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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Honorable William H. Seals, Circuit Court Judge

MAURIO DAETREL RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000508

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof?

STATEMENT

In August of 2011, the Colleton County Grand Jury indicted Petitioner, Maurio Daetrel Rivers, for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime, indictments #2011-GS-15-00549, 00550, 00551. (App. pp. 230-231). On December 12, 2012, Petitioner proceeded to jury trial before the Honorable Diane S. Goodstein. John D. Bryan represented Petitioner at trial. Steven Knight prosecuted the case. The jury found Petitioner not guilty of one count of attempted murder and not guilty of the weapon charge. The jury found Petitioner guilty of one count of attempted murder. Judge Goodstein sentenced Petitioner to thirty (30) years. (App. p. 232). A timely notice of intent to appeal was filed and the direct appeal perfected. A three-judge panel of the South Carolina Court of Appeals heard argument in the case on November 5, 2014, and on December 3, 2014, affirmed the conviction in an unpublished opinion. State v. Rivers, Op. No. 2014-UP-441 (S.C. Ct. App. Filed December 3, 2014). (App. pp. 269-270). Petitioner filed a petition for rehearing and filed a motion to relieve counsel and proceed *pro se*. The Court of Appeals granted the motion to relieve counsel and on April 16, 2015, denied the petition for rehearing. Petitioner then filed a petition for writ of certiorari with the South Carolina Supreme Court that was denied on November 19, 2015.

On June 1, 2016, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 271-284). The State filed a return on April 17, 2017. (App. pp. 285 - 290). On November 15, 2017, Petitioner filed a motion to relieve PCR counsel and an amended PCR application. (App. pp. 291-298). An evidentiary hearing was held on April 1, 2019, and April 3, 2019, before the Honorable William H. Seals, Jr.. Leslie T. Sarji represented Petitioner at the PCR hearing. Benjamin Limbaugh represented the State. In a written order signed December 21, 2019, Judge

Seals denied relief and dismissed the application. (App. pp. 411-420). On January 10, 2020, Petitioner filed a motion to alter or amend pursuant to Rule 59(e) SCRCP. (App. pp. 421-424). On January 15, 2020, PCR counsel filed a motion to alter or amend pursuant to Rule 59(e) SCRCP. (App. pp. 427-428). The State filed a return on July 21, 2020. (App. pp. 429-432). Judge Seals denied the motion on July 23, 2020. (App. pp. 425-426). A timely notice of intent to appeal was filed on August 7, 2020.

On February 22, 2021, the petition for writ of certiorari was filed with the South Carolina Supreme Court. (App. p. 433). The return was filed on June 10, 2021. (App. p. 458) The reply brief was filed on June 21, 2021. (App. p. 475). On June 29, 2021, pursuant to Rule 243(1), SCACR, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. On November 28, 2023, the South Carolina Court of Appeals denied the petition for writ of certiorari as to questions one and three but granted the petition for writ of certiorari as to question two and ordered briefing as provided by Rule 243(j), SCACR. (App. p. 489). The brief of petitioner was filed on December 14, 2023. (App. p. 490). The brief of respondent was filed on October 25, 2024. (App. p. 510). The reply brief was filed on November 7, 2024. (App. p. 541). On February 5, 2025, this Court remanded the case for a supplemental order addressing the issue of whether trial counsel was ineffective for failing to object to the trial court's accomplice liability charge as an improper comment on the facts of the case. Rivers v. State, 2025-UP-040 (Filed S.C. Ct. App. Feb. 5, 2025). (App. p. 556).

Both sides submitted proposed order to Judge Seals. In a written order signed February 23, 2025, Judge Seals again denied relief and dismissed the application finding Petitioner failed to meet his burden of establishing both deficiency and prejudice based on the trial judge's example given to the jury during the instruction on accomplice liability. (App. p. 558). A timely

notice of intent to appeal was served on March 13, 2025. This petition for writ of certiorari follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof.

