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Aug 23 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case Number: 2018-001269

THE STATERESPONDENT.

v.

KENNETH LAMONT ROBINSON, JR.APPELLANT.

BRIEF OF AMICI CURIAE

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Introduction

On February 22, 2018, Kenneth Robinson was convicted for a murder he did not personally commit based on South Carolina's hand of one, hand of all accomplice liability doctrine. At the time of the conduct at issue, Kenneth was fifteen years old. Nevertheless, the trial court applied the same standard used for adults to Kenneth without any adjustment to account for Kenneth's adolescence. Although the use of one standard for adults and children is the current practice under South Carolina law, such a practice fails to account for crucial differences between adolescences and adults.

The hand of one, hand of all doctrine includes the accomplice liability doctrine of natural and probable consequences ("NPC"). By incorporating the NPC standard, the hand of one, hand of all doctrine functions on a foreseeability analysis that uses a reasonableness standard to determine a person's guilt. The use of an NPC standard for adults has been widely criticized by scholars and rejected by numerous courts, because a foreseeability standard does not require intent to commit the offense and lowers the mens rea. Moreover, when this standard is applied to adolescents, because these youth are not capable of responding in the way assumed by the doctrine, it leads to convictions of children who are not criminally culpable.

Specifically, neuroscience research has shown and the United States Supreme Court has accepted that adolescents are different from adults in crucial ways, including immaturity and lack of a sense of responsibility, vulnerability to external influences, and malleable characters. An adult standard for what is a reasonably foreseeable consequence is fundamentally different than an adolescent reality. Where these differences undermine the purposes of criminal law, the law should account for these differences. *Miller v. Alabama*, 567 U.S. 460, 473-74 (2012) ("criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

The application of the hand of one, hand of all doctrine to adolescents fails to achieve the purposes of criminal law. The current standard cannot accurately and proportionately adjudge an adolescent's culpability, and non-culpable individuals cannot be deterred. Since the unique nature of adolescence affects this application of the hand of one, hand of all doctrine in a legally relevant way, the fact of an adolescent's age is legally relevant, and the law should not ignore it.

Statement of Interest of Amicus Curiae

South Carolina Appleseed Legal Justice Center is a nonprofit law firm that works on behalf of low income South Carolinians for legal, economic and social justice. This work is done through policy advocacy and systemic litigation. Protecting our state's most vulnerable residents and recognizing that our state's children are our most precious resource. SC Appleseed works to ensure that fairness and equity principles are applied to all, especially the children of our state. For that reason SC Appleseed works tirelessly to ensure the needs of children are recognized in the criminal justice system and worked for the passage of Raise the Age legislation. The continued protection of children in the intersection of criminal adjudication and juvenile justice is a priority for our work.

Argument

I. The "Hand of One is the Hand of All" Doctrine incorporates the natural and probable consequences standard, which relies on a foreseeability analysis.

The hand of one, hand of all is a theory of accomplice liability that was used to convict Kenneth Robinson. Trial Tr. 1628, l. 19 – 1631, l. 1. In addition to describing a more traditional theory of accomplice liability, under the hand of one, hand of all doctrine, one who joins with another to accomplish an illegal purpose is criminally liable for everything done by his confederate

incidental to, or as a natural and probable consequence of,¹ the execution of common design. *State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007); *State v. Cannon*, 49 S.C. 550, 27 S.E. 526, 530 (1897).

Although the “hand of one, hand of all” terminology is unique to South Carolina law, the doctrine incorporates the more widely used natural and probable consequences standard of accomplice liability. The NPC doctrine, as commonly formulated by other states, is an exception to the general rule of accomplice liability that the intent to commit one crime is not sufficient proof of intent to commit another crime. Evan Goldstick, *Accidental Vitiating: The Natural and Probable Consequence of Rosemond v. United States on the Natural and Probable Consequence Doctrine*, 85 FORDHAM L. REV. 1281, 1289 (2016). The NPC standard imputes criminal intent to a secondary crime whenever that secondary crime is the “natural and probable consequence” of the accomplice’s intent to aid the principal in a primary crime. *Id.* at 1289. The “hand of one” doctrine describes accomplice liability in South Carolina and often includes the NPC doctrine permitting the same imputation of criminal intent that grounds both doctrines in a foreseeability analysis. Trial Tr. 1628, ll. 21-25; see e.g. *Cannon*, 49 S.C. 550.

