*
11. *See id.* at 26, 495 S.E.2d at 204.

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these cases, ruling that in the future a person's presence at the crime scene would not necessarily preclude him from being an accessory after the fact.[12] By removing "absence from the crime scene" as an element of the accessory after the fact offense, the court repaired its earlier unreasonable assumption that a person present at the commission of the crime must either be guilty as a principal or not be guilty at all.

Prior to *State v. Collins*, South Carolina's version of accessory after the fact illogically excluded from criminal liability persons who had certainly aided the felon after he had completed the offense, but who were "present" at the scene of the crime.[13] *Collins* removed this requirement and properly allowed the charge to include those truly guilty as an accessory, regardless of their presence at the commission of the crime.[14]

Part II of this Note explores the background of accessory after the fact and how the offense evolved out of accomplice crime. Part III examines the rise and fall of the common-law absence requirement by comparing significant South Carolina cases. Finally, Part IV discusses the consequences of removing the absence requirement from the common law.

II. BACKGROUND

The ramifications of the *Collins* decision are more easily understood by examining the role of the accessory after the fact charge in the broader framework of accomplice crime. The fine distinction between the accessory after the fact and other accessories or actors has confused police, juries, and judges.

A. *Accomplice Liability*

Early in common law, guilty parties to a felony crime were categorized as either principals or accessories.[15] The actor that perpetrated the crime was the principal, and all others involved were accessories. Accessories fell into three categories depending on their relationship in time and place to the crime: (1) accessories before the fact, (2) accessories at the fact, and (3) accessories

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12. *Id.* at 27-28, 495 S.E.2d at 205 (overruling State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995); State v. Whitted, 279 S.C. 260, 262 S.E.2d 388 (1983); State v. Plath, 279 S.C. 260, 284 S.E.2d 221 (1981)). However, the court reversed Russell Collins's conviction because the court claimed applying the change in common law retroactively to the time the crime was committed would result in an ex post facto or due process violation. At the time of the shooting, the earlier cases controlled. See *infra* Part III for a discussion of *Plath*, *Hudgins*, and *Whitted*. Therefore, Collins was entitled to a directed verdict. *Id.* at 28 & n.4, 495 S.E.2d at 205 & n.4.

13. *See* Plath, 277 S.C. at 139, 284 S.E.2d at 228 (finding that an accessory's absence at the time of the crime is an essential element of the offense).

14. *Collins*, 329 S.C. at 27-28, 495 S.E.2d at 205.

15. Rollin M. Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581, 581 (1941).

after the fact.[16] Later, the party labeled accessory at the fact was renamed a principal in the second degree.[17]

A principal in the first degree is one who commits the crime by his own hand, by an inanimate agency, or through an innocent party.[18] If *X* stabs *V*, then *X* is the principal in the first degree. If *X* poisons *V*'s favorite scotch and *V* dies from the poison, then, even if *X* is not present, *X* is the principal first. And suppose *X*, knowing that *P* suffers from paranoid delusions, gives *P* a gun and tells *P* that *V* is coming to kill him. If *X* then invites *V* over to visit *P*, who subsequently shoots *V*, *X* may be a principal in *V*'s murder if *P* is determined to be an innocent agent.[19] More than one person may be first-degree principals to the crime, if they all participate in the criminal act.[20] Suppose *X* and *Y* alternately stab *V*, who dies from a loss of blood. Both *X* and *Y* are principals first.

A principal in the second degree is one, actually or constructively present at the crime, who aids, counsels, commands, or encourages its commission.[21] For example, a principal second may be one who stands by with a gun while the principal first shoots one of the victims. The principal second need not be actually present at the commission of the crime if he is aiding the principal and is close enough to render assistance if needed.[22] The actor's constructive presence implicates him as long as he plays an active role in the crime, such as being either a lookout or a driver of the getaway car.[23]

An accessory before the fact is one who aids, counsels, commands, or encourages the commission of the crime, but who is not present "either actually or constructively at the moment of perpetration."[24] Suppose *X* recruits *A* and *B* to rob a bank and provides them with guns and masks. *X* remains at home while *A* and *B* commit the crime. *X* is an accessory before the fact.