Facts

The jury found Petitioner guilty of the attempted murder of Lieutenant Joseph Burnette with the Dorchester County Sheriff's Office. On July 12, 2011, at 7:00 PM Deputy Justin Eaches with the Dorchester County Sheriff's Office attempted to stop a black car on Interstate 95 for failure to use a turn signal. (App. p. 63, lines 10 – p. 64, lines 1-2). The deputy testified that he saw two black males in the car and he identified Petitioner as the driver. (App. p. 64, lines 13-25). A chase ensued and the deputy asked for assistance from Lt. Burnette. (App. p. 67, line 3 – p. 68, lines 1-9). Lt. Burnette took over the pursuit of the car because of the condition of Deputy Eaches' patrol car and the high rate of speed of the chase. (App. p. 68, lines 1-6). Lt. Burnette testified that he heard gunshots after the car exited the interstate onto Highway 61. (App. p. 87, lines 15-16). Lt. Burnette testified that these first set of shots were fired by the passenger. (App. p. 85, lines 4-7). Lt. Burnette confirmed that the passenger, Bronson Shelley, stuck his head out of the sunroof, looked at the officer and shot at him. (App. p. 92, line. 19 – p. 93, lines 1. 7; p. 96, line 22 – p. 97, lines 1-7).

The black car was eventually struck by Lt. Burnette's patrol vehicle. (App. p. 84, lines 13-15). According to Lt. Burnette, as the black car was traveling backwards out of control before flipping over, he heard a second set of what he later determined to be gunshots. (App. p. 97, line 8 – p. 98, lines 1-20). Lt. Burnette testified that while there were two different sets of shootings, he only saw one person, the passenger and co-defendant, Bronson Shelley, shoot during the first set. (App. p. 97, lines. 4-15). Lt. Burnette did not testify as to who was shooting the second time. According to Lt. Burnette, both the driver and passenger fled from the vehicle after it wrecked. (App. p. 85,

lines. 19-24. Lt. Burnette released his K-9 and Petitioner was apprehended[1]. (App. p. 85, line 12 – p. 86, lines 1- 11). Deputy Eaches assisted in the apprehension of the passenger, Bronson Shelley. Shelley had a holster in his pocket when he was apprehended. (App. p. 73, lines 4 – 17).

There were three guns recovered from the wreck scene. One gun, a .38 special, was found on the ground after the car was rolled upright. (App. p. 105, line 21 – p. 106, lines 1-18, p. 107, line 19 – p. 108, lines 1-4). Another gun, a Bursa Firestone .380, was found lying in plain view while the car was still upside down. (App. p. 109, lines 1-4; p. 133, lines). This gun was found with the slide back indicating all bullets had been fired from the weapon. (App. p. 109, lines 1-20; p. 133, lines 11-16). A third gun, a Colt .45, was found inside the glove box of the black car. (App. p. 111, line 11 – p. 112, lines 1-3).

Five shell casings were recovered on Highway 61. (App. p. 116, line 11- p. 117, lines 1-4). These casings matched the Bursa Firestone .380. (App. p. 145, lines 11-12). Bullet fragments were collected at the scene of the wreck. (App. p. 116, lines 19-23; p. 117, lines 6-11). One of the fragments was fired by the .38 special. (App. p. 146, lines 2-3). There were four holes in the windshield of the black car where shots had been fired outward. (Tr. p. 124, line 1 – p. 127, line 1; p. 129, lines 11-12).

