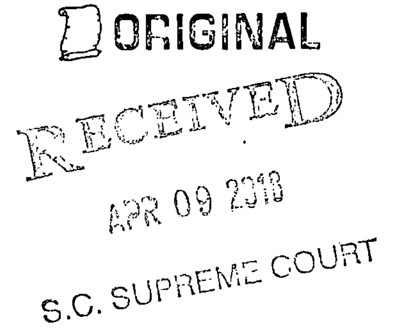
STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



Certiorari to Williamsburg County

Honorable D. Craig Brown, Circuit Court Judge

TOSHONDA MICKENS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001940

PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in finding defense counsel provided effective representation where the record shows counsel's explanation of accomplice liability—"the hand of one is the hand of all"—was incorrect, and Petitioner was understandably confused, and Petitioner testified she would have accepted the eleven year plea offer if she understood the concept of accomplice liability 8

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ISSUE PRESENTED

Whether the PCR court erred in finding defense counsel provided effective representation where the record shows counsel's explanation of accomplice liability—"the hand of one is the hand of all"—was incorrect, and Petitioner was understandably confused, and Petitioner testified she would have accepted the eleven year plea offer if she understood the concept of accomplice liability?

STATEMENT

The state alleged Petitioner was the getaway driver in a botched burglary and robbery that resulted in the death of James McNeal (Decedent). App. 66, l. 25 – 67, l. 15. Petitioner was initially charged as an accessory, but was later indicted as a principal for murder, burglary in the first degree, and armed robbery. App. 1258, ll. 4-13; App. 1240, ll. 12-22; App. 1295-1297. The state contended that although Petitioner did not shoot Decedent or enter his home, she was guilty under the law of accomplice liability—"the hand of one is the hand of all."

Petitioner did not understand how she could be guilty. App. 1244, ll. 11-18. She talked about the new indictments with her defense counsel, Timothy Griffith, and became "frantic." App. 1; App. 1244, ll. 9-12. Petitioner said counsel told her: "Well, you're charged with hand of one, hand of all." App. 1244, ll. 14-15. Petitioner was confused, and asked defense counsel: "What does that mean? What does that have to do with me? I didn't murder anyone. I didn't commit a crime." App. 1244, ll. 16-18. Petitioner testified counsel's explanation was: "Well, it's the hands of one, hands of all. If somebody else does something, then you go down for it." App. 1244, ll. 18-21.

At trial, the state showed P.J. Williams approached Petitioner and two men (James Henry and Laquincy Williams) about robbing "a dude that had a whole lot of money . . ." App. 789, ll. 15-23; App. 792, ll. 4-16. P.J. Williams said they would wait for a time when the man had drugs, money, and when he could "make sure it was safe." App. 790, ll. 21-25. Petitioner's accomplice James Henry said: "he was telling us the whole time that the dude wasn't going to have no gun. He don't carry no gun." App. 790, l. 25 – 791, l. 2. Henry said: "So he was telling us he was going to make sure when everything was safe, so it would go smooth. You know what I mean, nobody would get hurt." App. 791, ll. 7-10.

Petitioner drove the men and dropped them off near Decedent's home. App. 805, ll. 18-19; App. 807, ll. 3-12. James Henry and Laquincy Williams entered the home to rob Decedent. App. 808, ll. 6-15. However, Decedent unexpectedly "came up with a gun from somewhere . . ." and was shot and killed by Laquincy Williams. App. 810, ll. 4-5; App. 811, ll. 15-17. The men phoned Petitioner, and she picked them up and drove them away. App. 819, ll. 5-15; App. 820, ll. 1-10.