An accessory after the fact is "one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment."[25] Suppose after *A* and *B* rob the bank, they meet *C*, who agrees to hide them in her basement until the police leave the area. Although *C* was not involved in the commission of the crime, she is now an accessory after the fact.

The common-law theory of parties to the crime is premised on the

16. *Id.*
17. *Id.*
18. JOSHUA DRESSLER, CRIMINAL LAW 790 (1994).
19. *See, e.g.*, Johnson v. State, 38 So. 182, 183 (Ala. 1905) (finding an insane person an instrumentality of a murder, not the principal).
20. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 570 (2d ed. 1986).
21. *See* DRESSLER, *supra* note 18, at 790; LAFAVE & SCOTT, *supra* note 20, at 571.
22. LAFAVE & SCOTT, *supra* note 20, at 571.
23. *See id.*
24. DRESSLER, *supra* note 18, at 790.
25. *Id.*

notion that guilt for the commission of one crime may attach to several.[26] The liability of the secondary party—the principal second or accessory before or after the fact—derives from the criminal act of the primary party.[27] This derivative liability does not mean that the secondary party's actions are the cause in fact of the crime. The primary actor acts of his own volition. Instead, the secondary party incurs liability as a legal consequence of his own actions.[28]

For a crime to occur, an actor must complete the bad act with the requisite bad state of mind.[29] Suppose *X* fires a gun and kills *V*. The firing of the gun is the bad act. If *X* fired the gun with the intent to kill *V*, then *X* had the requisite bad state of mind, and he may be charged with murder. But if V inadvertently jumped into *X*'s line of fire, and *X* killed him by accident, then *X* did not commit murder. Conversely, if *X* decides he will kill *V*, but never acts on his intent, he has not committed murder. Without both the bad act and the bad state of mind, no crime exists. For example, in a bank robbery, the primary actor, or principal first, goes to the bank with the intent to steal the money (criminal state of mind) and actually takes the money from the vault (criminal act). The secondary actor, such as a lookout, goes to the bank with the intent that the principal will steal the money (criminal state of mind) and serves as a lookout to warn the principal when the police arrive (criminal act). The secondary party is not relieved from liability because he did not reach in the vault himself to grab the money. It is enough that he intended for the crime to occur, and his actions somehow contributed to its commission. Accomplice liability "functions like causation [as] it fixes blame upon a person for a result"—specifically, the unlawful acts of another.[30]

B. Accessory After the Fact Distinguishes Itself

At early English common law, the penalty for all felony crimes was execution, and under the notion of accomplice liability, all parties to the crime were equally guilty of the same primary substantive offense.[31] When statutory additions increased the number of crimes classified as felonies, general dissatisfaction with the application of the death penalty to so many resulted in the creation of several legal devices which made conviction difficult, even in the face of overwhelming guilt.[32] The technicalities imposed strict requirements on the jurisdiction of the courts, the pleading of the parties, the trial, and the

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26. *See* Perkins, *supra* note 15, at 586.

27. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 324, 337 (1985).

28. *Id.* This derivative liability, however, should not be confused with vicarious liability, which depends on the relationship between the two parties. Here, the secondary party performs some action consistent with the primary actor's intent. *Id.*

29. *Id.* at 346.

30. *Id.* at 356.

31. *See* Perkins, *supra* note 15, at 613.

32. *Id.* at 607.

degree of guilt.[33]

When most felonies were removed from the status of capital crimes, the underlying purpose for the technical distinctions in procedure became obsolete.[34] Most states legislated some form of change to common-law accomplice liability.[35] As a result, some jurisdictions contain remnants of the common-law hindrances to conviction of accessories.[36] Perhaps the role most affected by statutory modification was the accessory after the fact. Even in early English common law, the harm caused by the accessory after the fact was considered less threatening than the harm caused by the principals or the accessories before the fact.[37] Before benefit of clergy was abolished in England, it was afforded to accessories after the fact in circumstances in which other parties to the crime were denied the privilege.[38] The old common-law notion that the liability of the accessory after the fact attached by tainting him with the crime of the primary actor gave way to the modern idea that the accessory after the fact is guilty of a separate substantive offense.[39] Because an accessory after the fact becomes involved in the crime only after its commission and has had no role in causing the felony, his criminal intent is to impede justice.[40]

