

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County  
Honorable Steven H. John, Circuit Court Judge

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**RECEIVED**

JUL 05 2016

**SC SUPREME COURT**

DERRICK D. HARRIOTT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002610

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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LAURA R. BAER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred in finding that trial counsel provided effective assistance where he failed to present any evidence in support of or request a jury charge on insanity?

## STATEMENT OF THE CASE

### **Procedural History**

On February 21, 2008, the Sumter County Grand Jury indicted Petitioner Derrick Harriott for murder and possession of a firearm during the commission of a violent crime, related to the shooting death of Harriott's girlfriend, Quanna Cooper (hereinafter "the Decedent"). App. 231, l. 14 – 232, l. 2; App. 578 – 579. Prior to trial, Harriott was evaluated by two forensic psychiatrists, Dr. Richard L. Frierson and Dr. Pamela M. Crawford, both of whom opined that Harriott was criminally responsible but was unable to conform his conduct to the requirements of law due to his mental disease or defect.<sup>1</sup> App. 566; App. 572.

On November 10 through 13, 2008, Harriott appeared for trial before the Honorable George C. James, Jr. and a jury. Harriott was represented by William Ceth Land and the State was represented by assistant solicitor Harry Connor. App. 1.

Harriott's aunt, Joyce Witherspoon, who had raised him since he was nine years old, said that Harriott was in special education classes from elementary through high school and received a certificate rather than a diploma. App. 228, l. 19 – 230, l. 21. In March 2007 she saw a change in Harriott in that he was "sleeping a lot." App. 232, ll. 12-16. Just a few weeks prior to the murder, Harriott went to his employer and friend, Eugene Finkdeiner, "very distraught and upset" and crying. App. 208, l. 6 – 209, l. 4; App. 216, ll. 6-24. Harriott told Finkdeiner that he believed that the Decedent was drugging him and that she videotaped him being raped by "some guys" while under the influence of the drugs. App. 217, ll. 1-8; App. 217, l. 20-25. The trial judge instructed the jury that the testimony was not being offered to establish that any drugging or sexual assault actually occurred but rather as evidence of Harriott's state of mind. App. 217,

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<sup>1</sup> Dr. Crawford did not testify at Harriott's trial, but her letter to trial counsel was admitted into evidence at the second PCR hearing. See App. 572.

ll. 9-16; see also App. 278, ll. 3-22. Finkdeiner said that Harriott became withdrawn and distant around the time of their conversation. App. 218, ll. 1-15.

Dr. Richard Frierson, the forensic psychiatrist from the Department of Mental Health conducted an evaluation of Harriott. App. 242, l. 13 – 245, l. 16. Harriott scored a 69 on prior I.Q. testing, which falls in the range of “mild mental retardation.” Dr. Frierson agreed that Harriott’s cognitive and intellectual abilities are limited. However, he opined that, because of his high functioning, Harriott “falls in the range of borderline intellectual functioning, which is not retarded but certainly well below what would be considered average.” App. 248, 19 – 250, l. 1.

Dr. Frierson described the delusions that Harriott was having at the time of the offense as “a fixed false belief,” which Harriott believed to be true even though it was not based in reality. He said that the delusions were a very common symptom of severe mental illness. App. 253, l. 23 – 254, l. 8. His delusions included that the Decedent was drugging him and allowing men to come into his room at night and sexually assault him. Harriott believed that the Decedent was filming it and placing the videos on the internet. He believed that the police were involved and that people in North Carolina and around town in Sumter knew about it and would laugh at him. App. 253, ll. 11-22. Dr. Frierson said Harriott had asked his employer to drug test him so that he could prove what was happening, but he would not have believed the negative results. App. 254, ll. 12-20. Harriott’s delusions are primarily “persecutory” meaning that he believes someone is out to harm him. App. 255, l. 14 – 256, l. 2; App. 270, ll. 9-20. Harriott also had a prostate infection which caused pain in the rectal area, which fed his delusions. App. 256, l. 15 – 257, l. 9; App. 263, ll. 7-22.

When asked about malingering, Dr. Frierson said that Harriott was not intelligent enough to fake his delusions. App. 256, ll. 3-15. Dr. Frierson ultimately opined that Harriott was

capable of distinguishing right from wrong, evidenced by his statement after the shooting to call the police. App. 258, l. 21 – 259, l. 2. However, Dr. Frierson said that Harriott’s mental disease or defect prevented him from conforming his conduct to the requirements of the law. App. 259, ll. 5-10. Harriott could not stop himself from shooting the Decedent in the midst of their argument, particularly when his sexual performance was brought up. App. 251, l. 11 – 253, l. 6; App. 259, l. 13 – 260, l. 11; App. 268, ll. 8-14; see also App. 566 – 572.

