STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Williamsburg County
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-001940

TOSHONDA MICKENS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

RESPONDENT'S ISSUE PRESENTED

Whether the PCR court properly found Trial Counsel was not ineffective where probative evidence shows he fully explained the doctrine of accomplice liability—"the hand of one is the hand of all"— to Petitioner, and Petitioner had a full working knowledge of how she could be convicted under accomplice liability when rejecting a plea offer and choosing to go to trial.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Petitioner was first indicted for armed robbery, first-degree burglary, accessory before the fact to a felony, accessory after the fact to a felony, and criminal conspiracy (2011-GS-45-016) by the Williamsburg Grand Jury during the January 2011 term for the Court of General Sessions. In the July 2013 term, Petitioner was re-indicted for these crimes and additionally for murder (Amended 2011-GS-45-016). The charges of accessory before the fact to a felony and accessory after the fact to a felony were dismissed.

These charges arose from an incident that occurred in Hemingway, South Carolina between the hours of midnight and 8:00 A.M. on November 2, 2007. Petitioner left her home in Florence, South Carolina, along with three armed co-defendants, and drove to the residence of Victim, 27 year old James Allen McNeal, to rob him. App. 66. Victim was a known drug dealer, and this group of co-conspirators intended to steal money and drugs from Victim's home. App. 65. Petitioner's involvement in this crime included conspiring to commit burglary and armed robbery, and providing transportation for these crimes to be carried out. App. 67.

On September 9, 2013, Petitioner proceeded to trial in front of the Honorable W. Jeffrey Young. Petitioner was represented by Timothy Griffith, Esquire. Assistant Solicitors Kimberly Barr, Esquire and Tyler Brown, Esquire of the Williamsburg County Solicitor's Office, prosecuted the case. Petitioner was convicted as indicted. Judge Young sentenced Petitioner on September 13, 2013 to thirty years' imprisonment for murder, thirty years' imprisonment for first degree burglary, thirty years for armed robbery and five years for criminal conspiracy, to be served concurrently.

Petitioner filed a timely notice of appeal on September 18, 2013. An appeal was perfected and an Anders brief was submitted by Carmen V. Ganjehsani, Esquire, on October 2, 2014. The South Carolina Court of Appeals dismissed the appeal on May 11, 2016, finding that the appeal was without merit sufficient to warrant a new trial. State v. Mickens, Op. No. 2016-UP-209 (S.C. Ct. App. 2016). On May 27, 2016 the remittitur was submitted by the Court.

Petitioner filed a timely application for post-conviction relief on September 13, 2016 (2016-CP-45-00248). In her application, Petitioner alleged that she is being held in custody unlawfully for the following reasons:

1. Sixth Amendment Violation

    a. "My attorney was not notified of my [preliminary] hearing and I was forced to represent myself. I wasn't court appointed an attorney nor was I offered a continuance."

2. Ineffective Assistance of Counsel

    a. "My attorney informed me he was not ready for trial but refused to ask for a continuance."
    b. "I wasn't aware of my new charges until the day my trial started"

Respondent submitted its Return on February 14, 2017. Petitioner subsequently amended her application on March 7, 2017, to include the following additional allegations:

1. Ineffective assistance of trial counsel for failure to investigate prior to trial.
2. Ineffective assistance of trial counsel for failure to review trial strategy.
3. Ineffective assistance of trial counsel for failure to review discovery and evidence.
4. Ineffective assistance of trial counsel for failure to review and discuss the benefits and risks associated with proceeding with a trial or accept and enter a guilty plea.

An evidentiary hearing into the matter was convened on March 29, 2017 at the Williamsburg County Courthouse before Honorable D. Craig Brown. Petitioner was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Julie A. Coleman of the South Carolina Attorney General's Office. At the PCR hearing, Petitioner

testified on her own behalf. Respondent presented the testimony of Trial Counsel Timothy L. Griffith, Esquire. Judge Brown denied and dismissed the application with prejudice in an Order signed June 15, 2017 and filed June 23, 2017.

Petitioner filed a timely Notice of Appeal on September 20, 2017. The Petition for Writ of Certiorari and Appendix were filed on April 9, 2018. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

This court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo and will reverse the PCR court decision only if its decision is controlled by an error of law. Id., Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). The standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the post-conviction judge's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237,238, 314 S.E.2d 839, 839 (1984).