Petitioner was charged with the attempted murder of both Lt. Burnette and Deputy Eaches and charged with possession of a weapon during the commission of a violent offense. The jury found Petitioner not guilty of the attempted murder of Deputy Eaches and not guilty of the weapon charge. The indictment for the attempted murder of Lt. Burnette reads, "That in Colleton County, South Carolina, on or about July 12, 2011, the defendant, Maurio Daetrel Rivers, with malice

[1] Petitioner testified at the PCR hearing that he filed a federal civil suit against the officers for allowing the dog to continue to bite him in the groin. (App. p. 333, line 23 – p. 334, lines 1-4). Petitioner testified that he received a settlement of ten thousand dollars ($10,000). (App. p. 326, lines 15-25).

aforethought accompanied by a present ability to complete the act and the intent to kill, either express or implied, did attempt to kill the victim, Deputy J. Burnette with the Dorchester County Sheriff's Office, while on Augusta Highway, by shooting at the victim; in violation of S.C. Code of Laws Section 16-03-0029 of the South Carolina Code of Laws (1976), as amended." (App. p. 231). The indictment does not contain accomplice liability language.

In his closing argument the prosecutor discussed the principle of "the hand of one is the hand of all." (App. p. 169, line 20 - p. 170, lines 1-17). The prosecutor gave the examples of a get away driver and a look out as examples of the hand of one is the hand of all. (App. p. 169, line 25 – p. 170, lines 1-11). The prosecutor emphasized the high speed chase and fleeing from the car to show intent. (App. p. 170, line 18 – p. 171, lines 1-8). The prosecutor also argued that the second round of shots came from inside the car on the driver's side. (App. p. 172, lines 6-11).

Defense counsel argued that mere presence is not sufficient for accomplice liability. (App. p. 173, line 25 – p. 174, lines 1-13). Defense counsel also argued that it was impractical to believe that Petitioner, the driver, fired the second round of shots at the same time as he was trying to regain control of the car as it spun out of control and flipped over. (App. p. 176, line 13 – p. 177, lines 1-5). The jury found Petitioner not guilty of the weapon charge.

Discussion

During the instruction on accomplice liability/hand of one is the hand of all the trial judge gave the following example:

> Now, ladies and gentlemen, I'm going to charge you that if a crime is committed by two or more persons, two or more people, who are acting together in committing the crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan or purpose.

> For example, ladies and gentlemen, two people can be responsible and can be guilty of burglary if one – only one person went into the house and one person was the lookout and driving the car or the getaway car and the lookout but only one person actually went into the house at night. Ladies and gentlemen, although only one person went into the house, both people are guilty of burglary in the first degree because they acted together in concert to commit a burglary.

(App. p. 193, line 17 – p. 194, lines 1-8). During deliberations the jury asked for an additional charge on the hand of one is the hand of all. (App. p. 209, line 15 – p. 210, line 1). The judge recharged the jury:

> Ladies and gentlemen, I am now going to recharge you regarding the hand of one is the hand of all. If a crime is committed by two or more people acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose. For example, two people can be guilty of burglary when only one of the people goes into the house and the other person sits in the car as the lookout and is the getaway driver.
>
> If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all, or as it is sometimes said, the hand of one is the hand of all. In the example that I gave you, only one person went into the house and actually committed the going into the house, the burglary; however, both are responsible, both are guilty if they are acting together, assisting each other in committing the offense.

(App. p. 211, lines 1-21).

In the PCR application Petitioner alleged that trial counsel was ineffective for failing to object to the example given by the trial judge. (App. pp. 283-284). In the amended application Petitioner also alleged that trial counsel was ineffective in failing to object to the example given. (App. p. 295). During the PCR hearing Petitioner testified, "And the jury basically inferred from another – she gave an example of a burglary and a getaway driver as the example of the hand of one is the hand of all in her jury instruction." (App. p. 328, lines 12-15). Petitioner testified that trial counsel did not object to the example and then testified, "And I think that was pretty much what prejudiced me the most because it made the jury think that they only thing I had to do to be guilty of