The hand of one, hand of all doctrine establishes an accomplice’s culpability based on a foreseeability analysis. *State v. Mattison*, 388 S.C. 469, 484, 697 S.E.2d 578, 586 (2010) (“the alleged accomplice must have acted with the intention of encouraging and abetting the commission

¹ The original formulation of the doctrine uses “natural and probable consequence of the acts done in pursuance of the common design”, *State v. Cannon*, 49 S.C. 550, 27 S.E. 526, 530 (1897), but some modern formulations use “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); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002). The South Carolina Court of Appeals has adjudged that both these formulations accurately state accomplice liability under the “hand of one” theory. *State v. Curry*, 370 S.C. 674, 682–84, 636 S.E.2d 649, 653–54 (Ct. App. 2006).

of the homicide, or, at least that the commission of the murder by the principal must have been a *reasonably foreseeable consequence* of the defendant's actions.”) (emphasis added). The use of the NPC standard presumes the accomplice reasonably foresaw that the subsequent crime would occur as a result of the common illegal purpose. See John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV 237, 249 (NPC holds people accountable for “any offense that is a reasonably foreseeable consequence of the criminal scheme.”).

Analytically, South Carolina courts apply the doctrine by first determining a common illegal purpose. *State v. Langley*, 334 S.C. 643, 648, 515 SE.2d 98, 101 (1999) (“the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown.”). Once a common illegal design is established, courts use the NPC standard to determine if the crime was a “reasonably foreseeable consequence” of that purpose. See *Mattison*, 388 S.C. 469 at 484. This analysis assumes an accomplice contemplated and appreciated the risk of engaging in his or her behavior – or should have – and proceeded regardless.² Therefore, the accomplice is deemed culpable, because he took an unreasonable risk by engaging in the criminal purpose when the potential consequences were apparent.³

² Uri Maoz & Gideon Yaffe, *What Does Recent Neuroscience Tell Us About Criminal Responsibility?*, 3 J. L. & BIOSCI. 120, 135 (2016) (“a crucial aspect to the legal notion of recklessness is *conscious awareness* of probabilistic information. The thought is not just that the reckless agent represents information about the risks of harming others but also that he acts in a way that imposes those risks while aware of the possibility, although not the certainty, of harm. Awareness of risks is crucial to the thought that the reckless agent is *criminally culpable*.”)

³ “You made a choice to get in the car. You knew when you got in that car you should not have been in that car” Sentencing Tr. 356. See *Mattison*, 388 S.C. 469 at 484 (“The alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide, or at least that the commission of the murder by the principal must have been a *reasonably foreseeable consequence*.”) (emphasis added); See Decker, *supra*, at 249.

II. Accomplice liability based on a foreseeability standard has been widely rejected by scholars and courts for failing to account for individual culpability.

Across the country, courts and scholars criticize a foreseeability standard, such as NPC, for accomplice liability, because such a standard deems individuals to be criminals without establishing a fundamental element that justifies condemnation – a culpable mens rea for the offense. *State v. Jefferies*, 316 S.C. 13, 17 (quoting *United States v. Bailey*, 444 U.S. 394, 403 (1980)) (“Criminal liability is normally based upon the concurrence of two factors, ‘an evil meaning mind [and] an evil doing hand . . . ’”). A key criticism of foreseeability standards like NPC, or the analogous application of the “hand of one” doctrine, is that they either lower the mens rea requirement or functionally remove the mens rea requirement. Goldstick, *supra*, at 1309 (discussing arguments by scholars criticizing NPC for lowering the requisite mens rea and arguments by scholars that NPC entirely eliminates the mens rea requirement). Commentators also describe the NPC doctrine as “incongruous and unjust” because it “imposes accomplice liability solely upon proof of foreseeability or negligence when typically a higher degree of mens rea is required of the principal.” *Id.* at 1361.

The drafters of the Model Penal Code refused to adopt the NPC doctrine, in part, for the lack of sufficient mens rea. Drafters cited concerns that the NPC doctrine permits attaching liability merely on a showing of “foreseeability.” Even where statutes require finding a higher mens rea, the NPC doctrine allows conviction with a significantly lower mens rea than the statute prescribes. The drafters also emphasized that “if anything the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.” Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1379 (1998). (citing MODEL PENAL CODE commentary at 312

(Proposed Official Draft 1962)).