In post-conviction relief proceedings, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an allegation of ineffective assistance of counsel exists, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper standard for review of counsel's performance is whether the attorney provided representation within the range of competency required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Judicial scrutiny of counsel's performance follows a strong presumption that counsel's conduct falls within the wide range of adequate and reasonable professional assistance.

The court uses a two-pronged test set forth in Strickland when evaluating allegations of ineffective assistance of counsel. Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 116, 386 S.E.2d 624, 625 (1989). Under this prong, attorneys are held to an objective standard of "reasonably effective

assistance" under "prevailing professional norms". Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland 466 U.S. at 690). Second, the applicant not only has to show that counsel's assistance was constitutionally deficient, but also that they were prejudiced by this deficiency so severely that it produced a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625.

ARGUMENT

The PCR court properly found Trial Counsel was not ineffective where probative evidence shows he fully explained the doctrine of accomplice liability--"the hand of one is the hand of all"-- to Petitioner, and Petitioner had a full working knowledge of how she could be convicted under accomplice liability when rejecting a plea offer and choosing to go to trial.

Petitioner asserts the PCR court erred in finding defense counsel provided effective representation where counsel's explanation of accomplice liability— "the hand of one is the hand of all"— was incorrect, and Petitioner testified she would have accepted the eleven year plea offer if she understood the concept of accomplice liability. However, this issue is meritless, as probative evidence supports the PCR court's ruling that Trial Counsel fully and correctly explained accomplice liability and was not ineffective. Furthermore, Petitioner is not entitled to relief because the appropriate standard is not whether Petitioner would have accepted or rejected a previous plea offer, but rather, if the outcome of the trial would have been different. Therefore, this Court should affirm the PCR Court's denial of post-conviction relief.

Trial

Petitioner was convicted of murder, first-degree burglary, armed robbery, and criminal conspiracy (2011-GS-45-16) for participating as an accomplice in the subject crimes occurring in Hemmingway, South Carolina. Petitioner provided the transportation for the group of home invaders, who ultimately fatally injured the resident of the property. Originally, Petitioner was indicted for accessory before the fact to a felony and accessory after the fact to a felony, but these charges were dismissed and the indictment was amended, and she was charged with murder. Petitioner was tried with her co-defendant, Laquincy Williams.

There were fifteen witnesses called at trial, including DNA analysis experts, medical professionals from McLeod Regional Hospital and Medical University of South Carolina,

members of the Williamsburg Sherriff's Office and Florence County Sherriff's Office, State Law Enforcement Division, and an Agent of the Federal Bureau of Investigations. Witnesses and evidence presented at trial showed that on the evening in question a group of people wearing hoodies kicked in the door of the victim's home, came inside, shot the victim, stole money, and fled.

Juandalyn Miller testified that she was in the car with Petitioner and co-defendants on the night the incident occurred before the robbery took place. App.92. She witnessed Petitioner drive the group around a "trailer park" many times, then drop the three other co-defendants off. She stated Petitioner asked a man in the street where they could find some "weed." App. 97, 102, 103. Petitioner then drove away, and the co-defendants called Petitioner's phone and told her to pick them up. App. 103. When the co-defendants got back into the car, one of them mentioned "the screen door is locked. Damn, damn." App. 104. Miller then asked to be dropped off home in Florence before they did "whatever you all are going to do." App. 104, line 24. Miller testified that when they returned to Florence after their first brief trip to Hemmingway, they smoked marijuana, and then Petitioner left with her co-defendants in the same vehicle. App. 109,110. When Petitioner returned to the house a while later, Miller testified that one co-defendant was crying and Petitioner told her another co-defendant had been shot at Seal Test in Florence County. App.111, 112. Miller testified that she knew Petitioner was lying when she told her he had been shot at Seal Test. App. 114. Petitioner then drove the injured accomplice to McLeod Hospital for treatment of the gunshot wound. App.114, 115. Later in the day of November 2, 2007, Petitioner showed law enforcement a place at Seal Test where she allegedly picked up the injured co-defendant. App.117.