attempting to harm the officers was trying to get away driving. And I think that was the most prejudicial thing in the instruction was that." (App. p. 328, lines 17-22). Trial counsel did not recall objecting to the example. (App. p. 369, lines 9-14). When asked about the burglary/getaway driver example trial counsel testified that he believed the jury would have made the distinction. (App. p. 378, line 25 – p. 379, lines 1-2). The judge's instruction, however, repeated what the prosecutor argued in closing argument. (App. p. 169, line 25 – p. 170, lines 1-11). While the prosecutor was free to argue the examples in closing argument, the trial judge should not have included the examples in her instruction to the jury. Unlike a getaway driver or look out example where there is a prior agreement, the high speed chase and fleeing from the car fail to establish a prior agreement between Petitioner and the passenger to shoot at the officers. Based on the "hand of one" instruction, (App. p. 193, lines 17-24), followed by the getaway driver example, (App. p. 193, line 25 – p. 194), the jury could have reasonably, but improperly, believed that Petitioner's act of fleeing from the police made him responsible for the acts of the shooter. The hand of one instruction and getaway driver example allowed the jury to find Petitioner guilty of attempted murder without requiring the State to demonstrate an agreement between the shooter and Petitioner to attempt to kill the officer.

In the supplemental order of dismissal the PCR judge wrote, "With that law in mind, the trial judge did not violate the prohibition on comments on the facts by using an illustrative example that – just as trial counsel appeared to recognize – was highly distinct from the factual scenario involved in Applicant's case." (App. p. 564). The PCR judge additionally wrote:

> Furthermore, even if trial counsel's failure to object could somehow be deemed deficient performance, Applicant nevertheless was not and could not have been prejudiced by defense counsel's performance in that regard because there was no reasonable likelihood of a different outcome even if an objection had been raised since: (1) the trial judge's illustrative example was not improper or objectionable; (2) the jury was otherwise properly instructed on the law concerning accomplice

> liability and "the hand of one is the hand of all"; (3) the illustrative example employed a factual scenario entirely distinct from the factual scenario involved in Applicant's case such that it could not have improperly influenced the jury in any manner; and (4) the jury heard a highly similar illustrative example from the solicitor as part of his closing argument remarks.

(App. p. 565). The PCR judge erred. The accomplice liability charge followed by the burglary getaway driver example was improper and objectionable as an improper comment on the facts. Trial counsel was deficient for failing to object to the charge and the example. Petitioner was prejudiced by the deficient performance.

The evidence failed to show a mutual agreement between the shooter and Petitioner to attempt to kill the officer. As the State failed to show evidence of an agreement, it was error to charge the jury with accomplice liability. The evidence at trial showed Petitioner was the driver fleeing from the police. The passenger was shooting at the officers. The State offered no additional evidence to link Petitioner's driving and the passenger's shooting. The burglary getaway driver example was not distinct from Petitioner's driving and fleeing the police. While the burglary getaway example included the language that, "they acted together in concert to commit a burglary," the accomplice liability charge only generally references a crime. The language of the accomplice liability charge given in this case, without the example, would be correct if warranted. The accomplice liability charge in this case, however, was not warranted because there was no evidence of an agreement to shoot at the officers. At best, a jury might find evidence of an agreement to flee from the police. Attempted murder, however, is not a natural consequence of fleeing from the police. The jury could have been confused that this was enough to find Petitioner guilty under the theory of accomplice liability. The confusion caused by the charge and example is demonstrated by the fact that the jurors requested clarification on accomplice liability. (App. p. 209, line 15 – p. 210, line 1). The fact that the judge's example

was the same as an example argued by the prosecution enhances the prejudice resulting from the charge. The improper charge and example diluted the State's burden of proof. There is a reasonable probability that, but for counsel's deficient performance, the jury would have found that Petitioner was not guilty under the State's theory of accomplice liability.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Deficient Performance

The PCR judge erred in finding trial counsel was not deficient because the "illustrative example," as referenced in the in the supplemental order of dismissal, was neither improper nor a prohibited comment on the facts. The trial judge's example was both improper and objectionable. Trial counsel was deficient in failing to object to the hand of one jury instruction

that included a getaway driver example because the charge and example, under the specific facts of this case, became an improper charge on the facts. "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. See also Pantovich v. State, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) ("The modern trend, however, has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence."); State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) (stating "the trial court shall not provide a limiting instruction or otherwise comment to the jury on" suicide-attempt evidence because such a charge may be an improper charge on the facts).