Prior to trial, Petitioner was offered a plea bargain by the state to reduce the first degree burglary to second degree burglary, recommend eleven years, and dismiss the remaining charges. App. 1260, l. 19 – 1261, l. 5. Petitioner was conflicted on whether to take the plea, and at times agreed to take the plea offer. Defense counsel said that prior to trial: "she definitely wanted to take the plea." App. 1266, ll. 12-13. "[S]he wanted to take the plea, even though she didn't want to admit guilt or anything like that." App. 1265, ll. 9-12. Counsel said he discussed the plea with Petitioner and "had her sign a piece of paper talking about the plea."[1] App. 1265, ll. 15-17.

Petitioner met with defense counsel and the solicitor on her court date and Petitioner said she would take the plea bargain, but maintained that she was not guilty. App. 1266, ll. 11-13; App. 1249, l. 17 – 1250, l. 4. The solicitor told her she could not plead guilty if she was not guilty. App. 1250, ll. 8-9. At that point, Petitioner still did not understand the legal concept of accomplice liability, and trial counsel did not explore the possibility of an *Alford* plea. App. 1250, ll. 6-19. Petitioner was struggling with the concept that she could be convicted of something that she "did not actually do." App. 1250, ll. 20-23.

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[1] Counsel said the solicitor made a plea offer of burglary second degree with a recommendation of eleven years. App. 1260, l. 22 – 1261, l. 5; App. 1276, ll. 19-23. He explained that the offer of a recommendation of eleven years either came after Petitioner signed the advice of plea offer or before, but he wrote "no recommendation" because he "wasn't sure what [the solicitor] said . . ." App. 1267, ll. 9-17; App. 1276, ll. 15-25. The advice of plea offer was entered into evidence at Petitioner's PCR hearing as Respondent's Exhibit 1, and is confusing on its face. App. 1283. It was prepared by defense counsel. App. 1276, ll. 12-14.

When asked whether he explained "hand of one, hand of all" to Petitioner, defense counsel said that he "would have talked to her about hand of one is hand of all." App. 1264, ll. 4-5. Counsel could not specifically recall a conversation with Petitioner about this legal concept, and admitted that nothing in his notes reflected a discussion about it, but said "as a general rule, I always discuss that."[2] App. 1264, ll. 6-20. **Counsel testified: "usually I use the example: Listen, 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 murder. 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, ll. 2-8 (emphasis added).

Petitioner was confused as to how she could be found guilty as a principal. She explained: "It wasn't broken down to me as simple as one person—an accomplice's testimony is all the evidence that is needed. None of that was broken down to me. It was just 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, l. 22 – 1245, l. 2.

Petitioner testified that the judge's instruction to the jury on the legal concept of "hand of one, hand of all" was the first time she had heard it explained that way. App. 1246, ll. 10-24. Petitioner said when she heard the judge charge the jury on accomplice liability, she realized that "you can be actually convicted of something you didn't do." App. 1247, l. 25 – 1248, l. 1. Petitioner thought: "Well, if I had known this, I would have just went ahead and took the plea because that's all it took." App. 1247, l. 4 – 1248, l. 7. Petitioner testified that had she understood how she could be convicted based on accomplice liability, she would not have proceeded to trial and would have accepted the plea bargain. App. 1249, ll. 6-11. Petitioner said

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[2] Despite this testimony, trial counsel later said: "I had explained very carefully to her what hand of one, hand of all was." App. 1269, ll. 20-22.

she would have accepted the plea offer of second degree burglary, for zero to fifteen years, or for a recommendation of eleven years, if trial counsel had explained the concept to her the way the judge explained it to the jury. App. 1248, ll. 8-18.

Petitioner was found guilty and sentenced to incarceration for thirty years for murder, thirty years for burglary in the first degree, thirty years for armed robbery, and five years for criminal conspiracy, with sentences to run concurrently.[3] App. 1187.