Neither Petitioner nor her co-defendant chose to testify in their own defense. Trial Counsel argued to the jury in closing argument that the testimony of the State's witnesses at trial was inconsistent and unreliable. He suggested that Petitioner was not involved with these crimes but got thrown into this situation three years later, when her co-defendant was arrested and falsely gave law enforcement her name to try to save himself. He argued the only thing Petitioner did was pick up a guy who was hurt and took him to the hospital. App. 1108 - 1116.

Evidentiary Hearing

At the evidentiary hearing, Petitioner and Trial Counsel, Timothy L. Griffith, Esquire, were the only witnesses called. Petitioner testified that she met Trial Counsel two weeks after he took her case for forty five minutes to discuss her charges, and she believed that Counsel was going to seek a plea offer. App. 1238, 1239. She stated she was given a plea offer for second-degree burglary for a sentence of zero to fifteen years, with no recommendation. App. 1243. She testified that she did not want to take the plea offer because she did not participate in the crime, and she rejected the offer. App. 1244.

Petitioner testified that it was not brought to her attention that her indictment had been amended and her charges had been enhanced from an accessory to a participant when she was given her plea offer. She testified that she met with Trial Counsel on September 9, 2013, in the court room, where she mistakenly believed that she was appearing for a roll call a week before her trial, but it was actually the day that her trial was scheduled to begin. App. 1242, 1243. Petitioner testified that although Trial Counsel had explained the "hand of one hand of all" concept of law to her before trial began, she maintains that she did not know that she could be convicted under this theory. App. 1244, 1245. She insisted that she does not want a new trial. App. 1248. Instead, she only wants to take the plea offer that she has rejected prior to conviction. App.1249.

Petitioner stated she was told that if the "hand of one is the hand of all" then you are exposed to a conviction for the crime that another commits. App. 1244. Petitioner maintained that this concept was not broken down as "simply as an accomplice's testimony is all the evidence that is needed". App. 1244. Instead, Petitioner asserted it was only explained to her as "if somebody says that I was with them and they commit a crime then I'm going down for the crime they committed." App. 1244, 1245. Petitioner recalled the judge giving jury instructions about the legal concept of "hand of one, hand of all" near the end of the trial. App. 1246. Petitioner also testified that Trial Counsel gave her the opportunity during the trial to read the physical jury charge "in black and white." App. 1247. Petitioner asserted that if Trial Counsel had used the exact words the trial judge used in his jury instructions when explaining this concept, then she would have taken the original plea offer instead of proceeding to trial. App. 1248.

Petitioner added that Solicitor pulled her to the side the day after trial had begun to ask if she still wanted to reject the plea that the State was offering. App. 1249. However, Petitioner refused to admit any guilt, which is an elemental requirement for pleading guilty to the court. App. 1250. There is no indication from the record that the State was interested in offering or accepting an Alford plea and there was no discussion of one at this time. App. 1250. Petitioner testified that it was still not clear to her that she could be convicted under the "hand of one, hand of all" legal principal even after the multiple explanations. App. 1250. She stated that only now, after she has heard the judge, spoken to PCR Counsel and done some legal research on her own in pursuing a criminal justice course, does she understand that she could be lawfully convicted under this doctrine. App. 1250, 1251.

Trial Counsel testified that he was appointed to Petitioner's case on May 17, 2013, and they had their first meeting on August 22, 2013. App. 1254, 1255. Trial Counsel explained that

he always tries to contact each of his clients at least once a month to keep them informed on the case and that is typically done over the telephone. App. 1256. Trial Counsel testified that at their initial interview she was charged with accessory to murder based upon the statement of a co-defendant. App. 1257. He stated they knew that a co-defendant would be testifying at trial against Petitioner's recount of her involvement being limited to picking up a shot man on the street in Florence and taking him to the hospital. App. 1257, 1259. Trial Counsel testified he knew what the State's theory was after speaking to the Williamsburg Solicitor's Office, which he then discussed with Petitioner. App. 1257. He also gathered background information during their meetings together. App. 1257, 1258. Before trial he reviewed the case, discussed discovery and the evidence, as well as some plea negotiation strategies, such as pursuing a Youthful Offender Act (YOA) sentence, and that he would ask for credit to be applied for her time served. App. 1259.