In State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019), the South Carolina Supreme Court wrote:

> We have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven. See, *e.g.*, State v. Grant, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980) (holding it was improper for the trial judge to charge the jury that the defendant's flight may be considered as evidence of guilt); State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant's request to charge the jury specific examples of conduct that might be considered as evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (holding, in a drug trafficking case, that the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use).

Like the examples above, the getaway driver example given in the instruction in this case was improper. Under the facts of this case, where the evidence shows that Petitioner was the driver and the passenger shot at the police, the getaway driver example given by the trial judge became an improper charge on the facts. The example in the present case is easily distinguished from the

example given in State v. Young, 238 S.C. 115, 127, 119 S.E.2d 504, 510 (1961), overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), a case cited in the supplemental order of dismissal. In Young the judge gave the following example:

> Relative to the question if there be any testimony in a given case showing that more than one person may have been involved therein, I charge you that all persons who are present, concurring and participating by some overt act in any crime are principals therein and the act which caused such crime is regarded in the law as the act of each and all so present and participating and concurring. There is no distinction in law under such circumstances in the degree of their guilt or the nature of their offense founded on the nearness or remoteness of their personal agency. One who is present, helping, aiding and abetting another or others in the execution of an agreement between them with a common purpose to commit a crime would be responsible for the act of any one of the party provided that such act was done pursuant and incidental to such common purpose. Just to illustrate, gentlemen, I happened to be looking last night at a comedy on television where the Kingfish and Andy, I believe, were trying to get out of the telephone slot an old nickel. Well, I believe the Kingfish was outside the telephone booth and Andy was inside the telephone booth. The Kingfish was watching, the other was trying to get the nickel out. Well, the mere fact that the one on the outside was not inside would make no difference in their degree of guilt because in such an instance the act of one would be the act of both if it was in the minds of both when they went there to get the nickel. So that's what the law means by saying that when two or more parties are engaged in the commission of a crime, the one watches, the other shoots, the law says it makes no difference who fired the fatal shot.

Young, 238 S.C. at 127, 119 S.E.2d at 510. Young was charged with murder, not taking a nickel out of a telephone slot. The charge in Young was not an improper comment on the facts. In contrast, the evidence in the present case showed that Petitioner was the driver and the passenger shot at the police. The getaway driver example given by the trial judge was an improper charge on the facts.

In State v. Quick, 141 S.C. 442, 140 S.E. 97, 99 (1927), another case cited in the supplemental order of dismissal, Quick was charged with violation of the prohibition law for whiskey found in his house. The judge gave an example of possession involving his car. The

Court found the example given was not an improper comment on the facts writing, "Oftentimes juries can be made to understand the law of the case easier if they are given helpful illustrations. **In giving such illustrations, however, a trial judge should avoid the facts of the case on trial.** There was no evidence in this case to show that the whisky found was in the appellant's automobile. The language last quoted from the charge, and the illustration made by the circuit judge, contained a correct statement of the law. We do not think it was a charge on the facts." Quick, 140 S.E. at 99, (emphasis added). The getaway driver example in the present case failed to avoid the facts of the case on trial where the Petitioner was the driver of the car and the passenger shot at police. The example in the present case was an improper comment on the facts.

The example given involving the getaway driver in the present case is analogous to the requested examples of legal provocation refused in State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), overruled by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009). In Hughey the Court wrote, "The requested examples constitute a direct charge on the facts because Hughey alleges that a knife was pulled on him, Jackson spit in his face, and there was sudden mutual combat. The requested jury charge elevates the specific facts of the case, such as spitting in a person's face, to an acceptable act of legal provocation." 339 S.C. at 452, 529 S.E.2d at 728. The getaway driver example constituted a direct charge on the facts. The example in the present case improperly elevated driving the car/fleeing from the police to accomplice liability for attempted murder. Trial counsel was deficient in failing to object to the example.

