

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
J. Derham Cole, Circuit Court Judge  
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S.C. Supreme Court

DAVID C. CARSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001857  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

WANDA H. CARTER  
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## ISSUES PRESENTED

- 1.) Trial counsel erred in failing to request that the solicitor elect which charge to pursue (murder or accessory after the fact of murder) against petitioner, or in the alternate to sever petitioner's case from the co-defendant's case, because the witnesses' testimony connected petitioner to the accessory charge and co-defendant Jones to the murder charge, which in turn meant that the improper joinder of the cases and charges prejudiced petitioner by bootstrapping him to the co-defendant's murder charge.
- 2.) Trial counsel erred in failing to object to the "hand of one is the hand of all" charge because the record was devoid of any evidence linking petitioner to the murder, which the co-defendant admitted he alone committed, via accomplice liability.

## STATEMENT

Petitioner David C. Carson was convicted of murder per jury trial held during the March 2010 term of the Spartanburg County General Sessions Court before Judge E.C. Burnett, III. Petitioner was sentenced to imprisonment for a period of thirty years. App. 1 – 339. Andrew Johnston represented petitioner at trial, and Deputy Solicitor Barry Barnette appeared on behalf of the state. Petitioner appealed, but on April 25, 2012, his conviction and sentence were affirmed by the South Carolina Court of Appeals. See State v. Carson, No.2012-UP-243 (S.C. Ct. App. April 25, 2012). Elizabeth A. Franklin-Best represented petitioner on direct appeal.

On November 28, 2012, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 341-348. The respondent filed a return dated October 3, 2013, requesting that a hearing be held in response to petitioner's PCR action. App. 349-353.

A PCR hearing was convened on April 10, 2014, at the Spartanburg County Courthouse before Judge J. Derham Cole. App. 355-404. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General Suzanne H. White appeared on behalf of the state.

On July 25, 2014, Judge Cole issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 355 – App. 412.

Petitioner appealed Judge Cole's Order of Dismissal from the case. This petition follows.

## QUESTION I

Trial counsel erred in failing to request that the solicitor elect which charge to pursue (murder or accessory after the fact of murder) against petitioner, or in the alternate to sever petitioner's case from the co-defendant's case, because the witnesses' testimony connected petitioner to the accessory charge and co-defendant Jones to the murder charge, which in turn meant that the improper joinder of the cases and charges prejudiced petitioner by bootstrapping him to the co-defendant's murder charge.

Petitioner and co-defendant Jones were tried jointly for the murder of David Miller whose dead body was never found. In addition, the solicitor added the charge of accessory after the fact of murder to petitioner's indictment. No accessory charge was levied against co-defendant Jones. There was no substantial circumstantial evidence connecting petitioner to Miller's murder. To the contrary, the evidence proved that co-defendant Jones was guilty of murder and that petitioner was guilty of accessory; but nonetheless, counsel neither moved to require the solicitor to elect one charge upon to which to try petitioner nor to sever petitioner's case from the co-defendant's case. Note that neither petitioner nor Jones testified at trial and that neither of the men called witnesses in their defense. Petitioner was convicted of murder only and Jones was convicted of murder also. The state's theory of the case was that Miller was last seen alive in the company of petitioner and co-defendant Jones and that they were responsible for his death.

The evidence adduced at trial proved clearly that co-defendant Jones committed the murder. Jones told two witnesses that he "killed a guy." Petitioner gave a statement indicating that he disposed of the body. Petitioner's defense as argued by defense counsel per a directed verdict motion outlined how there was no substantial circumstantial evidence presented establishing that

petitioner committed murder. This was outlined by defense counsel per his motion for a directed verdict of acquittal on the murder charge on petitioner's behalf.<sup>1</sup>

At trial, state's witness Steve Reddish testified that he and Miller, along with petitioner and co-defendant Jones, were hanging out on Sunny Street in Spartanburg on Saturday, July 30, 2005, and that after midnight Miller drove off in his truck and then petitioner and co-defendant Jones drove off together in one vehicle. Reddish stated that he never saw Miler again. App. 81, l. 5 – p. 87, l. 19.

State's witness Harry Bowing and Mark Davis testified that they both saw Miller, petitioner, and co-defendant Jones in a pool hall in the area in question on Saturday, July 30, 2005, and that a few days later, co-defendant Jones confessed to both of them (Bowing and Davis) that he (co-defendant Jones) had killed a man. App. 106, l. 18 – p. 111, l. 8; App 122, l. 1 – p. 127, l. 5.