Upon reviewing discovery, Trial Counsel recalled explaining the "hand of one hand of all" doctrine. He explained, "I did discuss the fact that because, according to the State, she had conspired together with the others to commit a crime and had gone to commit a crime that anything that occurred during that crime, she would also be liable to be charged with. I explained to her what hand of one, hand of all was. Because all the persons who conspire together are deemed to be equally guilty because it was a conspiracy to commit the crime or a crime." App. 1262, line 17 – 1263, line 1. He knows he explained this to her because he always uses this example to illustrate the principle: "If you and your buddy are going to steal candy bars from the grocery store; and he kills somebody while you are there, you can be charged with the murder." App. 1263, line 2-5. "I always use that example because it just doesn't matter if you two conspired to do something, the hand of one is the hand of all." App. 1263, line 5-8.

Trial Counsel noted he informed Petitioner that a plea offer was pending. App.1265. He stated that she initially told him that she wanted to take the plea but, then returned the next week and chose to reject the offer. App. 1265. He provided her with a piece of paper that explained the plea offer and the potential consequences if convicted at trial, which she signed. App. 1267, 1268. Furthermore, he stated that Petitioner, Trial Counsel and Solicitor Kimberly Barr all discussed the plea offer together, and she seemed to be ready to accept it until right before the jury was selected. Trial Counsel told her that he could not make the decision for her, he was prepared for trial and that there was no reason to request a continuance. App. 1266, 1269. Trial Counsel testified that he explained the "hand of one is the hand of all" concept very carefully to Petitioner and he believed that she truly understood the discussion, and if he had felt that she did not, he would have explained it even further. App. 1273. Notably, Trial Counsel stated that it was his opinion that her family persuaded her to go to trial for murder because "she should never plead guilty to a crime that she did not commit." App. 1269.

Order of Dismissal

The PCR court's Order of Dismissal held the testimony presented at the evidentiary hearing satisfied neither prong of the Strickland test and dismissed the allegations with prejudice. The court found Trial Counsel was not ineffective for failing to discuss with Petitioner the risks of going to trial compared to the benefits of pleading guilty. App. 1291. The court found "Trial Counsel credibly testified that he explained to [Petitioner] the fact that she could be convicted of murder and the other charges under the doctrine of 'hand of one, hand of all.'" The PCR court went on to find that Petitioner "was properly advised of the plea offer from the State and the risks of proceeding to trial rather than pleading guilty. The decision not to plead guilty was [Petitioner's]

decision to make, and this Court finds that [Petitioner] knowingly and intelligently made that decision." App. 1292.

The PCR court pointed to Respondent's Exhibit 1, which indicated Trial Counsel reviewed the State's plea offer with Petitioner before trial. App. 1292. Trial Counsel explained that she could receive a sentence of more than thirty years if she chose to go to trial and was convicted. The court relied on Trial Counsel's credible testimony that he explained that she could be convicted of murder and the other charges under the doctrine of "hand of one hand of all". Accordingly, the allegation was denied and dismissed with prejudice.

Discussion

The PCR court properly found Trial Counsel was not ineffective because probative evidence supports the court's finding that Trial Counsel explained "the hand of one is the hand of all" to Petitioner and his explanation was correct under South Carolina law. The PCR court relied heavily on Trial Counsel's credible testimony, finding that he did in fact offer a sufficient explanation of the "hand of one, hand of all" legal concept. First, it is important to note that the PCR court found Trial Counsel's testimony regarding this issue to be more credible than Petitioner's testimony that he explained the pertinent legal concept inadequately. As a standard of review, this Court gives great deference to the findings of a PCR judge's findings where matters of credibility are involved. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010); Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). Because Trial Counsel's credible and detailed testimony supports the PCR Court's finding that Trial Counsel was not ineffective under Strickland, this finding should be upheld.

South Carolina Code §16-1-40 defines an accessory as "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, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon". S.C. Code Ann. §16-1-40 (1976). This is often referred to as "the hand of one is the hand of all" legal theory. This concept of accomplice liability is "well settled that if two or more combine together to commit an unlawful act, such as robbery, in the execution of that criminal act, a homicide is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act." State v. Crowe, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972). The common purpose may not have included even the contemplation or slightest intention to commit murder, but if the original common purpose was to commit any unlawful action and in the execution of that goal someone is murdered by a co-conspirator, all conspirators participating in the unlawful common design are as guilty as the slayer. State v. Cannon, 49 S.C. 550, 27 S.E.2d 526 (1897).