Petitioner filed an application for post-conviction relief (PCR) on June 16, 2016. App. 1211 – 1218. The state submitted a return dated February 14, 2017. App. 1219 – 1225. Petitioner filed an amendment to her PCR application dated March 7, 2017. App. 1226 – 1227. An evidentiary hearing on the matter was held March 29, 2017, before the Honorable D. Craig Brown. App. 1228. Petitioner was represented by Lance Boozer, and Julie Hall appeared on behalf of the state. App. 1228. Petitioner alleged ineffective assistance of counsel for failing to review and discuss the benefits and risks associated with accepting a guilty plea versus proceeding to trial. App. 1226.

In summation, PCR counsel asserted that when evaluating whether to plead guilty or go to trial, there are certain things one must know to make that decision intelligently. App. 1279, ll. 19-22. PCR counsel correctly explained: "She needs to know why she can be convicted even if she doesn't believe she can be. Her testimony is that she was never explained or given this explanation of hand of one, hand of all until the judge did so." App. 1279, l. 24 – 1280, l. 3. "[H]ad it been explained to her in the manner in which the judge did it, she would have accepted that plea." App. 1280, ll. 4-5. PCR counsel said: "if Your Honor believes that Mr. Griffith didn't

[3] She appealed her conviction and sentence, and an *Anders* brief was submitted. App. 1190 – 1208. The South Carolina Court of Appeals dismissed Petitioner's appeal in an opinion filed May 11, 2016. *State v. Mickens*, Op. No. 2016-UP-209 (S.C. Ct. App. 2016). App. 1209 – 1210.

properly explain that to her—[then] that would be ineffective assistance of counsel." App. 1280, ll. 14-17. "The prejudice is she gets convicted and serves a much greater sentence than she would have had she pled guilty and accepted it." App. 1280, ll. 10-12.

The PCR court issued an order of dismissal signed June 15, 2017. App. 1284 – 1294. As to the allegation that trial counsel was ineffective for failing to discuss the risks of going to trial compared to the benefits of pleading guilty, the court found this claim meritless. App. 1291 – 1292. The court determined: **"Trial Counsel credibly testified that he explained to Applicant the fact that she could be convicted of murder and other charges under the doctrine of 'hand of one, hand of all.'"** App. 1292 (emphasis added). The order of dismissal states:

> Trial counsel testified that he does not specifically remember discussing with Applicant the "hand of one, hand of all" doctrine, but knows he explained it to her because he always discusses it with his clients as a general rule. He stated that he would have used the example of going to steal a candy bar with a friend, and if the friend kills somebody while you do it, you can be charged with murder under the "hand of one, hand of all" theory.

App. 1288.

The PCR court said that as indicated in Respondent's Exhibit 1, trial counsel reviewed the state's plea offer with Petitioner before the trial, and she was properly advised of the plea offer and the risks of going to trial rather than pleading guilty. App. 1291 - 1292. The court found Petitioner's decision to reject the plea offer was knowingly and intelligently made. App. 1292.

ARGUMENT

The PCR court erred in finding defense counsel provided effective representation where the record shows counsel's explanation of accomplice liability—"the hand of one is the hand of all"—was incorrect, and Petitioner was understandably confused, and Petitioner testified she would have accepted the eleven year plea offer if she understood the concept of accomplice liability.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (citing *Strickland*, 466 U.S. at 687). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.*

"Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

In *Von Moltke*, the United States Supreme Court discussed how confusing and misleading elements of a conspiracy charge are to a layman. *Von Moltke*, 332 U.S. at 721. "Determining

whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. Conspiracy charges frequently are of broad and confusing scope . . ." *Id.*

Petitioner was tried for murder, criminal conspiracy, burglary in the first degree, and armed robbery, after rejecting a plea offer to burglary in the second degree. The state's theory was that Petitioner was the getaway driver for what was she thought was to be a burglary and robbery, but escalated into a murder outside of her presence. As the United States Supreme Court noted, conspiracy is a confusing legal concept for a layman. When added to the accomplice theory of liability, the confusion is compounded.