Diane Stephens testified that around 2:00 a.m. on July 31, 2005, she heard a truck pull into her yard, and that she heard two car doors slam shut and the car driving off. Stephens stated that later she saw Miller's truck in her yard, but that it was not parked where he (Miller) usually parked. App. 97, l. 17 – p. 105, l. 22.

Petitioner's girlfriend Sharon Valentine testified that when petitioner returned her car to her on July 31, 2005, she found blood all inside of it. App. 127, l. 13 – p. 135, l. 17. DNA tests results showed that the blood stains inside her car matched Miller's blood type. App. 250, l. 18-25.

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<sup>1</sup> Counsel argued that "the State has presented no evidence that [petitioner] was directly responsible for the unlawful killing with malice aforethought of Darryl Miller. The evidence that has been presented shows that he drove the car with the deceased body, that the car had blood in it, and the blood belonged to the deceased, and that he attempted to clean the car of this evidence. However, there is, again, no evidence that he acted in concert with anyone else who might have killed this gentlemen, and there is no evidence that he actually performed any act which led to that person's death. In fact, the only evidence in the record that someone actually unlawfully killed anyone is evidence that [co-defendant] Jones made admissions that he and he alone, not acting in concert with [petitioner], killed this gentleman. So, we would again ask for a directed verdict of not guilty on count one of the murder charge." App. 272, l. 4 – p.273, l. 9.

Police Officer Jay Steadman questioned co-defendant Jones and petitioner soon after these events occurred because they were both considered suspects in the case. Officer Steadman testified that co-defendant Jones admitted he stated that he killed Miller, but that he was joking. App. 146, l. 5 – p. 147, l. 9. Officer Steadman added further that he questioned petitioner also and that petitioner stated that he and Miller were at a residence on Caulder Avenue in Spartanburg where a guy fought, robbed, and shot Miller, and that he (petitioner) put Miller’s body in the car he was driving, took it to some woods in Union County and dumped it there. App. 142, l. 1 – p. 156, l. 25.

During the PCR hearing, petitioner testified in effect that trial counsel erred in failing to require the solicitor to elect which of two charges (murder and accessory after the fact of murder) to take to trial, or in the alternate to sever his trial from co-defendant Jones’ trial, because he (petitioner) “only cleaned up the crime scene” and “disposed of the body,” but did not commit murder. App. 366, l. 2 – 12; App. 368, l. 16 – p. 369, l. 6; App. 374, l. 4 – 24; App. 377, l. 3 – 12.

Trial counsel testified at the PCR hearing and explained that he did not object to a joint trial or joint charges because the joinders were “strategically sound” since co-defendant Jones “mentioned nothing about [petitioner] having played any role” in the murder and the evidence pointed to petitioner as being guilty of accessory rather than murder. Counsel stated that telling the jury that petitioner was “guilty of accessory [and]not guilty of murder...was the best play.” App. 382, l.13 – p. 384, l. 17; App. 387, l. 9 – p. 389, l. 2.

The PCR judge ruled that counsel articulated a valid strategy in support of not moving for a severance of the charges or the trial on petitioner’s behalf because there was no need for either action where there was insufficient proof that petitioner was guilty of murder, but sufficient proof that he was guilty of accessory after the fact of murder only in the case. App. 409-410.

As a rule, offenses can be joined in one indictment if the offenses arise out of a single chain of circumstances, and are proved by the same evidence, and are of the same general nature and that no prejudice results. City of Greenville v. Chapman, 210 S.C. 157, 211 S.E.2d 865 (1947). However, the joinders in petitioner's case prejudiced his defense since he was charged with murder and accessory, **and** could not be found guilty of both, because this meant that it was certainly likely that the jury would **infer** that petitioner committed murder by mere association or mere presence with co-defendant Jones, who admitted he committed murder, despite the fact that the record is absolutely devoid of any proof that petitioner committed murder via the accomplice liability charged. Compare, State v. Tate, 286 S.C. 462, 334 S.E.2d 289 (1985), where the Court struck down the joinder of two forgery charges in part because although the two forgeries were unconnected, the jury might have **inferred** that the criminal disposition that led the defendant to commit one forgery rendered him capable of committing the other forgery. Compare also State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996), where the Court held that the trial judge erred in failing to sever ABHAN and homicide charges against the defendant (children's mother) because there was no evidence that the defendant committed homicide, but evidence of guilt on the ABHAN offense probably led the jury to **infer** guilt on the homicide offense.