C. *Accomplice Liability and Accessory After the Fact in South Carolina*

The development of accomplice liability in South Carolina was not unusual. Principals first and second were defined by their traditional common-law roles, but South Carolina courts placed little importance on the distinction between the two in terms of pleading, procedure, and sentencing.[41] Presence at the scene is the crucial distinction between principals and accessories before the fact. An accessory before the fact aids and abets the principal, but is not actually or constructively present at the commission of the crime.[42] Although the South Carolina Code groups the accomplice and principal roles together for

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33. *Id.* For example, the accessory could be tried only in the jurisdiction where the accessory acts took place, not where the crime occurred. *See id.* at 609-10. Also, an actor could not be charged with the felony as a principal if evidence suggested he was an accessory, and vice versa. *Id.* at 610.

34. *Id.* at 615.

35. *Id.*

36. *See id.*

37. *See id.* at 621-22.

38. *Id.*

39. *See* ROLLIN M. PERKINS & RONALD W. BOYCE, CRIMINAL LAW 728 (3d ed. 1982).

40. *Id.* at 765.

41. WILLIAM SHEPARD MCANINCH & W. GASTON FAIREY, THE CRIMINAL LAW OF SOUTH CAROLINA 362 (3d ed. 1996). However, a notable exception to this general rule is the commission of vehicular crimes. The driver must be distinguished from the aider and abetter on separate theories of culpability. *See id.* at 363.

42. *See id.*

the sake of punishment,[43] South Carolina retains some of the common-law peculiarities that maintain barriers to convictions in accomplice crimes. Some precedents suggest that should the State convict a defendant indicted as a principal when the evidence tends to show guilt as an accessory before the fact, the conviction is illegal.[44] However, should the State withdraw a prosecution for murder, a later accessory-before-the-fact charge would not be precluded.[45]

In South Carolina, an accessory after the fact is one who (1) harbors and assists the principal felon (2) after the felony has been completed (3) knowing the felon has committed the offense.[46] As in other jurisdictions, South Carolina eventually recognized that the accessory after the fact was guilty of a separate substantive offense than that of the original felony.[47] The Code of Laws of South Carolina, although silent on the definition of accessory after the fact, does prescribe this type of accessory's punishment "based upon the classification below the punishment provided for the principal offense."[48] South Carolina refused to assign as much blame to the accessory after the fact as to the other parties to the crime. If distinguishing between the accessory before the fact and the principals was important in the common law even when the punishment was the same, then distinguishing between the common-law

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43. The South Carolina Code provides:

> A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon.

S.C. CODE ANN. § 16-1-40 (Law. Co-op. Supp. 1998).

44. *See, e.g.*, State v. Sheriff, 118 S.C. 327, 327-28, 110 S.E. 807, 807 (1922).

45. *See* State v. Jennings, 158 S.C. 422, 425, 155 S.E. 621, 622 (1930). However, this case seems to be overruled by S.C. CODE ANN. § 16-1-40 (Law. Co-op. Supp. 1998), which states that accessories before the fact and all principals are punished in the manner prescribed for the principal. *See supra* note 43. But later cases, decided after the enactment of the statute and its similar predecessor, are also inconsistent with the notion that all parties to the crime, with the exception of accessory after the fact, are guilty of the same substantive offense. In *State v. Cox*, 290 S.C. 489, 351 S.E.2d 570 (1986), the South Carolina Supreme Court reversed the defendant's conviction as an accessory before and after the fact to murder because the trial judge incorrectly instructed the jury that the principal must be found guilty before the accessory could be convicted. *Id.* at 492-93, 351 S.E.2d at 572. The court did not comment on the conviction of one defendant as both accessory before and accessory after the fact even though conviction of both offenses is contrary to the rationale for accomplice liability. An accessory before the fact is guilty of murder because he had the requisite criminal intent for the offense (an intent that the victim die) and aided the principal in accomplishing that objective. *See supra* note 29 and accompanying text. The accessory before the fact is thus equivalent to the principal. To see the accessory before the fact also as an accessory after the fact leads to the illogical position that a murderer can be guilty of aiding himself to escape detention. Carried to its logical conclusion, this would mean that all criminals who attempted to avoid detection would be guilty as accessories after the fact in addition to their guilt for the underlying offense.