Prejudice

Petitioner was prejudiced by the deficient performance because the charge diluted the State's burden of proof by omitting the requirement that in order for the jury to find Petitioner guilty of attempted murder, the State had to prove that the passenger and Petitioner had an agreement, a pre-arranged plan to attempt to murder the police officer. Based on the example included in the hand of one/accomplice liability charge, the jury could have found liability based solely on Petitioner driving the car and failing to stop for police. In finding Petitioner not guilty of the weapon charge, the jury appears to have rejected the State's argument that Petitioner was the shooter of the second round of shots. The jury's verdict reflects that the jury found Petitioner guilty based on accomplice liability, "the hand of one is the hand of all."

In State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276–77 (2017), the South Carolina Supreme Court wrote:

> " 'Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.' " State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (alteration in original) (quoting State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (internal quotation marks omitted). "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." Id. at 262, 647 S.E.2d at 705. "However, '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].' " Id. (alteration in original) (quoting State v. Hill, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977)).

The getaway driver example diluted the State's burden of presenting evidence of a pre-arranged common design or purpose between Petitioner and the co-defendant for some illegal purpose of which the attempt to murder the police officers was incidental or a natural or probable

consequence.[2] This case is different from most other cases dealing with the hand of one hand of all accomplice liability charge where the parties pre-arrange to meet for some illegal act, usually a burglary or a robbery, and in the process someone is shot or killed. Petitioner was the driver of the car that failed to stop for a minor traffic violation. The co-defendant was a passenger in Petitioner's car who shot at police. There was no evidence of a pre-arranged plan to attempt to kill the officer. Even if the driver, with control of the car, and the passenger could have developed a plan to flee from the police, the shooting is not incidental or a natural or probable consequence of any assumed plan to evade law enforcement.

The PCR judge found no prejudice resulting from the failure to object to the accomplice liability charge and example in part because "... the jury was otherwise properly instructed on the law concerning accomplice liability and 'the hand of one is the hand of all' . . ." (App. p. 565). The PCR judge erred. Under the facts of this case, the accomplice liability instruction was not warranted.[3] In State v. Johnson, 444 S.C. 442, 449–50, 908 S.E.2d 102, 105–06 (2024)(n. #5 omitted), the South Carolina Supreme Court wrote:

> As we stated in Sellers, "Ordinarily, the State convicts a defendant of a crime by proving that he personally committed the criminal act." 442 S.C. at 148, 898

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[2] There is mention of a stolen car during the PCR hearing but this was not discussed at trial. (App. p. 304, lines 8-9; p. 355, lines 3-8).

[3] On direct appeal Petitioner argued the trial court erred in failing to direct a verdict of acquittal for three reasons: 1. the State failed to present evidence Petitioner fired any shots; 1. the State failed to present evidence to support a conviction for attempted murder under a theory of accomplice liability; and 3. the State failed to establish Petitioner had the requisite specific intent to kill required for attempted murder. (App. pp. 241-246). The Court of Appeals affirmed citing State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) ("On appeal from the denial of a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State."); id. ("[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.") (emphasis in original). State v. Rivers, Op. No. 2014-UP-441 (S.C. Ct. App. Filed December 3, 2014). (App. pp. 269-270). The opinion does not specifically address whether the accomplice liability instruction was warranted.