In the case at bar, co-defendant Jones admitted that he murdered Miller. Therefore, since there was no substantial circumstantial evidence presented establishing that petitioner aided and abetted along with co-defendant Jones' murder of Miller (other being present with the two men at some point), the joinder of the offenses of murder and accessory constituted error as the evidence established that petitioner committed the offense of accessory only. Additionally, in light of the evidence in the case that showed that petitioner was guilty of accessory only and not guilty of murder via accomplice liability, it was clear that petitioner's and co-defendant Jones' defenses were

antagonistic; and therefore, counsel should have moved for a severance of petitioner's trial from co-defendant Jones' trial on this basis also. Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right unless a defendant requests a trial severance based on the likelihood that he and his co-defendant would present mutually antagonistic defenses. State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999).

Thus, counsel erred in not moving to require the solicitor to elect which charge of the two on which to try petitioner, particularly since he could not have been convicted on both of these two charges, or in the alternate counsel erred in not moving to sever the trial of petitioner from co-defendant Jones' trial. Counsel's errors as outlined above constituted ineffective assistance of counsel at trial in violation of the Sixth Amendment (see also Strickland v. Washington, 466 U.S. 668 (1984)); and petitioner was prejudiced as a result because the joint charges and joint trial led the jury to **infer** that petitioner was guilty of murder, particularly since petitioner could not have been convicted of both charges. But for counsel's errors, a reasonable probability exists that petitioner's trial would have ended differently.

## QUESTION II

Trial counsel erred in failing to object to the "hand of one is the hand of all" charge because the record was devoid of any evidence linking petitioner to the murder, which the co-defendant admitted he alone committed, via accomplice liability.

Petitioner testified during the PCR hearing that trial counsel erred in failing to object to the accomplice liability charge because it was not a proper charge in the case as he did not act in concert with co-defendant Jones to commit murder. App. 374, l. 10 – p. 376, l. 1.

With regard to this issue, trial counsel testified at the PCR hearing that the accomplice liability charge was applicable and supported by the evidence. App. 393, l. 2 – p. 394, l. 10. The trial judge charged the jury on the law of accomplice liability. App. 316, l. 14 – p. 318, l. 11. The PCR judge ruled trial counsel was not ineffective in this regard. App. 410 – 411.

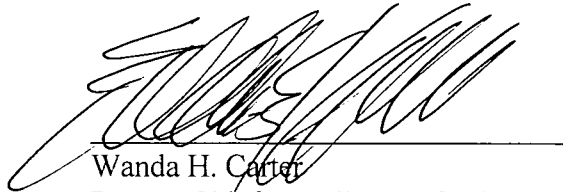
The rule regarding the offense of murder is that the hand of one is the hand of all. State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971). However, the law to be charged is determined from the evidence presented at trial. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). Here, the charge of accomplice liability was not applicable in petitioner's case because there was no evidence presented at trial indicating that petitioner aided and abetted along with co-defendant Jones to murder Miller. Hence, trial counsel erred in not objecting to the accomplice liability charge because such a charge resulted in a murder conviction against petitioner in the case. The reason being that petitioner and co-defendant Jones were both convicted of murder and petitioner was found not guilty of accessory despite the fact that the evidence supported a conviction against petitioner on accessory only.

In other words, the jury was instructed that petitioner could not be convicted on both murder and accessory. This meant that due to the accomplice liability charge, the jury could choose not to convict on the accessory charge and decide to link petitioner to the actions of co-defendant Jones, who confessed to murder, under theory of the hand of one being the hand of all. Trial counsel's error in failing to object to the accomplice liability charge constituted deficient representation of petitioner at trial in violation of the Sixth Amendment to the United States constitution. See also Strickland v. Washington, *supra*. Petitioner was prejudiced as a result because but for this error, a reasonable probability exists that outcome of petitioner's trial would have been different.

CONCLUSION

Based on the foregoing arguments, petitioner requests that this Court grant the petition and allow full briefing on the issues raised in the case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

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DAVID C. CARSON,

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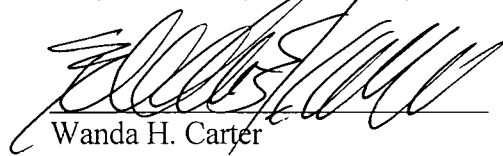
RESPONDENT

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CERTIFICATE OF SERVICE

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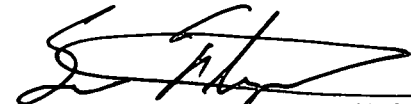
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. David C. Carson #250533, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC, 29210, this 11th day of December, 2014.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day  
of December, 2014.



(L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.