46. *See* State v. Nicholson, 221 S.C. 399, 405, 70 S.E.2d 632, 634 (1952).

47. *See* MCANINCH & FAIREY, *supra* note 41, at 369.

48. S.C. CODE ANN. § 16-1-55.

accessory after the fact and the other parties was critical because even the legislature intended that these actors be removed from accomplice liability.

In South Carolina, accessory after the fact now has more in common with the offenses of misprison of felony and compounding crime.[49] The focus in these offenses is not on the commission of the original crime, but on another's actions after, and in response to, that event. An actor is guilty of the common-law misdemeanor of misprison of felony if he criminally neglects to prevent the felony from being committed or if afterwards he fails to bring the felon to justice, but is not so involved as to make him an accessory before or after the fact.[50] Suppose *X* is an eyewitness to a bank robbery. When the police arrive, he quickly leaves the scene. On independent information the police learn he was present and question him. *X* denies being at the scene and refuses to provide any information to the police that might help identify the perpetrators. Later *X* admits to being at the scene and witnessing the robbery, but no evidence suggests he is in any way involved in the crime. *X* may be guilty of misprison of felony.[51] Although there are no reported cases in South Carolina, the common law also recognizes the offense of compounding crime, which is the agreement, for consideration received, not to prosecute or inform on one who has committed a crime.[52]

The accessory after the fact is a unique criminal actor whose role evolved out of the already complicated notion of accomplice liability and into the less morally reprehensible field (as measured by penalty) of obstruction-of-justice crimes. Although in theory the accessory after the fact is far removed from the original parties to the crime, in reality the distinctions are often confused and misinterpreted. The true distinction between the accomplice and the accessory after the fact is having the intention to aid the commission of the crime—accomplice—versus having no intent to aid the crime and providing no assistance in its commission, but only becoming involved after the social harm has taken place—accessory after the fact. The only difference in the label of the crimes of accessory before the fact and accessory after the fact is one preposition, implying superficially only a temporal distinction between the elements. If the crucial distinction between the accessory before the fact and the principals first and second is the element of presence at the commission of the crime, then that element of presence might be easily, but mistakenly, transferred to the crime of accessory after the fact. These fine distinctions in terminology, combined with an inconsistent eradication of procedural complications, created a likely atmosphere for the *Collins* loophole to emerge.

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49. *See* MCANINCH & FAIREY, *supra* note 41, at 370.

50. *Id.* (quoting State v. Carson, 274 S.C. 316, 318, 262 S.E.2d 918, 920 (1980)).

51. *See Carson*, 274 S.C. at 317, 262 S.E.2d at 919.

52. MCANINCH & FAIREY, *supra* note 41, at 370. "Agreements to . . . stifle public prosecutions are contrary to public policy." *Id.* Of course, some statutes authorize practices such as restitution in exchange for the dismissal of charges, abandoning public policy for practicality and judicial economy. *See generally* S.C. CODE ANN. § 16-11-615 (Law. Co-op. Supp. 1998) (authorizing restitution for the unlawful destruction of timber).