> S.E.2d at 120. The law of accomplice liability provides, however, that a person may be guilty of a crime even though he did not personally commit the criminal act. See State v. Crowe, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972) (holding a defendant who did not shoot the victim but was acting in concert with the shooter was "as guilty as the one who committed the fatal act"). In a murder case, for example, if two people plan or agree to commit the murder, and both of them are present at the scene of the crime, but only one of them actually shoots and kills the victim, both participants in the plan or agreement are nevertheless guilty of the murder. State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 100-01 (1999). Thus, in a murder case involving a gunshot, the trial court should charge the law of accomplice liability when there is any evidence (1) the defendant had a mutual plan or agreement with another person to commit the murder, and (2) the other person in the mutual plan or agreement fired the fatal shot. See Washington, 431 S.C. at 407, 848 S.E.2d at 786 (holding it was error to give an accomplice liability charge when—though there was evidence the defendant had a mutual plan with another person and evidence that another person fired the fatal shot—there was no evidence the other person who might have fired the shot was part of the mutual plan); Barber v. State, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011) ("[T]he question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the [crime] took place."). In this case there is evidence of a mutual plan or agreement and that Creep fired the fatal shot pursuant to that plan or agreement.

In the present case the State failed to present evidence that Petitioner had a mutual plan or agreement with the passenger to shoot at the officers. Failing to stop and fleeing from the police is not sufficient to show a mutual plan or agreement to attempt to kill the police. The unwarranted accomplice liability added to the prejudice rather than eliminated the prejudice as found in the order of dismissal. If this Court finds the accomplice liability was somehow warranted, the example should not have been included because it was a comment on the facts of this specific case.

The PCR judge additionally found no prejudice resulting from the failure to object to the accomplice liability charge and example in part because " . . .the illustrative example employed a factual scenario entirely distinct from the factual scenario involved in Applicant's case such that it could not have improperly influenced the jury in any manner . . ." (App. p. 565). The PCR judge erred. The burglary getaway driver example was not distinct from Petitioner's driving and

fleeing from the police. The burglary getaway example included the language that, "they acted together in concert to commit a burglary." The accomplice liability charge, however, only references a crime or unlawful act generally, rather than a specific crime[4]. The judge instructed the jury:

> Now, ladies and gentlemen, I'm going to charge you that if a crime is committed by two or more persons, two or more people, who are acting together in committing the crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan or purpose.

(App. p. 193, lines 17-24).

The unwarranted accomplice liability charge combined with the getaway driver example confused the jury and allowed the jury to find Petitioner guilty based on a theory of accomplice liability by simply finding there was evidence of an agreement to flee from the police, an unlawful act or crime as referenced in the accomplice liability instruction. There was no evidence of an agreement to shoot at the officers and attempted murder is not a natural consequence of fleeing from the police. The confusion caused by the charge and example is demonstrated by the fact that the jurors requested clarification on accomplice liability. (App. p. 209, line 15 – p. 210, line 1). Petitioner demonstrated prejudice.

Finally, the PCR judge found no prejudice resulting from the failure to object to the accomplice liability charge and example in part because "...the jury heard a highly similar illustrative example from the solicitor as part of his closing argument remarks." (App. p. 565). Arguments made by a prosecutor are different from instructions on the law made by the judge. If an accomplice liability charge is warranted, the prosecutor would be entitled to argue the

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[4] The language of the accomplice liability charge given in this case, without the example, would be correct if warranted. As argued, the charge was not warranted.

example. The judge, however, should not provide an example that emphasized the argument by the prosecutor and constituted an improper comment on the facts. Like the unwarranted accomplice liability charge, the fact that the judge's example was the same as an example argued by the prosecution enhanced the prejudice resulting from the example rather than eliminated the prejudice as found in the order of dismissal. The improper charge and example diluted the State's burden of proof.

Petitioner demonstrated both deficient performance and prejudice resulting from trial counsel's failure to object to the accomplice liability charge followed by the burglary getaway driver example as an improper comment on the facts. There is a reasonable probability that, but for trial counsel's failure to object to the improper example in the jury instruction, the result of the proceeding would have been different. In reviewing an alleged error in jury instructions, an appellate court will not reverse the circuit court's decision absent an abuse of discretion. See Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). In reviewing jury charges for error, the appellate court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct.App.2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). Viewing the charge as a whole in light of the evidence presented, the charge was an improper charge on the facts that diluted that State's burden of proof.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

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ATTORNEY FOR PETITIONER

This 18th day of July, 2025.