Other state and federal courts recognize that accomplice liability based on foreseeability impermissibly lowers the mens rea requirement or allows an accomplice to be convicted with a lower mens rea than the principal. The D.C. Circuit, 2nd Circuit, 7th Circuit, Nevada Supreme Court, New Mexico Supreme Court, D.C. Court of Appeals, and Vermont Supreme Court have explicitly rejected a foreseeability-based standard for accomplice liability due to the failure to demonstrate the mens rea required to establish criminal culpability.⁴ Because a foreseeability standard that does not require the actual perception of risk is a negligence standard, these courts acknowledge that the NPC standard functions as a negligence standard which fails to assess whether an individual is criminally culpable and permits convicting an accomplice with a lesser intent than required to convict the principal.

⁴ *United States v. Powell*, 929 F.2d 724, 727, 289 U.S. App. D.C. 131, 134 (D.C. Cir. 1991) (rejecting a broad reading of the NPC standard because the standard permits the conviction of an accomplice with a lower mens rea than the principal); *United States v. Peoni*, 100 F.2d 401, 401–02 (2d Cir. 1938) (interpreting a federal accomplice statute as requiring evidence of an accomplice’s “purposive attitude”); *United States v. Greer*, 467 F.2d 1064, 1069 (7th Cir. 1972) (holding that a jury may not impute an accomplice’s intent from an initial crime to a subsequent crime simply because the subsequent crime was “a foreseeable consequence” of the initial crime, because this would impermissibly predicate accomplice liability on “negligence rather than criminal intent.”); *Sharma v. State*, 118 Nev. 648, 654–55, 56 P.3d 868, 871–72 (2002) (citing Wayne R. LaFare & Austin W. Scott, *Criminal Law* §6.7(b), at 579 (2d ed. 1986)) (rejecting the NPC standard for specific intent crimes because the NPC doctrine lowered the mens rea to a negligence standard by allowing a defendant to be convicted merely on a showing that “the charged crime, although not intended, was nonetheless foreseeable.”); *State v. Carrasco*, 124 N.M. 64, 68–70, 946 P.2d 1075, 1079–81 (1997) (rejecting the NPC doctrine because the standard “allows a defendant to be convicted for crimes the defendant may have been able to foresee but never intended.”); *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (rejecting the NPC doctrine on the grounds that the doctrine relieves the government of having to prove every element of the crime when charging a defendant as an accomplice.); *State v. Bacon*, 163 Vt. 279, 288–89, 658 A.2d 54, 61 (1995) (overturning the rule that “each one is criminally responsible for the acts of each and all who participate with him in the execution of the unlawful design” because the rule “violates one of the most basic principles of criminal law by allowing the jury to convict a person for causing a bad result without determining that the person had some culpable mental state with respect to that result.”).

The U.S. Supreme Court has echoed other courts' concerns about trying an accomplice using a lesser mens rea. In *Rosemond v. U.S.*, the petitioner was charged with aiding and abetting the violation of 18 U.S.C. §924(c) "by using a gun in connection with a drug trafficking crime." 572 U.S. 65, 68 (2014). The Court held that to convict as an accomplice, the State must show "not just an act facilitating one or another element, but also a state of mind extending to the entire crime." *Id.* at 75–76. Because of the compound nature of the charge, the petitioner could only be convicted if "his intent reach[ed] beyond a simple drug sale, to an armed one." *Id.* at 76. Commentators have suggested, if the *Rosemond* holding is broadly applicable, "proof of an accomplice's intent to aid an initial crime is no longer sufficient to convict that same accomplice of a subsequent crime to which the accomplice provided no further aid." Evan Goldstick, *supra*, at 1297.

III. Adolescents do not possess the foresight required to avoid this application of the hand of one, hand of all liability due to biological development.

The hand of one, hand of all doctrine used in this case premises liability for accomplices on a foreseeability standard; however, adolescents are innately ill-equipped to make decisions based on anticipation of future events. It is now widely accepted that adolescents anticipate and understand risks in a fundamentally different way than adults due to normal cognitive maturation patterns. Neuroscientists have mapped brain development with magnetic resonance images (MRI) that show the adolescent brain continues to evolve significantly throughout the teens and early twenties.⁵

⁵ The term "adolescence" has been defined in a variety of ways that includes different age ranges. Kenneth Robinson was 15 at the time of the conduct at issue, which makes Kenneth an adolescent regardless of the definition used. This brief will use "adolescence" to refer to humans ranging in age from teenage years through the mid-20s, which reflects the period of time used by the scientific community. See Alexa C. Curtis, *Defining adolescence*, J. ADOLESCENT & FAMILY HEALTH, Oct.

Certain areas of the brain remain underdeveloped until late adolescence while other areas of the brain develop rapidly; leading to poor predictive abilities, poor impulse control, and a unique susceptibility to peer pressure. Jay N. Giedd, *The Amazing Teen Brain*, SCI. AM., May 31, 2015, at 32–37; Catherine A. Hartley & Leah H. Somerville, *The Neuroscience of Adolescent Decision-making*, 5 CURRENT OP. BEHAVIORAL SCI. 108 (2015). This combination of attributes is linked to adolescents’ higher tolerance of seemingly risky behavior especially where decisions are based on future events. “[T]he teenage brain is not an old child brain or a half-baked adult brain; it is a unique entity” that processes decisions based on foreseeability entirely differently than a reasonable adult. Giedd, *supra*, at 33. Accordingly, when judging actions based on an adult standard, an adolescent’s actions may seem unreasonable; however, the action is completely reasonable to a neurotypical adolescent.

1. Later development of the prefrontal cortex inhibits adolescents’ ability to accurately predict consequences and control their behavior.

Later maturation of the prefrontal cortex contributes to risky behavior in adolescents. See Hartley, *supra*. Neuroscientists have shown, through MRI studies, the prefrontal cortex is one of the last areas to undergo maturation. See Nitin Gogtay et al., *Dynamic mapping of human cortical development during early childhood through early adulthood*, 101 PROCEEDINGS NAT’L ACAD. SCI. U.S.A 8174 (2004); Christian K. Tamnes et al., *Development of the Cerebral Cortex Across Adolescence: A Multisample Study of Inter-Related Longitudinal Changes in Cortical Volume, Surface Area, and Thickness*, 37 J. NEUROSCI. 3402 (2017).

The prefrontal cortex is the regulatory system of the brain and the center of “executive function.” Hyun Jin Chung, Lisa L. Weyandt & Anthony Swentosky, *The Physiology of Executive*

2015, at 10; see e.g. Elizabeth Sowell et al., *Longitudinal Mapping of Cortical Thickness and Brain Growth in Normal Children*, 24 J. NEUROSCI. 8223 (2004).

Functioning, in HANDBOOK OF EXEC. FUNCTIONING 13 (Sam Goldstein and Jack A. Naglieri eds., 2014). Major features of executive function “include abilities such as inhibitory control, attention shifting, working memory, goal-directed behavior, and strategic planning.” *Id.* Each executive function “has a role in cognitive control, for example filtering out unimportant information, holding in mind a plan to carry out in the future and inhibiting impulses.” Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. CHILD PSYCH. & PSYCHIATRY 296, 301 (2006).

The executive functions of the prefrontal cortex rely on the connectivity between the prefrontal cortex and other areas of the brain. As the human brain develops, the brain goes through a process called “pruning,” which is the shedding of unused neuronal connections and strengthening of frequently used neuronal connections. The changes in neuronal connections and reduction of gray matter build the capability necessary to perform increasingly complex functions. The loss of gray matter volume has been found to start in the anterior portions of the brain with the loss of gray matter volume in the prefrontal cortex occurring last and only at the end of adolescence. *See Gogtay, supra.*

Underdeveloped executive functions cause adolescents to process information about probable risk and uncertainty about risk differently than adults. “[T]he adolescent contemplating some form of reckless behavior has in mind a system of distributions or frequencies that describe the likelihood that the contemplated act will result in a disastrous outcome.” Jeffrey Arnett, *Reckless behavior in adolescence: A developmental perspective*, 12 DEVELOPMENTAL REV. 339, 350 (1992). But adolescents have poor probability judgment. *Id.* (citation omitted). And even when adolescents accurately assess the probability of abstract negative consequences resulting from reckless behavior, they tend to underestimate their own probability of suffering those consequences. *Id.*

Researchers have also found that adolescents show a greater tolerance for ambiguity in decision-making. *See* Hartley, *supra*. The acceptance of ambiguity makes their decisions seem riskier, because many real-world decisions characterized as “risky” involve unknown outcome probabilities. *Id.* To an adult, the decision may be unjustifiably risky because the probability of a severe consequence is high or unknown, but to an adolescent who views the consequence as unlikely, the decision is not considered risky.

2. Developmental mismatch causes adolescents to engage in riskier behavior especially when around peers and in emotionally heightened situations.

Unlike the slower developing prefrontal cortex, the reward-seeking region of the brain – the limbic system – experiences accelerated development during puberty, thereby causing a developmental mismatch. *See* Geidd, *supra*; *see also*, Kathryn L. Mills et al., *The Developmental Mismatch in Structural Brain Maturation during Adolescence*, 36 DEV. NEUROSCI. 147, 158 (2014) (82% of study participants showed a developmental mismatch). Present in “ordinary teens,” but unique to the adolescent brain, the “mismatch” of development between the prefrontal cortex and the limbic system underlies stereotypical adolescent behaviors such as risk taking, sensation seeking, heightened emotional reactivity, and susceptibility to peer pressure. *Id.* at 149; Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain’s Reward Circuitry*, 14 DEV. NEUROSCI. F1 (Mar. 2011).

The developmental mismatch in adolescents has been compared to a Ferrari without brakes. *See, e.g., Frances Jensen Discusses ‘The Teenage Brain’,* YOUTUBE, https://www.youtube.com/watch?v=2_sHfaY4PoY&t=348s (July 24, 2017) (esteemed neurologist provides a succinct description for a lay audience of the behavioral impact that neurology has on adolescents). The reward system of the brain and the regulatory system “contribute to decision-making in an interactive fashion, with impulsive or risky choices often

coinciding with the increased engagement of incentive processing regions and the decreased involvement of cognitive control activity.” Chein et al., *supra*. at F2. The increased activation of the limbic system in adolescences causes adolescences to be significantly more responsive to reward-relevant cues and reward anticipation than adults. *Id.* In adults when the limbic system is activated, the Ferrari is given gas and the regulatory system provides the brakes. However, the delayed maturation of the regulatory system means that adolescents do not have the requisite brakes to stop the limbic system so decisions are made on a reward-seeking basis. Frances Jensen Discusses ‘The Teenage Brain’, *supra*; *see also*, Gogtay, *supra*.

The mismatch contributes to adolescent’s heightened propensity towards risk-taking especially around peers. *See* Chein et al., *supra*, at F1-F2. Within and outside the scientific community there is longstanding recognition that “adolescence is the time of greatest susceptibility to peer influences.” Arnett, *supra*, at 354. When adolescents are around peers, the reward-related regions of the brain show greater activation and the regulatory system shows less activation, which suggests “that the presence of peers increases adolescent risk taking by heightening sensitivity to the potential reward value of risky decisions.” Chein et al., *supra*, at F1. This susceptibility to peer influence alters the decision-making process and renders adolescents especially vulnerable to participating in group conduct.⁶

Due to an inability to thwart peer influences, adolescents will engage in uncharacteristic behavior if one person in the group undertakes the behavior. Arnett, *supra*, at 355. Consequently,

⁶ *See, e.g.*, Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCH. 625 (2005); *see, e.g.*, Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEV. PSYCH. 1531 (2007); *see also, e.g.*, Bruce G. Simons-Morton et al., *The Effect of Passengers and Risk-Taking Friends on Risky Driving and Crashes/Near Crashes Among Novice Teenagers*, 49 J. ADOLESCENT HEALTH 587 (2011).

in a group of peers, adolescents are likely to engage in the behavior of the highest sensation-seeking individual even when the behavior is abnormal for them.⁷ Around others, adolescents are driven by social influences and reward seeking behavior and are unlikely to contemplate the consequences of group action. Arnett, *supra*.

Another behavioral consequence of the mismatch is a heightened sensitivity to socio-emotional stimulation. Adolescents' susceptibility to emotional overload is so prevalent that neuroscientists coined the term "hot-functioning" to describe the phenomenon. See Hartley, *supra*. Hot-functioning means that "in arousing or exciting situations where outcomes are directly experienced, adolescents are less influenced by their explicit knowledge of the probabilities of potential negative outcomes and are more willing to take risks to obtain potential rewards." *Id.* at 115. During hot-functioning, even adolescents who usually behave like adults demonstrate significant differences "in their cognitive strategy and/or in their response to risk and reward." David A. Sturman & Bitá Moghaddam, *The Neurobiology of Adolescence: Changes in Brain Architecture, Functional Dynamics, and Behavioral Tendencies*, 35 NEUROSCI. & BIOBEHAVIORAL REV. 1704, 1709 (2011).

In short, neuroscience evidence suggests "that adolescents' decision-making is indeed unique, and that their patterns of uniqueness can be partially attributed to normative maturational changes in brain function." Hartley, *supra*, at 116. The use of MRI mapping indicates that behavioral differences in adolescents are a result of the biological composition and the evolution

⁷ Arnett, *supra*, at 355 (explaining that "[b]ecause high sensation is an inherent part of reckless behavior, the highest sensation seeker in the group would be most attracted to the prospect of engaging in reckless behavior. The rest of the group may go along with the highest sensation seeker on a reckless adventure, partly out of conformity and partly on behalf of their own sensation seeking propensities. For the followers, their sensation seeking propensities might not be high enough for them to initiate reckless behavior in most circumstances, but high enough for them to go along once a leader initiates it.").

of the human brain. Neurologically normal adolescents are uniquely oriented towards risk-seeking behavior, lack future-oriented thinking, have underdeveloped impulse control, and are particularly susceptible to peer pressure. The combination of these characteristics causes a drastic difference between adolescent and adult decision-making when those decisions are based on future consequences.

IV. Hand of One, Hand of All Fails to Assess Culpability in Juveniles and Ignores the Transitory Nature of Juvenile Criminality

Neuroscience research on adolescence shows that the adolescent brain is biologically incapable of meeting a standard of behavior based on foreseeability and risk analysis. The hand of one, hand of all doctrine as used here, however, assumes defendants can foresee the consequences of their behavior and assesses culpability based on the foresight of consequences plus the decision to accept the risk. *See Decker, supra; See also, Maoz, supra* fn. 2. A defendant who does not contemplate the crime or realize there is a risk of the crime occurring lacks any mental state for that crime. Neuroscience findings are significant in the criminal law context, because adolescents' failure to appreciate the consequences of their actions in the same manner as adults means that the adult perspective of mens rea that criminal law relies on differs significantly from the reality of adolescents' mens rea. *See Jenny E. Carroll, Brain Science and The Theory of Juvenile Mens Rea, 94 N.C. L. REV. 539 (2015)*. If a court holds adolescents culpable for the actions of a principal despite a lack of foresight and the acceptance of risk, the hand of one, hand of all doctrine in these instances functionally has no mens rea requirement for the crime which the defendant is deemed culpable. Without a mens rea, the doctrine has no basis for deeming an action culpable and imposing punishment. *Id.*

Holding youth culpable for the actions of a principal they did not anticipate, foresee, or have the mens rea for fails to serve retributive justice. *See, e.g., State v. Rowell, 321 S.C. 114, 119*

(1995) (“Courts have long accepted the idea that a criminal act must include the element of mens rea.”). Under a retributivist perspective, punishments contribute to justice “only when the punished deserve it, when they are sufficiently culpable.” Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 464 (2013). But to convict a defendant who did not possess the requisite mens rea, such as a juvenile accomplice, is to convict a defendant who is not criminally culpable. *Rowell, supra*, at 119. In cases of juvenile accomplices, “research findings that juveniles ‘lack the freedom that adults have to extricate themselves from a criminogenic setting’ should insulate juveniles from the imposition of harm-based retributivist principles.” Erin H. Flynn, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 UNIV. PENN. L. REV. 1049, 1072–73 (2008). Therefore, a conviction based on a foreseeability standard of liability for an adolescent who lacks the foresight assumed by the standard “flouts the most fundamental tenant of criminal law that punishment be based on blameworthiness.” *Rogers, supra* at 1379.

Strict rules for accomplice liability are often justified due to the presumed value of deterrence. *See, State v. McWee*, 322 S.C. 387, 395, 472 S.E.2d 235, 240 (1996) (noting solicitors arguments on deterrence in an accomplice case). Theories of specific and general deterrence require that a law communicate the proper message, the subjects receive that message accurately, and the subjects react rationally to the message. [See](#) Kelli D. Tomlinson, *An Examination of Deterrence: Where Do We Stand?*, 80 Federal Probation 33 (2016).