III. DEVELOPMENT THROUGH THE COMMON LAW

Collins's appeal forced the South Carolina Supreme Court to consider how the elements of the criminal charge of accessory after the fact had evolved to the case before them. Citing a foundation in case law dating back to the 1950s, the court began with the historically basic elements of the crime: (1) the felony is complete, (2) the accused knows the principal committed the felony, and (3) the accused harbors or assists the principal.[53] However, the court cited three cases in which the additional requirement that the accused be absent from the commission of the crime made its way into the common law.[54]

A. State v. Plath

The facts of *State v. Plath*[55] are quite "sordid."[56] Cindy Sheets, girlfriend of the accused John Plath, and a juvenile female, girlfriend of the accused John Arnold, testified in exchange for immunity about the kidnapping and murder of Betty Adkins.[57] According to the two girls, all four were present when they picked up Adkins while she was hitchhiking.[58] They took her to a wooded area near a dump, forced her to perform sexual acts with Plath and Sheets, stomped on her, beat her with a belt, hit her with a jagged bottle, stabbed her, and choked her with a garden hose.[59] They then left her body in the wooded area.[60] At trial Plath tried to minimize his role in the crime, but never denied his presence during its commission.[61]

On appeal Plath argued that the trial judge should have instructed the jury on the law of accessory after the fact.[62] The supreme court cited the three elements of *Nicholson* and further added that "[t]he accessory's absence at the time the crime was actually committed is necessarily implied from the above definition and is an essential element of the offense."[63] In support of this expansion, the court cited *Corpus Juris Secundum* and *American*

53. State v. Collins, 329 S.C. 23, 25-26, 495 S.E.2d 202, 204 (1998) (citing State v. Nicholson, 221 S.C. 399, 405, 70 S.E.2d 632, 634 (1952)). In *Nicholson*, the defendant received a stolen adding machine and passed it along to one of the other defendants for sale. The State had not presented any evidence that the defendant knew the machine had been stolen, and the conviction was reversed. *Nicholson*, 221 S.C. at 404-05, 70 S.E.2d 634.

54. *Collins*, 329 S.C. at 26, 495 S.E.2d at 204.

55. 277 S.C. 126, 284 S.E.2d 221 (1981).

56. *Id.* at 131, 284 S.E.2d at 224.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 139, 284 S.E.2d at 228.

63. *Id.*

Jurisprudence.[64] *Corpus Juris Secundum* states this proposition directly,[65] and *American Jurisprudence* provides that "[a]ccessories include persons who in some manner are connected with a crime, either before or after its perpetration, but who are not present at the time the crime is committed."[66] From the *Nicholson* elements and the legal-encyclopedia explanations of accessory after the fact, the court concluded that because "Plath admitted he was present at the scene of the crime, the elements of accessory after the fact were not present" and affirmed the trial judge's refusal to charge the jury.[67] The decision is unclear about whether the court erroneously equated presence with actual participation in the crime or simply declined to distinguish them in this case because Plath, never denying his involvement, only tried to minimize his role. This case would not turn on any fine distinction between mere presence and presence and participation, and the court did not clarify its position.

B. State v. Whitted

Following closely on the heels of *Plath*, the court in *State v. Whitted*[68] focused on the importance of the defendant's presence at the commission of the crime because the defendant's guilt as an accessory after the fact would preclude culpability of a greater offense.[69] Louise Whitted was indicted for murder, accessory before and after the fact to murder, and conspiracy to commit murder.[70] The trial judge refused to accept her guilty plea to the accessory-after-the-fact charge.[71] The supreme court correctly stated that in accessory-after-the-fact crimes, "the accused's involvement begins after the crime is accomplished," but presupposed this with the observation that "[o]ne element of accessory after the fact is the absence of the accused at the scene of the crime."[72] If the accused had been an accessory after the fact, then she could not also have been guilty as a principal actor in the commission of the crime. Her attorney freely admitted that had the judge permitted her to plead guilty to accessory after the fact, he would have moved for a dismissal of the murder charge.[73] The judge correctly instructed the members of the jury to consider the murder charges first and then to consider the accessory charge only if they found her not guilty of the former.[74] The judge's instructions and pretrial rulings reinforced the notion that the crimes were mutually exclusive, but

64. *Id.*
65. 22 C.J.S. *Criminal Law* § 95 (1961).
66. 40 AM. JUR. 2D *Homicide* § 28 (1968).
67. *Plath*, 277 S.C. at 139, 284 S.E.2d at 228.
68. 279 S.C. 260, 305 S.E.2d 245 (1983).
69. *Id.* at 262, 305 S.E.2d at 246-47.
70. *Id.* at 261, 305 S.E.2d at 246.
71. *Id.* at 262, 305 S.E.2d at 247.
72. *Id.* at 262, 305 S.E.2d at 246.
73. *Id.* at 262, 305 S.E.2d at 246-47.
74. *Id.* at 263, 305 S.E.2d at 247.

