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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Larry B. Hyman, Circuit Court Judge

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TRAMAINE D. NELSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001024

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

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### **ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective in failing to object when the judge instructed the jury on the law of accomplice liability, "the hand of one is the hand of all," when the evidence failed to show that Petitioner and co-defendants joined together to accomplish an illegal purpose but there is evidence in the record that Petitioner and others drove back to the apartments where Petitioner had been robbed earlier because the robber called Petitioner and told him to come get his money and when Petitioner and others arrived they only shot in self-defense after shots were fired at them?

## STATEMENT

In October of 2007, the Charleston County Grand Jury indicted Petitioner, Tramaine D. Nelson, for murder, indictment #2007-GS-10-11054. In October of 2008, the Charleston County Grand Jury indicted Petitioner for assault and battery with intent to kill, indictment #2008-GS-10-7463. On November 9, 2009, Petitioner proceeded to jury trial before the Honorable Kristi Lea Harrington. William L. Runyon represented Petitioner at trial. Harry C. Leventis prosecuted the case. The jury returned with verdicts of guilty and Judge Harrington sentenced Petitioner to forty five (45) years for murder and twenty years concurrent of assault and battery with intent to kill. Petitioner filed a timely notice of intent to appeal and the direct appeal was perfected. On September 12, 2012, the South Carolina Court of Appeals dismissed the appeal. State v. Tramaine D. Nelson, 2012-UP-518 (S.C. Ct.App. September 12, 2012).

On October 26, 2012, Petitioner filed an application for post-conviction relief {PCR}. The State filed a return on July 8, 2013. On September 10, 2015, an evidentiary PCR hearing was held before the Honorable Larry B. Hyman. Christopher L. Murphy represented Petitioner at the PCR hearing. J. Rutledge Johnson represented the State. In a written order filed May 2, 2016, Judge Hyman denied relief and dismissed the application. A timely notice of intent to appeal was filed on May 13, 2016. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in failing to object when the judge instructed the jury on the law of accomplice liability, “the hand of one is the hand of all,” when the evidence failed to show that Petitioner and co-defendants joined together to accomplish an illegal purpose but there is evidence in the record that Petitioner and others drove back to the apartments where Petitioner had been robbed earlier because the robber called Petitioner and told him to come get his money and when Petitioner and others arrived they only shot in self-defense after shots were fired at them.

The jury found Petitioner guilty of a drug related shooting in Charleston on July 13, 2007. Petitioner provided a statement to police which was admitted in evidence at trial. (App. p. 215, line 3 – p. 216, 217, lines 1-2). Petitioner told the police that he had been robbed during a drug deal earlier. (App. p. 215, lines 4-15). Petitioner stated, “My home boy, Juan, set up a drug deal for me. I called the guy I was doing the deal with on the cell phone. I got out of Wanda’s white Grand Marquis and gave the guy the dope. He ended up pulling a handgun out and robbing me of the drugs.” Petitioner went on to say:

The guy who robbed me called my cell phone and told me to come and get my money. He was trying to intimidate me. Me, Timothy, and A.T.L. got into a small SUV style vehicle. I don’t remember the color. A.T.L. drove, I sat behind the driver, and Timothy was in the front passenger seat. We pulled up to the apartments where I was robbed. Timothy got out of the car and started shooting. I got out of the back seat with a black Glock .45. I ran around the car and shot one time. I don’t know how many times Timothy shot.

(App. p. 215, line 18 – p. 216, lines 1-2).

Javon Bryant testified at trial that his nickname is A.T.L. (App. p. 224, lines 6-11). Bryant testified that he drove Petitioner and Timothy Hoard back to the apartments where Petitioner had been robbed earlier. (App. pp. 229-235). Bryant testified, “When I got out of the car, he [Petitioner] was on his cell phone and he explained to me that the person had called and told him he can come pick his money – pick his money up.” (App. p. 231, lines 20-23). When

asked if he was referring to the person who robbed Petitioner, Bryant answered, "Yes, sir." (App. p. 231, lines 24-25). Bryant testified that he did not know that Petitioner and Hoard had guns in the car with them when he took them to the apartments. (App. p. 236, lines 3-5). Bryant testified that Petitioner and Hoard got out of the car at the apartments and Bryant heard shots fired shortly thereafter. (App. p. 235, line 3 – p. 236, lines 1-19). When asked if Petitioner said why he shot at the people, Bryant testified, "They were shooting at him." (App. p. 243, line 24- p. 244, lines 1-16). Bryant confirmed that Petitioner never said that they were going to the apartments to shoot people. (App. p. 242, lines 7-9). Instead, Bryant confirmed that they went to the apartment to collect the money he should have received earlier. (App. p. 242, lines 13-16).

Officer John Neale with the Charleston County Sheriff's Office testified that he found three 7.62 shell casings and one .223 shell casing at the scene. (App. p. 111-114). The deceased died from a gunshot wound to the back. The forensic pathologist was unable to determine the caliber of the fatal bullet. (App. p. 135, lines 5-24).

During the charge conference the State requested a charge on "the hand of one." (App. p. 311, lines 13-14). Instead of objecting, trial counsel stated, "The simple fact of the matter is that we can't successfully argue against you charging the hand of one is the hand of all, although we would love to be able to." (App. p. 313, lines 8-11). The judge instructed the jury with the law stating:

If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose. If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all, or it is sometimes said the hand of one is the hand of all. Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the

crime is committed, is not sufficient to convict the defendant as a principle. Guilt as a principle is shown by actual or constructive presence at the scene as a result of prior arrangement; therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principle. The State must prove beyond a reasonable doubt, by competent evidence, the theory of the hand of one is the hand of all. A principle in a crime is one who either actually commits the crime or who is present aiding, abetting, or assisting in committing the crime. When a person does an act in the present [sic] of and with the assistance of another, the act is done by both.