Under the "hand of one, hand of all" theory of accomplice liability, a person who joins with another to accomplish an illegal purpose is criminally liable for everything done by his or her accomplice incidental to the execution of the common scheme. State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). The State need not show a formal expressed agreement to prove that the parties acted as accomplices, but may prove the agreement by circumstantial evidence and the conduct of the parties. State v. Fleming, 243 S.C. 265, 274, 133 S.E.2d 800, 805 (1963). Although not necessary, acts may be shown, "since from them an inference may be drawn as to the existence and object of the conspiracy." Id. "To establish sufficiently the existence of the conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the

parties. The circumstantial evidence and the conduct of the parties may consist of concert of action." Id.; 15 C.J.S. Conspiracy 93(a) (2018). In a criminal case, on a motion for a directed verdict, the issue is whether there is any evidence reasonably tending to establish guilt. Id. 243 S.C. at 274, 133 S.E.2d at 806; See State v. Riley, 219 S.C.112, 64 S.E.2d 127 (1951).

In Petitioner's case, the State presented testimony from Juandalyn Miller and the corroborating evidence from the cooperating co-defendant that implicated Petitioner's direct involvement as an accomplice and integral part in the commission of these crimes. Miller testified to being with Petitioner and co-defendants at Petitioner's residence in Florence the night that this occurred in November 2007. App. 89, 92. Miller was in the front seat of the car with the co-defendants when they first ventured to Hemmingway on a scouting mission to find marijuana. App. 95, 103. Miller was present when the co-defendants first attempted to break into Victim's residence unsuccessfully. App. 102, 104. At that time she asked to be brought home along with Petitioner's youngest child, who was also present in the vehicle. App. 103. Miller told law enforcement after she heard a co-defendant exclaim upon returning to the car, "the screen door is locked, damn, damn", she wanted to be brought home because she did not wish to be a part of whatever the others were going to do at the trailer park. App. 103, 104, 108.

When Petitioner, co-defendants and Miller returned back to Petitioner's house, Miller smoked marijuana with them. App. 108. Then Miller saw the co-defendants leave together. App. 109. Miller was able to identify the car that they drove in the night of the incident and Petitioner as the driver. App. 110. Miller was also present in the aftermath of the incident, when Petitioner and co-defendants returned home. App. 111. Miller was responsible for transporting Petitioner to and from her hairdresser, upon Petitioner's request, immediately after returning to Florence; and subsequently to McLeod Hospital to visit the injured co-defendant. App. 115, 116. Miller was also

present when Petitioner was stopped by police at the hospital and when Petitioner showed law enforcement the area that she claimed to pick up co-defendant in Florence earlier that day. App. 112.

a. Deficiency

Petitioner now argues Trial Counsel failed to sufficiently explain the accomplice liability doctrine to her. However, the record shows Trial Counsel did explain the legal doctrine, and his explanation of accomplice liability was correct under South Carolina law. Petitioner asserts Trial Counsel's "candy bar" example fails to account for the requirement that for an accomplice to be guilty as a principle in a homicide resulting from the stealing of a candy bar, the homicide must have been a reasonably foreseeable consequence of her actions. PWC 10 (citing State v. Mattison, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010)). Petitioner asserts murder is not a reasonably foreseeable consequence of shoplifting candy bars, so Trial Counsel's example was incorrect and caused Petitioner to be confused, which in turn caused her to reject the State's plea offer.

However, Petitioner testified that, in her "confusion," she believed that "if somebody else does something, then you go down for it." App. 1244, line 18-21. If this testimony is true, then Petitioner *did* understand accomplice liability, and her contention that she rejected the plea offer on this basis makes little sense. If anything, Trial Counsel's "candy bar" example of accomplice liability is overly inclusive, and apparently led Petitioner to believe she could be liable even for events that were not foreseeable consequences of her conspiracy. If she truly believed that she could "go down for" her co-defendant's crimes even if she was not present during the shooting, then it is more likely that she would accept the plea offer, not reject it. The assertion that her mistaken belief that she could be liable for any crime regardless of foreseeability prevented her

from accepting the plea offer is meritless based on her testimony of her understanding of Trial Counsel's explanations.