apparently premised the orders on the accused's presence at the crime rather than on her participation.[75]

C. State v. Hudgins

State v. Hudgins[76] involved two young men, aged seventeen and eighteen, who were stopped while driving a stolen truck with a hose dragging 250 feet behind them.[77] When Officer Chris Taylor asked the men about the hose, he was unaware the vehicle was stolen.[78] Because it was raining at the time, the officer suggested they sit in his patrol car to discuss the matter.[79] When Officer Taylor turned and began walking toward his car, one of the men shot him in the head.[80] The two men ran away and hid the gun, but were arrested a few days later.[81] Both men's statements implicated Hudgins, the seventeen year old, as the "triggerman."[82] Cheek, Hudgins' companion, pled guilty to accessory after the fact and testified for the State.[83] Hudgins later claimed he admitted to the shooting only because he was the younger of the two men and thought that "the system would be more lenient on him."[84] He was convicted of murder and larceny and sentenced to death.[85]

Hudgins argued on appeal that the trial judge erred by refusing to instruct the jury on accessory after the fact and, alternatively, mere presence.[86] Though the decision is unclear about what evidence Hudgins introduced to support his defense, his request to the judge to instruct the jury on accessory after the fact and mere presence suggests that he argued his companion was the triggerman while he stood by, unaware his friend was about to shoot Taylor. The court upheld the trial court's ruling, stating that because the "appellant admitted to being present when the murder occurred, he was not entitled to an

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75. *See id.* at 262, 305 S.E.2d at 246.
76. 319 S.C. 233, 460 S.E.2d 388 (1995).
77. *Id.* at 235, 460 S.E.2d at 389.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 236, 460 S.E.2d at 390. Mere presence is not sufficient to support accomplice liability. State v. Johnson, 291 S.C. 127, 129, 352 S.E.2d 480, 482 (1987). When a question exists as to whether a person is an accomplice, the trial court may be required to instruct the jury that one 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.'" State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996) (quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). If Hudgins testified that he was not the triggerman and provided no assistance to Cheek, there appears to be no basis to refuse his requested instruction.

instruction on accessory after the fact."[87]

An interesting aspect of this case reveals the inconsistent application of the absence requirement. The court did not object to accepting the companion's guilty plea to accessory after the fact despite his presence at the commission of the crime. The absence requirement prevented Hudgins from obtaining the requested jury instruction, but did not apply to Cheek when Cheek agreed to testify for the State that Hudgins was the one who pulled the trigger. More than two years before the *Collins* decision, if the companion had truly satisfied the *Nicholson* elements of accessory after the fact,[88] but had been present at the commission of the crime, he should have slipped through the loophole created in *Plath* as well and walked away from the charge.

D. State v. Collins

In *Collins* the court said,

> It is clear from a reading of *Plath, Hudgins,* and *Whitted* that the result in those cases was based on the fact that there was evidence adduced at trial which demonstrated *participation* in the actual commission of the substantive offense of murder. There is, however, a distinction between being present and *participating* in the crime, and being *merely present* during the commission of the crime.[89]

By way of explanation, the court cited textbook authority that suggests it is indeed possible to be present at the scene of the crime, not actively participate in its commission (mere presence), and then later aid or assist the felon.[90] The *Collins* court viewed the precedent established by *Plath*, *Whitted*, and *Hudgins* as if such a scenario had never occurred to it (although it occurred to Hudgins's companion as demonstrated through his guilty plea) and declared a "modif[ication]" of existing case law.[91]