Several neighbors testified that at approximately 5:20 p.m. on March 16, 2007, they heard several gunshots in the Orchard Place apartment complex located in Sumter, South Carolina. Three neighbors saw Harriott come out of the Decedent’s apartment and throw his gun down on the ground. They heard him say “Someone call the police.” Though none of them wrote it in their statements, they also claimed at trial that Harriott said “I shot the bitch.” App. 45, l. 9 – 46, l. 17; App. 52, l. 2 – 53, l. 19; App. 54, l. 21 – 55, l. 17; App. 56, ll. 7-10; App. 56, ll. 2-6; App. 59, l. 22 – 60, l. 8; App. 63, l. 25 – 64, l. 24; App. 67, ll. 2-12. Another neighbor could not hear what Harriott was saying but described him as “ranting and raving.” App. 73, l. 24 – 74, l. 7.

When officers arrived, Harriott was standing outside of the apartment. Harriott took off his shirt and “did a 360” to show that he did not have any weapons on him. He then lay on the ground, facedown, as he was instructed to do. App. 78, l. 19 – 79, l. 15. Officer Heath Gardner said that while he was handcuffing Harriott, he kept saying over and over “I know what I did. I know I shot her.” App. 79, l. 17 – 80, l. 9. While officer William Lyons was escorting Harriott to the patrol car, he said “I did it. I know what I did. I did what I had to do.” He “kept just repeating it.” App. 84, ll. 1-15. Harriott was cooperative with police. App. 82, ll. 4-5.

Officers found the Decedent at the bottom of the staircase inside of the apartment with multiple gunshot wounds. App. 86, l. 1 – 87, l. 17; App. 92, l. 19 – 93, l. 24. Ballistics

confirmed that several of the bullet fragments removed from the Decedent and casings found in the apartment were fired from Harriott's semiautomatic rifle. Other items collected were unsuitable for testing or the results inconclusive. App. 167, l. 6 – 176, l. 5. The forensic pathologist testified that there were fourteen gunshot wounds to the Decedent's body, all of which entered on the front of her body. App. 192, ll. 2-11; App. 196, ll. 16-18. Gunshot residue was found on the hands of the Decedent and Harriott. App. 181, l. 13 – 183, l. 6.

The jury returned a verdict of guilty but mentally ill as to both charges. App. 368, l. 1 – 369, l. 5. Judge James sentenced Harriott to life without the possibility of parole.<sup>2</sup> No sentence was issued on the weapons charge pursuant to S.C. CODE ANN. § 16-23-490. App. 388, l. 23 – 389, l. 1; App. 580 – 581.

On direct appeal, Harriott was represented by appellate defender Joseph L. Savitz, III. App. 392. Savitz filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), in which he raised the issue of whether the trial judge committed reversible error by failing to instruct the jury on the defense of insanity. App. 392. Upon consideration of the brief prepared by counsel and the *pro se* brief submitted by Harriott, the Court of Appeals dismissed the appeal pursuant to Anders. App. 403; App. 441. The remittitur was issued on August 3, 2012. App. 443.

#### **First PCR Application and Hearing (2013-CP-43-168)**

On January 31, 2013, Harriott filed an application for post-conviction relief. App. 444. On June 12, 2013, the State filed its Return. App. 455. An evidentiary hearing was held before the Honorable R. Ferrell Cothran on May 29, 2014. App. 460. Harriott was represented by Fulton

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<sup>2</sup> Harriott had no prior criminal record in General Sessions Court and was twenty-nine years old at the time of sentencing. App. 375, ll. 6-11.

Casey Dale Cornwell, and the State was represented by assistant attorney general Daniel Gourley.<sup>3</sup> App. 460; App. 490. Harriott and his trial attorney, William Land, testified at the PCR hearing.