Based on her own testimony, Petitioner clearly had a full working knowledge of the concept of accomplice liability. Even if Trial Counsel's candy bar example was oversimplified, Petitioner understood the basic theory that she could be convicted for the crimes that her co-defendants commit, even if she is not present. Petitioner claims she was told that "if somebody says I was with them and they commit a crime, then I'm going down for the crime they committed." App. 1244, line 25 – 1245 line 2. Regardless of Petitioner's understanding of the requirement that the result be a foreseeable consequence of the crime she intended to commit, she clearly knew and understood that she could be convicted of a crime she did not do. Therefore, Trial Counsel's explanation of accomplice liability was not deficient and must not have had any effect on her decision to plead guilty.

The Supreme Court defers to the PCR Court's factual findings and will uphold them if there is *any* evidence of probative value in the record to support them. (emphasis added). Frierson at 435; Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Here, the record clearly shows the discussions between Trial Counsel and Petitioner were extensive and that the concept of the "hand of one is the hand of all" legal concept was explained in depth, multiple times, both with Trial Counsel and with the Solicitor present, before trial commenced and after the jury was selected. Petitioner was given the possible consequences and probable outcomes as it pertained to her charges orally and signed a document containing this information in writing. The record supports the finding that Petitioner was aware of her exact charges before proceeding to trial. She was told why and how she was charged for these offenses under accomplice liability statutory law. Accordingly, because the record supports the PCR Court's finding that Trial Counsel was not

deficient in explaining these principles to Petitioner before she made her decision to reject the plea offer and proceed to trial, the finding should be upheld.

b. *Prejudice*

Furthermore, Petitioner is requesting relief under an improper prejudice standard. In order to be granted relief for ineffective assistance of counsel, Petitioner bears the burden of establishing first that counsel did not render reasonably effective assistance under prevailing professional norms to the extent that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler v State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Second, Petitioner must establish that this deficiency so prejudiced her that there remains a "reasonable probability that, but for, Counsel's unprofessional errors, *the result of the proceeding would have been different.*" Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (emphasis added). The record clearly shows that there was no deficiency in performance or in the efforts put forth to thoroughly explain the legal concepts and consequences associated with Petitioner's charges.

As a matter of law, even if Trial Counsel was deficient, the prejudice prong cannot possibly be met, and therefore there are still no grounds for relief. The proper standard for PCR is that Petitioner must prove that, without the deficiency, the outcome of the trial would have been different. But here, Petitioner is arguing that without the deficiency she would have pled guilty rather than go to trial, which still would have resulted in her conviction. Even if Petitioner had accepted the State's original guilty plea offer, she would still have a conviction for these crimes, which is the same result as her current conviction from trial. Therefore, Respondent submits that the prejudice prong cannot be met.

Furthermore, regardless of the incorrect prejudice standard Petitioner asks this Court to consider, Respondent asserts Petitioner has failed to prove that she would have accepted the guilty plea if she had completely understood the concept of accomplice liability, as she claims she did not. Petitioner testified at the evidentiary hearing that she was given a full opportunity to accept the State's plea offer, and the Solicitor even pulled her aside before the trial to be sure she did not want to accept the plea. App. 1249. However, Petitioner refused to plead guilty for a crime that she was adamant she did not commit. App. 1250. Trial Counsel credibly testified that it was his opinion that Petitioner's family convinced her not to plead guilty because she should never plead guilty to a crime she did not do. App. 1269. He believed this was the factor that changed her mind, not her lack of understanding of accomplice liability. This testimony shows Petitioner's decision to proceed to trial rather than plead guilty was not based on her understanding of accomplice liability or her opinion on whether or not she would be successful at trial, but was only based on her choice not to plead guilty to something she insisted she did not do.

Petitioner has failed to satisfy her burden of proving either prong of the Strickland test. Accordingly, this Court should deny Certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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August 22, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO WILLIAMSBURG COUNTY
Court of Common Pleas
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-001940

TOSHONDA MICKENS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Joanna K. Delany, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11433
Columbia, South Carolina 29211

This 22nd day of August, 2018

KAITLYN S. SLICE
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

August 22, 2018

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Toshonda Mickens v. State of South Carolina**
Appellate Case No. 2017-001940
Lower Court Case No. 2016-CP-45-0248

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Julie A. Coleman
Assistant Attorney General
SC Bar No. 102214

JAC/ks
Enclosures

cc: Joanna K. Delany, Esquire (2 copies)