IV. IMPACT OF THE *COLLINS* DECISION

The introduction of the absence requirement into the common law

87. *Hudgins*, 319 S.C. at 237, 460 S.E.2d at 390 (citing State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981)).
88. *See supra* note 46 and accompanying text.
89. State v. Collins, 329 S.C. 23, 26, 495 S.E. 2d 202, 204 (1998) (citations omitted).
90. *Id.* at 27, 495 S.E.2d at 204 (citing MCANINCH & FAIREY, *supra* note 41, at 368).
91. *Id.* at 26-28, 495 S.E.2d at 204-05.

after *Plath* resulted in both positive and negative consequences for a defendant charged as an accessory after the fact. The South Carolina Supreme Court did open a loophole through which one who had admittedly aided a felon after the completed offense could pass without recourse. But this seemingly pro-defendant oddity actually worked against the accused in *Plath, Whitted,* and *Hudgins*. In these cases, upon evidence showing the defendant's presence at the commission of the crime, the courts denied the defense the option of taking the accessory- after-the-fact charge to the jury. No matter how unlikely, if given the instruction, the jury might have believed the defense's version of the facts, acquitted the defendant of the substantive charge, and convicted him only of the lesser charge of accessory after the fact. In the already confusing application of accomplice liability, the absence requirement made it impossible, in some instances, to punish the defendant for his actual crime.

A. Before Collins

Prior to *Collins*, the absence requirement constrained law enforcement, in the form of state prosecutors, to choose between over-charging a *Collins* defendant as a principal first or second and not charging him at all. Accessory after the fact, even under *Plath*, was a separate substantive offense, not a lesser included one. Thus, the prosecution did not have the option of asking the jury to convict the defendant of accessory after the fact unless the defendant had actually been indicted on that charge. Even if prosecutors indicted on both of these inconsistent offenses, the absence requirement meant throwing out the accessory-after-the-fact charge (on evidence of presence) and leaving the jury with the option of finding the defendant guilty as the principal or not guilty at all. Unfortunately, neither under nor over charging is appropriate. One who knowingly aids a felon to avoid apprehension has committed a serious crime. Prior to *Collins*, if a person is guilty when he is absent from the scene, he is certainly no less culpable when he is present. Neither prosecutors nor society would feel comfortable releasing the accused because of an insignificant technicality: his physical presence at the commission of the crime. On the other hand, policy does not support convicting a man of a crime for which he is not guilty. When physical presence transforms him in the eyes of the prosecutor into a principal or accomplice, then the accused accepts more of the blame than that for which he is responsible. South Carolina statutory law takes a stand on the punishment of the accessory after the fact, mandating that he be sentenced to a lesser term than the principal.[92] When the jury is deprived of the accessory-after-the-fact instruction, the absence requirement creates problems in certain circumstances for both prosecutors and defenders who cannot assign the appropriate responsibility for the defendant's crime.

Practically, the absence requirement served another purpose: it

92. *See* S.C. CODE ANN. § 16-1-55 (Law. Co-op. Supp. 1998).

provided clarity. Obstruction-of-justice crimes, which accessory after the fact is now considered to be, are separate and distinct from accomplice liability. The physical aspect of the absence requirement clarified the definitive and moral differences between the two types of crimes. The most important audience to understand this difference is the trier of fact. If law enforcement and the judicial system can become confused and misinterpret the common-law elements of the crime, then juries could certainly struggle as well. Presence or absence at the commission of the crime is an efficient way to distinguish among accessories before the fact, principals, and accessories after the fact. If the accused is present and somehow connected to the crime, then the jury may easily believe he is guilty of the substantive charge. But if he is not present and gets involved later, then he can be guilty of only the less severe charge. The absence requirement made the distinction between obstructors and accomplices simple. Of course this "clarity" is appropriate only when all individuals present at the commission of the crime are, in fact, principals. The distinction actually obscures the truth when one merely present makes no attempt to aid and abet.

B. After Collins

The *Collins* decision effectively sealed the loophole that, in limited circumstances, precluded the conviction of a true accessory after the fact who was present at the commission of the crime. In theory the removal of the absence requirement levels the playing field. Prosecutors will no longer be forced in these circumstances to choose between watching a guilty man go free and charging him with an inappropriate crime. Moreover, those who aid and abet after the fact can expect the punishment to fit the crime.