The accomplice theory of liability is commonly referred to as "hand of one is the hand of all." *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007); *State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017). "For a person who has not actually committed the homicidal act to be regarded as a participant in a homicide, he or she must have aided, abetted, assisted, encouraged, or advised the killing." *State v. Mattison*, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010). Also, the accomplice must have acted with the intent to encourage and assist the commission of the homicide, or, at least "the commission of the murder by the principal must have been a reasonably foreseeable consequence of the defendant's actions." *Id.* (quoting 40 Am. Jur. 2d *Homicide* § 26 (2010)).

In his testimony before the PCR court, defense counsel recited the example he gives clients to illustrate the theory that the hand of one is the hand of all. His example was an inaccurate statement of the law. Counsel said that if you and your friend go to steal candy bars from the grocery store, and your friend kills somebody while you are there, you are guilty of murder because the "hand of one is the hand of all." App. 1263, ll. 2-8. Counsel's example of

accomplice liability if given to Petitioner, while undoubtedly given in good faith, was wrong. This example disregarded the requirement that for an accomplice to be guilty as a principal in a homicide, she must have aided, abetted, assisted, or encouraged the killing, or the killing must have been a reasonably foreseeable consequence of her actions. Murder is not a foreseeable consequence of shoplifting candy bars. Petitioner was understandably confused by this incoherent explanation of accomplice liability that did not take into account foreseeability, an element critical to Petitioner's understanding of her culpability. Petitioner testified she understood counsel's explanation of "hand of one, hand of all" to be: "If somebody else does something, then you go down for it." App. 1244, ll. 18-21.

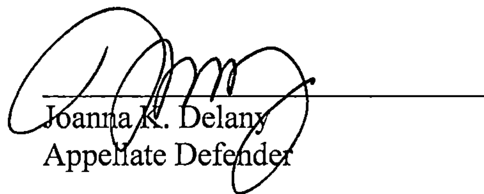
Petitioner was conflicted over whether to accept the plea offer as she did not comprehend the accomplice theory of liability. She did not understand how she could be guilty because she was not present when the crimes occurred. A fair reading of this record shows she had reason to be confused, as defense counsel's explanation of accomplice liability was incorrect, if he gave the candy bar example. Petitioner testified the judge's instruction to the jury on the legal concept of "hand of one, hand of all" was the first time she had heard it explained in that way. She said had she understood it that way, she would have taken the offer and pleaded guilty to the reduced charge.

The PCR court erred when it determined that defense counsel credibly testified he explained the doctrine of "hand of one, hand of all" to Petitioner. If counsel discussed the concept with Petitioner at all, and used the candy bar example he "usually" uses, the record clearly shows this explanation of accomplice liability is incorrect. Counsel's performance in this regard was deficient.

Petitioner was prejudiced by counsel's deficient performance in failing to fully and accurately discuss the risks and benefits of pleading guilty versus going to trial as she rejected the plea offer of burglary second degree, with a recommendation of eleven years, and which carried a maximum of fifteen years. Had counsel accurately explained the accomplice theory of liability to Petitioner, she would have accepted the plea offer, and would not have been eligible for the thirty year term of incarceration she received.

CONCLUSION

By reason of the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of April, 2018.

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TOSHONDA MICKENS,

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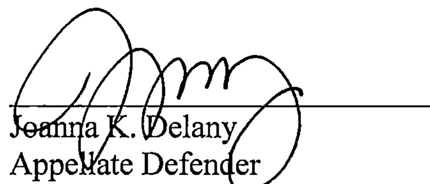
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

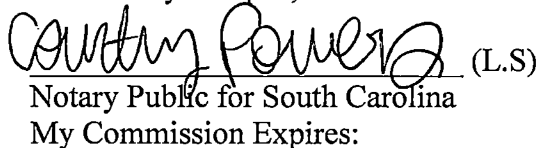
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Toshonda Mickens, #357123, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 9th day of April, 2018.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of April, 2018.


(L.S)

Notary Public for South Carolina
My Commission Expires: