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IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions

S.C. SUPREME COURT

Appellate Case No. 2021-000505

The Honorable Perry H. Gravely, Presiding Judge

The State of South Carolina.....Respondent,

v.

Devin Middleton.....Appellant.

**REPLY TO RESPONDENT’S RETURN TO  
PETITIONER’S PETITION FOR WRIT OF CERTIORARI**

Petitioner disagrees with Respondent’s claim that there was a strong enough factual basis in the record to support Petitioner's guilty plea under *North Carolina v. Alford*.<sup>1</sup> Additionally, Petitioner disagrees with Respondent’s claim that trial counsel was not defective but even if it were, Petitioner failed to prove that he would have gone to trial but for trial counsel’s deficiencies. We are asking that the court grant the writ of certiorari.

As Petitioner noted in his petition for a writ of certiorari, there are two requirements for an *Alford* plea. First, the defendant must intelligently conclude his interests require entry of a guilty plea and second, the record before the judge must contain strong evidence of actual guilt. In the State’s response they claim that both prongs of the *Alford* analysis are met. Petitioner disagrees.

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<sup>1</sup> 400 U.S. 25 (1970).

Respondent argued there is a strong factual basis for Petitioner's guilt because Petitioner conceded that there was a factual basis for his codefendant's guilt. Respondent's Return p. 11. Additionally, Respondent argues that because Petitioner participated in a physical confrontation with the victim (spraying the victim with pepper spray), that the victim is liable for the murder under the hand of one hand of all theory. *Id.* While it is true that Petitioner participated in spraying victim, this was part of horseplay that numerous people from that area would engage in. Petitioner admitted to spraying victim with pepper spray, but it was in the victim's hair, not his eyes. Petitioner was not trying to bait the victim into any sort of scheme. Respondent has offered no evidence to prove that Petitioner played any role in the crime outside of being present when the crime was committed.

As aforementioned, Petitioner was convicted of murder through "hand of one, hand of all" liability. Under South Carolina law, a person who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. *State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276-277 (2017). Respondent correctly states that in order to prove this theory, they do not have to prove that Petitioner did the shooting, merely that he aided or abetted the crime. Respondent's Return p. 11. However, what the Respondent has failed to prove is that there was a common scheme between Petitioner and Mr. Perry. The only evidence the Respondent possesses regarding the guilt of Petitioner is a rumor from the victim's mother, stating that the whole incident was planned, and Petitioner was involved. Cert Petition p. 4. Without

any other evidence, Petitioner cannot be guilty of this crime. The court in *State v. Thompson* held that “mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt.” *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007). Petitioner was present at the scene but because Respondent cannot prove the existence of a common scheme, it cannot find Petitioner guilty of murder under hand of one, hand of all liability and thus cannot establish that enough factual evidence existed to support a guilty plea under *North Carolina v. Alford*.

Respondent’s second argument is that trial counsel was not ineffective and if it were, Petitioner failed to prove that he would have gone to trial but for counsel’s deficiencies. In order to show ineffective assistance of counsel, a petitioner must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and insisted on going to trial. *Hill v. Lockhart* 474 U.S. 52 (1985). Petitioner and Respondent agree on this standard in *Strickland and Lockhart*. However, they differ in analysis. Respondent claims Petitioner failed to meet this standard by not proving he would have gone to trial. Petitioner disagrees. Petitioner, while pleading guilty to the crime, never admitted his actual guilt. The distinguishing feature of an *Alford* plea is that the defendant does not confirm the factual basis of the underlying plea. *United States v. Alston* 611 F.3d 219, 227 (4th Cir.2010). Essentially, by pleading guilty pursuant to *Alford*, a defendant "pleads guilty" but

does not admit guilt. But for Petitioner's bad advice from counsel, he would have clearly gone to trial because he never actually admitted his guilt. The Respondent is claiming that because Petitioner never said that he would have gone to trial, that he failed to meet the standard of proving it. Respondent's analysis is incorrect. The basis of the plea combined with the *Alston* standard proves Petitioner's position. It is clear Petitioner would have gone to trial had counsel analyzed the "evidence" obtained by the Respondent and realized that the basis of their claim is a rumor and mere presence at the scene.

Trial counsel rendered ineffective assistance of counsel because he advised Petitioner to plead guilty instead of going to trial when the Respondent never had enough evidence to convict him. This is a clear showing of prejudice because had Petitioner gone to trial, he would have been entitled to a directed verdict because of the Respondent's failure to produce evidence of Petitioner's involvement. "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). Furthermore, the court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). Instead, on the advice of counsel, Petitioner pleaded guilty to a crime with no evidence. The Respondent never proved anything more than that Petitioner was present at the scene. Due to lack of evidence in the record, the *Alford* plea should have never been accepted by the judge, and but for counsel's bad advice, Petitioner would have continued with the trial.

## CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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