The burden on the prosecutors to prove the accused's behavior after the fact will not change because of the *Collins* decision. The accused must still provide the requisite assistance after the commission of the crime to obstruct or hinder sufficiently the apprehension of the felon. But realistically if the defendant is present during the crime, prosecutors will more than likely still pursue a principal charge because they can usually convince the jury that a present individual was, in fact, playing some role in the commission of the crime. Although the prosecution must prove the requisite criminal act accompanied by the requisite criminal state of mind in situations like that in *Collins*, the evidence already tends to be consistent with the principal second charge. That the accused later intended to obstruct justice by aiding the felon suggests, but does not prove, that he had the requisite state of mind during the commission of the crime. His presence at the commission of the crime suggests (but again, does not necessarily prove) he committed the requisite criminal act. To sustain a principal second charge, the prosecution need show only that the accused somehow aided the principal first during the commission of the crime. Because a principal second can aid the principal first during the crime by acting as a lookout or being available to render assistance if necessary, the accused may be guilty as a principal second even if he appears to do nothing. If his

actions are not indicative of his role, then the charge turns on his state of mind at the commission of the crime. Which proposition is a jury more likely to believe about one who later aids the felon by hindering the felon's prosecution: (1) that he had no intention of aiding the principal first at the commission of the crime and was, perhaps, unaware that the crime was about to be committed; or (2) that he was present for the purpose of aiding the principal first and was actually participating in the crime? The prosecution may have little difficulty convincing the jury that a present (but true) accessory after the fact is instead a principal second. Rarely does a defendant escape responsibility for the substantive offense if he is at the scene with the perpetrators because prosecutors can usually provide some theory as to how his "presence" aided the principals.[93] If this argument fails and the evidence suggests the accused was present, but not involved in the crime, then the prosecution can ask for a jury instruction on accessory after the fact as an alternative to the substantive charge.

Practically, the court's removal of the absence requirement allows the defense and prosecution to compromise. Although accessory after the fact is not a lesser and included charge of a substantive crime—the elements are, in fact, necessarily mutually exclusive—evidentiary considerations may encourage one charged as a principal second to a crime to plea bargain down to the less severe accessory-after-the-fact offense. If the evidence suggests, but is not clear, that the accused played a role in the commission of the crime and later aided the felon, neither the prosecution nor the defense may want to go to the expense of trial on the principle charge. If the accused is a true accessory after the fact who happens to be present at the commission, the compromise leads to truth in punishment. If he is actually a principal second, then the State at least secures some form of conviction for a guilty individual.

VI. CONCLUSION

The *Collins* decision impacts a small area of criminal justice in South Carolina by giving notice to prosecutors and defenders of an opportunity to reach a right result in the charge of accessory after the fact—whether the path be through an efficient compromise or through a prolonged trial that turns on the actions of one individual during the commission of the crime. The requirement that the accused be absent from the scene of the crime was illogically introduced into the common law in the early 1980s. The absence requirement improperly relieved one actor of culpability even when all the substantive elements of his guilt were adequately proven or, more often, denied some defendants the opportunity to present the jury with an alternative to

93. Strangely, the trial court granted a directed verdict in Collins's favor on the murder charge. *Collins*, 329 S.C. at 25, 495 S.E.2d at 204. The jury was never allowed to determine whether Collins was merely present or actually played some role in the commission of the crime as an aider or abetter.

conviction of the more severe substantive crime. The *Collins* decision removes this element from the common law and levels the playing field for both the State and the defense. Now, to preserve justice, courts, prosecutors, and defenders have a greater responsibility to explain the fine distinction between accomplices and accessories after the fact to the trier of fact in *Collins*-like cases. The true elements of the charges, the actions of the accused, and his state of mind become critical now that both prosecutors and defenders have another option for explaining a defendant's presence at the commission of the crime. In reality, prosecutors may still pursue the principal charge of the substantive offense, and the defense may seek an acquittal. But when faced with a difficult case, both sides may willingly plea bargain down to accessory after the fact. At its most influential, when the truth is not always clear, the *Collins* decision to seal the loophole allows a practical means to a morally correct end.

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