Deterrence is not served when a foreseeability standard is applied to a juvenile. Lack of maturity and an underdeveloped sense of responsibility make juveniles less likely to foresee the consequences of actions and results in ill-considered actions and decisions. *Roper v. Simmons* 543 U.S. 551, 569 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Because “unintended,

or even unforeseen, acts ... cannot be deterred,” the hand of one, hand of all doctrine that covers accomplice liability for secondary crimes cannot deter juveniles who do not contemplate the consequences of their actions. *See* Joshua Dressler, *Understanding Criminal Law* § 31.06[B][2], at 516-17 (3d ed. 2001). “Even if teenagers are subconsciously aware of [the deterrence] message... their tendency to misperceive risk and their inability to remove themselves from problematic situations will counteract any deterrent effect.” Flynn, *supra*, at 1055. Because juveniles “fail to anticipate or plan a course of events or to minimize risks and danger”, the foreseeability standard under the hand of one, hand of all doctrine is unlikely to provide a deterrent for the same reason. *Id.*

To the extent that the hand of one, hand of all doctrine serves some rehabilitative purposes, when applied to adolescents the need for rehabilitation is de minimus given the transitory nature of adolescent criminality. Those who care about rehabilitation will “want the criminal law to bring into its curative sweep anyone who has certain attitudes toward crime and its harms, as accomplice liability largely does.” Girgis, *supra*, at 463. However, juveniles’ capacity for reformation through maturation renders the application of the hand of one, hand of all doctrine to juveniles unnecessary. Juvenile criminal activity is driven by transient traits such as developmental influences on decision-making and a lack of self-control. “[M]any studies find a similar pattern of adolescent offending, with the aggregate level of criminal involvement beginning at about age thirteen and increasing until age seventeen, followed by a sharp decline.” Elisabeth S. Scott, “*Children Are Different*”: *Constitutional Values and Justice Policy*, 11 OHIO STATE J. CRIM. L. 71, 87 (2013). Although juveniles tend to be more reckless than adults, normal maturation generally resolves excessive risk-taking and vulnerability to group conduct. Despite actions to the contrary, juveniles “have not yet developed an ‘irretrievably depraved character.’” *Roper*, 543 U.S.

at 570.

V. Applying this version of the hand of one, hand of all doctrine to adolescents is inconsistent with U.S. Supreme Court precedent that recognizes the importance of accounting for differences among adults and children when applying the law.

The U.S. Supreme Court, state legislatures, and other areas of law, such as tort law, recognize an important distinction between adults and adolescents and apply different standards and rules accordingly. Drawing on precedent and developments in neuroscience, the U.S. Supreme Court has recently begun to reject the uniform application of legal principles to adolescents where neurological distinctions carry legal significance. *Graham v. Florida*, 560 U.S. 48 (2010) (holding life without parole unconstitutional for juveniles for a nonhomicide offense); *Miller v. Alabama*, 567 U.S. 460 (2012) (holding the mandatory imposition of life without parole unconstitutional for youth); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding capital punishment unconstitutional for youth); *J.B.D. v. North Carolina* 564 U.S. 261 (2011) (holding that a child’s age is a relevant factor to the reasonableness inquiry under the Fifth Amendment). Accordingly, the application of the hand of one, hand of all doctrine to adolescents without accounting for the cognitive differences between adults and adolescents is incompatible with the Supreme Court’s treatment of adolescents in the criminal justice system.

The U.S. Supreme Court has explicitly recognized children as a distinct group, drawing on finding three differences between adults and adolescents. *Graham*, 560 U.S. at 68 (“It remains true that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult...”); *Miller*, 567 U.S. at 471 (“*Roper* and *Graham* establish that children are constitutionally different from adults”); *Roper*, 543 U.S. at 570 (“The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.”). The Court has found that first, a “lack of maturity and an

underdeveloped sense of responsibility are found in youth more often than adults”; second, youth are more vulnerable than adults to outside influences; and third, the character of a juvenile is not as well formed as that of an adult. *Roper*, 543 U.S. at 569.