Harriott testified that the State originally offered him thirty years in exchange for a plea, but he decided to go to trial. App. 474, ll. 2-4; App. 479, ll. 1-6. Land told Harriott that he should cooperate with a mental health evaluation, which ultimately resulted in a finding that Harriott was suffering from a mental disease of defect. App. 474, ll. 5-17. At trial, the jury was given only three options on the verdict sheet – guilty, not guilty, or guilty but mentally ill. Land did not request a charge on insanity. App. 474, l. 18 – 476, l. 5. Land advised Harriott that a verdict of guilty but mentally ill was the same as a verdict of guilty as far as “the time and everything” but that Harriott would get treatment in the Department of Corrections. App. 476, ll. 9-14. Harriott said that Land “mainly discussed” trying to get a charge on voluntary manslaughter. App. 478, ll. 3-8. Notably, the trial judge refused to instruct the jury on voluntary manslaughter. App. 282, l. 4 – 291, l. 22; App. 297, l. 21 – 303, l. 11.

Land testified that Harriott’s case was never about whether he shot the victim or trying to get a not guilty verdict. App. 480, l. 18 – 481, l. 7. While Land originally hoped to use an insanity defense, he said that both of the mental health evaluators found that Harriott knew the difference between right and wrong. App. 481, ll. 10-18. Land said that he had no evidence to support an insanity charge, so he could not request that it be included on the verdict form. App. 482, ll. 12-17; App. 483, ll. 7-17. Their strategy at trial was “to try to get voluntary manslaughter.” App. 481, ll. 8-10; App. 484, ll. 2-6. Ultimately, the judge would not charge voluntary manslaughter, so it was not an option on the verdict form either. App. 481, l. 19 – 482, l. 3.

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<sup>3</sup> The cover page of the transcript erroneously lists “L. Boozer” as PCR counsel at the first PCR hearing. App. 460; but see App. 490.

### **Order of Dismissal (2013-CP-43-168)**

On July 11, 2014, Judge Cothran filed an Order of Dismissal denying Harriott's PCR application. App. 490 – 500. Regarding the allegation that trial counsel was ineffective in failing to request a charge on the defense of insanity, the Court ruled that Harriott's allegation was without merit and that he failed to allege sufficient evidence of prejudice. App. 495 – 496. Specifically, the Court wrote:

In the instant case, Trial Counsel explained that Applicant was having delusions about his girlfriend (hereinafter "Victim") drugging and raping him and filming the rape. Trial Counsel stated Applicant was actually suffering from rectal problems, which was tending to corroborate Applicant's delusions. Trial Counsel stated Applicant was evaluated by two separate doctors and was found criminally responsible and competent to stand trial. Based on the foregoing, this Court finds Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*).

App. 495 – 496.

### **Second PCR Application and Hearing (2014-CP-43-2334)**

On November 3, 2014, Harriott filed a second PCR application, with attachments. App. 501. On January 6, 2015, the State filed its Return and Motion to Dismiss all claims beyond Austin<sup>4</sup> review. App. 525. On July 1, 2015, Harriott filed a First Amendment to his PCR application. App. 529.

On July 14, 2015, an evidentiary hearing was held before the Honorable Steven H. John. App. 531. Harriott was represented by Lance Boozer, and the State was represented by Daniel Gourley. App. 531. Based on the State's conversations with PCR counsel Cornwall and letters indicating Harriott's desire to pursue an appeal, the State consented to an Austin appeal. App. 535, l. 4 – 537, l. 9.

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<sup>4</sup> Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991).

**Order Granting Belated PCR Appeal Pursuant to Austin (2014-CP-43-2334)**

On September 17, 2015, Judge John issued an Order granting Harriott an appeal pursuant to Austin. App. 573 – 577. Harriott filed a timely Notice of Appeal, and is serving his Petition for Writ of Certiorari pursuant to Austin v. State at the same time as this Petition.

This petition for writ of certiorari follows.

## ARGUMENT

**The PCR court erred in finding that trial counsel provided effective assistance where he failed to present any evidence in support of or request a jury charge on insanity.**

Trial counsel was deficient in determining that he could not pursue a defense of insanity because the medical professionals who evaluated Harriott opined that he could understand right from wrong, though they agreed that he could not conform his conduct to the requirements of law. App. 481, ll. 10-18; App. 483, ll. 7-17; App. 486, l. 19 – 487, l. 18; see also App. 566 – 571; App. 572. Trial counsel aptly recognized that he could not request an insanity charge where no such evidence was adduced a trial. App. 482, ll. 12-17. However, what he and the PCR court overlooked is that it was trial counsel’s responsibility to present evidence of insanity. If nothing else, he could have called Harriott himself to testify. See State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997) (“A defendant may rely on lay testimony to establish insanity.”).

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 (1984). “Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ ” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). 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).