Where two or more acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all. Present at the commission of a crime means to be sufficiently near, to aid and abet and assist in the commission of the crime. However, mere presence at the scene is not sufficient to convict one as a principle on the theory of aiding and abetting. Intent is also a necessary element, for there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means actually intending the result which occurs, not accidentally or involuntarily. Intent may be shown by acts in conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. The State must prove these elements beyond a reasonable doubt.

(App. p. 349, line 22 – 350, 351, lines 1-18). The trial attorney was deficient in failing to object to the charge.

When asked about the failure to object to the hand of one charge during the PCR hearing, trial counsel stated, ““And – and it really didn’t matter whose—whose shots, so to speak, took out the ultimate victim. The State was entitled to charge him hand of one is hand of all. I don’t usually object to everything just to be objecting. Maybe that’s a fault on my part.” (App. p. 455, lines 14-19). PCR counsel argued that the hand of one charge was improper because Petitioner and others returned to the apartments to collect the money owed rather than to commit a crime. When shots were fired, Petitioner and Timothy Hoard shot back in self-defense. (App. p. 460, line 15 – p 461, lines 1-17).

In the order of dismissal the PCR judge wrote:

Evidence in the record supports that there was an implicit agreement between codefendants to pursue their stolen property and money, none of which Victim had any involvement. According to Applicant's own statement, after Applicant was robbed of drugs and money when he was with Wanda and Tooka and they drove back to Wanda's house, Tooka's cousin, Timothy, was called over to Wanda's house, presumably to aid Applicant in getting his drugs and money back. Another codefendant, A.T.L. then drove up in a small SUV-type vehicle; both Timothy and Applicant proceeded to get into the car and drive to the apartments where applicant was robbed earlier that day. Both Timothy and Applicant possessed guns. Timothy was the first to get out and began shooting, followed by Applicant shooting one shot that ultimately killed Victim. Implicit in this action is an agreement between Timothy and Applicant which displays a common plan to retrieve Applicant's drugs and money. Therefore, the "hand of one hand of all" jury instruction was proper.

(App. p. 476). The PCR judge erred. There is nothing in the record to support the PCR judge's finding that Petitioner and Timothy went to the apartments to retrieve the drugs. Instead, the record supports that Petitioner and Timothy went to the apartments to collect the money that was owed to Petitioner. The record does not support that Petitioner and Timothy Hoard joined together to accomplish an illegal purpose. Bryant testified that he did not know that Petitioner and Timothy had guns in the car with them when he took them to the apartments. (App. p. 236, lines 3-5). The evidence in the present case does not support liability under "hand of one, hand of all" liability or accomplice liability.

In State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct.App.2002), the South Carolina Court of Appeals wrote, "Under the 'hand of one is the hand of all' theory, one 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." In Wilds v. State, 407 S.C. 432, 438-439, 756 S.E.2d 387, 390 (Ct.App. 2014), the South Carolina Court of Appeals addressed when a charge on accomplice liability, "hand of one is the hand of all" should be given writing:

Our supreme court has noted that “[l]ike a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.” Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). In Barber, as in the instant case, four men committed an armed robbery, and, during the robbery, one of the men shot two of the victims. Id. at 234–35, 712 S.E.2d at 437–38. Three of the robbers pled guilty and all testified at Barber's trial that Barber shot the two victims during the robbery. Id. at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. Id. at 438. Our supreme court noted “[t]o support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place.” Id. at 237, 712 S.E.2d at 439. Under this test, the court ultimately found the trial court did not err in instructing the jury on accomplice liability because “the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter.” Id. at 236, 712 S.E.2d at 439. In making this finding, the supreme court relied upon evidence presented at trial indicating three of the robbers were armed, two with .380 handguns, which was the type of weapon forensic experts testified fired all the shots during the robbery. Id. at 237, 712 S.E.2d at 439.

While there was some question as to who fired the fatal shot in the present case, there is no evidence that Petitioner and Hoard went to the apartments to commit a robbery as the co-defendants in Wilds and Barber. Trial counsel was ineffective in failing to object to the “hand of one” charge.


A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland,

466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Petitioner was prejudiced by trial counsel's deficient performance in failing to object to the jury instruction on "the hand of one is the hand of all" when there was no evidence that Petitioner and Timothy Hoard joined together to accomplish an illegal purpose. The State relied heavily on the "hand of one is the hand of all" theory in closing argument. (App. pp. 319-321). There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of November, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Larry B. Hyman, Circuit Court Judge

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TRAMAINE D. NELSON,

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V.

STATE OF SOUTH CAROLINA,

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\_\_\_\_\_


PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Termaine D. Nelson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. She has reviewed the record of petitioner's trial before Judge Larry B. Hyman, which was held on September 10, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve her as counsel for Termaine D. Nelson.


Respectfully Submitted,

  
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Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 28th day of November, 2016.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

  
Kathrine H. Hudgins  
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ATTORNEY FOR PETITIONER

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CERTIFICATE OF SERVICE

\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Termaine D. Nelson, #316883, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of November, 2016.

  
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Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 28th day of November, 2016.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: March 1, 2026