In distilling the three important distinctions, the Court relied on adolescent development research, particularly “behavioral studies and recent neuropsychological research” that show the execution of minors would not satisfy Eighth Amendment standards or meet the goals of punishment. *See* Brief for the American Psychological Ass’n, & the Missouri Psychological Ass’n as Amici Curiae Supporting Respondent at 4, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

In 2011, the Court extended the logic in *Roper* and found that the law must take into account a “reasonable child” perspective in the Fifth Amendment context when applying the “reasonable person” standard. *J.B.D. v. North Carolina*, 564 U.S. 261 (2011). The Supreme Court in *J.D.B.* applied the reasoning from prior cases noting that a reasonable child perceives and behaves differently than reasonable adults. *Id.* at 272 (“a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.”). By applying the significant distinctions between adults and adolescents, the Court concluded that “[i]ndeed, even where a ‘reasonable person’ standard otherwise applies, the common law has reflected the reality that children are not adults.” *Id.* at 274 (reasoning that “children as a class” are less mature, vulnerable to peer and other pressures, and “lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”).

State legislatures have long recognized the youth are different and less able to engage in mature decision-making in ways that adults do. *Roper*, 543 U.S. at 569 (“In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under

18 years of age from voting, serving on juries, or marrying without parental consent”). In South Carolina, youth cannot vote (S.C. Code §7-5-180; S.C. Const. art. II, §4), hold public office (S.C. Const. art. IV, §1), marry without adult permission (S.C. Code §20-1-250), consent to binding contracts (S.C. Code §63-5-310), obtain an abortion without parental consent (S.C. Code §44-41-31), get a tattoo (S.C. Code §44-34-60) or body piercing (S.C. Code §44-32-60). These protections for and restrictions on the actions of youth are a recognition by South Carolina state legislators that youth have not developed their fully mature decision-making capacity.

As the Court recognized in *J.D.B.*, the common law indicates a longstanding recognition of the critical differences between adolescents and adults. 564 U.S. at 274. A universal example is found in the tort law reasonableness standard, which factors age into the reasonableness issue. Restatement (Second) of Torts §283A (1965). The tort law approach recognizes that children are incapable of exercising the standards of judgment expected of adults. *Id.*

The U.S. Supreme court cases, South Carolina law, and the common law all reflect that age is a fact with legal significance. Specifically, the U.S. Supreme court cases found that adolescents, as a group, should be treated differently where legally relevant. The key distinctions of poor decision-making, immaturity, and susceptibility all impact adolescent’s behavior and perception of reasonableness. *See, J.D.B.*, 564 U.S. 261. These distinctions are directly relevant to the inquiry of whether an adolescent made a reasonable decision when accounting for the natural and probable consequences of a course of action. By failing to account for adolescents’ unique characteristics, the hand of one, hand of all doctrine in this context fails to achieve the purposes of punishment when applied to adolescents.

Kenneth Robinson’s situation exemplifies how the hand of one, hand of all fails to achieve the purposes of criminal law. Kenneth was convicted of murder by a jury based on a reasonable

foreseeability standard that did not consider the crucial fact that Kenneth was 15 years old at the time of the conduct. Trial Tr. 1628–1631. At sentencing the judge explained that Kenneth was culpable because he made a choice to get into a car that he knew he should not have.⁸ A judge and jury made up of adults judged Kenneth’s decision-making as criminally culpable without regard for age. Trial Tr. 1628–1631. But neuroscientists have proven that adolescent’s decision-making especially in situations involving peers – as was the case here – is different from adults in ways that render adolescents less culpable. By ignoring Kenneth’s age in assessing culpability, the judge and jury could not accurately assess blameworthiness. If Kenneth did not foresee that his conduct could lead to the victim’s death, then the hand of one, hand of all could not have deterred his actions. Lastly, Kenneth’s impressive progress as he has become a young man shows the transient nature of adolescent’s poor decision-making and that rehabilitation naturally occurs as adolescent’s grow up. Sentencing Tr. 49–50, 57–59. Because the hand of one, hand of all doctrine fails to achieve these goals, it is inconsistent with U.S. Supreme Court precedent and must be changed.

⁸ “You made a choice to get in the car. You knew when you got in that car you should not have been in that car” Sentencing Tr. 356.

Conclusion and Relief Requested

For the foregoing reasons, and for the reasons stated in Appellant's brief, this Court should vacate Robinson's conviction in this case and remand for further proceedings and South Carolina should recognize a reasonable juvenile standard of "hand of one, hand of all" crimes.

Respectfully submitted,

s/Whitney B. Harrison

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August 23, 2021