First, the applicant must demonstrate that counsel’s representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. “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). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

A defendant is insane if, "at the time of the commission of the act constituting the offense, [he], as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." S.C. Code Ann. § 17-24-10(A). "[T]he key to insanity is 'the power of the defendant to distinguish right from wrong in the act itself – to recognize the act complained of is either morally or legally wrong.'" Lewis, 328 S.C. at 278, 494 S.E.2d at 117 (quoting State v. Wilson, 306 S.C. 498, 506, 413 S.E.2d 19, 23 (1992)). A defendant is presumed to be sane. State v. Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989); State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993). The burden is on the defendant to prove the defense of insanity by a preponderance of the evidence. S.C. Code Ann. § 17-24-10(B). "However, when a defendant offers evidence of insanity, the state no longer enjoys the presumption, but must present evidence to the jury from which the jury could find the defendant sane." Smith, 298 S.C. at 208, 379 S.E.2d at 288.

Expert testimony is not necessary to prove insanity or sanity; lay testimony may be sufficient. Lewis, 328 S.C. at 278, 494 S.E.2d at 117. In fact, a jury may disregard expert testimony on the issue of a defendant's sanity. Id. "The law to be charged is determined from the facts presented at trial." Id. (citing State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986)). Thus, the trial court properly refuses to charge insanity only where there is no evidence tending to show the defendant was insane at the time of the crime charged. Id.

Here, trial counsel testified at the PCR hearing that both Dr. Frierson and Dr. Crawford reached the same conclusion – that Harriott was criminally responsible for his actions but unable to conform his conduct to the requirements of law due to his psychiatric impairment. App. 483, ll. 7-17; App. 486, l. 19 – 487, l. 18; see also App. 566 – 571; App. 572. Trial counsel said that he did not have Harriott evaluated any further because he “imagined they would come to same result.” App. 481, ll. 10-18. What counsel overlooked is that the jurors are not bound by expert testimony and that lay testimony on sanity can also be considered by the jury. See Lewis, 328 S.C. at 278, 494 S.E.2d at 117. Thus, counsel was deficient in failing to advise Harriott that his own testimony regarding his inability to understand the difference between right and wrong at the time of the incident would have been sufficient to require a jury instruction on insanity and the inclusion of insanity as an option on the verdict form. Without that advise, Harriott did not testify at his trial.

Because trial counsel also failed to present evidence to support a voluntary manslaughter instruction, counsel had effectively conceded Harriott’s guilt. With no insanity option, the jury was certain to return either a verdict of guilty or guilty but mentally ill. Notably, even the solicitor argued that Harriott was guilty but mentally ill in his closing argument. App. 333, ll. 2-7. Regardless, as counsel advised Harriott, the court’s sentence would be the same under either verdict. App. App. 476, ll. 9-14; see also App. 362, l. – 363, l. 7; App. 387, ll. 11-22. In this case, that sentence was life without parole, despite Harriott’s lack of criminal history and Frierson’s testimony that Harriott’s delusions could likely be successfully treated by a psychiatrist. App. 375, ll. 6-11; App. 388, l. 23 – 389, l. 1; App. 259, ll. 19-25.

CONCLUSION

Based on the foregoing, Petitioner Derrick D. Harriott respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issue raised herein.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County  
Hon. Steven H. John, Circuit Court Judge

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DERRICK D. HARRIOTT,

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PETITION TO BE RELIEVED AS COUNSEL

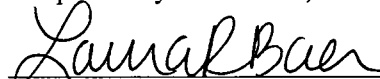
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Counsel for Derrick D. Harriott states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 29, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Derrick D. Harriott.

Respectfully submitted,



Laura R. Baer

Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County

Hon. Steven H. John, Circuit Court Judge

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DERRICK D. HARRIOTT,

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STATE OF SOUTH CAROLINA,


RESPONDENT

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CERTIFICATE OF SERVICE

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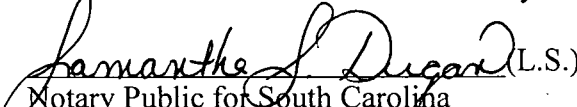
The undersigned attorney hereby certifies that a copy of the Johnson Petition for Writ of Certiorari in this case have been served on Daniel Gourley, Esquire at the Rembert Dennis Building; and Derrick D. Harriott, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of July, 2016. Copies of the Appendix were served along with the Petition for Writ of Certiorari pursuant to Austin v. State.



Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day of July, 2016

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: April 27, 2026.