

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Clarendon County

Honorable Brian M. Gibbons, Circuit Court Judge  
\_\_\_\_\_

MARCO ANDRE CLARK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001475  
\_\_\_\_\_

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

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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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The PCR court erred in finding that trial counsel was not ineffective in representing his client, a paranoid schizophrenic, because: (1) trial counsel admitted he failed to order an evaluation for criminal responsibility and the untimeliness of his request was the trial judge’s basis for denying funds for an evaluation; and (2) petitioner can show a reasonable probability that had an evaluation been timely performed, he would not have been held criminally responsible because of his severe mental illness and that he committed the crime two days after being released from a mental institution .....3

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## **ISSUE PRESENTED**

Whether the PCR court erred in finding that trial counsel was not ineffective in representing his client, a paranoid schizophrenic, where: (1) trial counsel admitted he failed to order an evaluation for criminal responsibility and the untimeliness of his request was the trial judge's basis for denying funds for an evaluation; and (2) petitioner can show a reasonable probability that had an evaluation been timely performed, he would not have been held criminally responsible because of his severe mental illness and that he committed the crime two days after being released from a mental institution?

## STATEMENT

On March 5, 2009, a Clarendon County grand jury indicted petitioner for armed robbery and a weapons charge. App. 121. On July 7, 2009, a motion hearing was held before the Honorable Howard P. King. Supp. App. 1. Amy A. Land represented the State. Supp. App. 1. Harold L. Devoe represented petitioner. Supp. App. 1. After Judge King denied petitioner's motion for funding for a criminal responsibility evaluation, petitioner pled guilty the same day. App. 1. Judge King sentenced petitioner to twenty-two years' imprisonment. App. 28, l. 7 – 29, l. 10. Petitioner raised the denial of funding on appeal. Supp. App. 24. The Court of Appeals held the guilty plea waived the issue. Supp. App. 35.

In March 2013, petitioner filed a PCR application. App. 31. On November 8, 2016, a hearing was held before the Honorable Brian R. Gibbons. App. 46. Charles T. Brooks represented petitioner. App. 46. Julie A. Coleman represented the State. App. 46. Judge Gibbons granted petitioner's PCR from the bench and subsequently entered a written order. App. 67, ll. 9 – 21. App. 70-72. The State filed a Rule 59(e) motion. App. 73. On May 3, 2017, Judge Gibbons held a hearing on the State's motion. App. 83. On June 3, 2017, Judge Gibbons entered an amended order denying post-conviction relief. App. 108. This petition follows.

## ARGUMENT

The PCR court erred in finding that trial counsel was not ineffective in representing his client, a paranoid schizophrenic, because: (1) trial counsel admitted he failed to order an evaluation for criminal responsibility and the untimeliness of his request was the trial judge's basis for denying funds for an evaluation; and (2) petitioner can show a reasonable probability that had an evaluation been timely performed, he would not have been held criminally responsible because of his severe mental illness and that he committed the crime two days after being released from a mental institution.

Petitioner is a paranoid schizophrenic. Supp. App. at 17. In the years leading up to this crime, he was in-and-out of mental institutions. Supp. App. at 15 – 17. Petitioner has spent:

- Ten days at Bryan Psychiatric Hospital in 2003, where he was diagnosed with “psychotic disorder NOS;”
- Two months at Bryan Psychiatric Hospital in 2004, where he was diagnosed with “schizophrenia, paranoid type” and reported Jimi Hendrix doing things to him through his music;
- Eight days at Bryan Psychiatric Hospital in 2005, again diagnosed with paranoid schizophrenia and having “hyperreligious” thoughts;
- Was found incompetent to stand trial in 2006 because people were trying to read his mind, he had a “third eye” that allowed him to investigate things that are unseen, and was diagnosed with schizophrenia;
- Two months at Just Care in 2006 with auditory hallucinations and diagnosed with schizophrenia;

Supp. App. at 15 – 17. Then, **two days before committing the crime in this case**, petitioner was released after spending twelve days at Three Rivers Center for Behavioral Health. Supp. App. at 17. He had auditory hallucinations and was diagnosed with paranoid schizophrenia. Supp. App. at 17.

Plea counsel had access to this information, yet did not ask to have petitioner evaluated for criminal responsibility. Supp. App. at 5, l. 7 – 7, l. 15. This mental health history appears in the competency evaluation performed by Dr. Michael Gassen which was completed nearly a month before trial. Supp. App. at 20. Plea counsel asked the court for funding to perform a criminal responsibility evaluation on July 7, 2009. Supp. App. at 5, l. 7 – 7, l. 15. Judge King asked plea counsel why he did not order the criminal responsibility evaluation at the same time he ordered the competency evaluation. Supp. App. at 5, l. 7 – 7, l. 15.

Plea counsel responded that he thought he ordered it, but admitted he made a mistake. Supp. App. at 5, l. 7 – 7, l. 15. Judge King denied the request, stating “at this late stage it should have been brought up long before now of criminal responsibility if that was the case.” Supp. App. at 9, ll. 11 – 15.

Left without any defense after this motion was denied, petitioner decided to plead guilty and ask for mercy from the court. App. 21, l. 21 – 22, l. 6. Judge King found petitioner competent to plead guilty. App. 10, l. 6 – 11, l. 7. Without relying on any evaluation of criminal responsibility, Judge King accepted the plea, stating, “I believe that he was responsible at the time that he committed this crime. Did know the difference between right and wrong, based upon my observations of his answers to these questions.” App. 19, ll. 2 – 13. Petitioner raised the denial of funding for the criminal responsibility evaluation on an appeal from his guilty plea, but the Court of Appeals held petitioner waived the issue by pleading guilty. Supp. App. 35.

The PCR court held plea counsel did not perform deficiently because he asked for funding and it was denied. App. 116. This finding is a legal error. Smalls v. State, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, Op. No. 27764, 2017 WL 736339 (Feb. 7, 2018). This Court reviews legal errors made by a PCR court *de novo*, with no deference to the lower court. Id. Plea counsel admitted he made a mistake in not ordering the criminal responsibility evaluation. Judge King denied the motion because it was untimely—a reason solely within plea counsel’s control. The State cannot convert deficient performance into a direct appeal issue when plea counsel’s negligence is the reason for the denial of a motion. Nor can there be any strategic reason for not asking for the evaluation because counsel realized he needed it, asked for it, but filed the motion too late. The PCR court erred on this prong of Strickland v. Washington, 466 U.S. 668 (1984).

The PCR court also erred on Strickland’s prejudice prong. The court held petitioner could not prove prejudice because he did not present expert testimony showing he would have met the test from M’Naghten’s Case, 8 Eng. Rep. 718 (1843). App. 117-19. See also State v. Lewis, 328 S.C. 273, 494 S.E.2d 115 (1997) (recognizing South Carolina’s adoption of M’Naghten test). This holding is also a legal error. While PCR counsel acknowledged he did not have an expert, the lack of expert testimony is not legally fatal to petitioner’s claim. App. 49, ll. 9 – 16. “A defendant may rely on lay testimony to establish insanity.” Lewis at 278, 494 S.E.2d at 117.

Petitioner’s testimony, combined with the plea record, establishes a reasonable probability that he was insane at the time he committed the crime. App. 55, l. 18 – 60, l. 6. Petitioner committed the crime immediately upon being released from a mental hospital where he was treated for paranoid schizophrenia. Supp. App. 13-20. Petitioner testified he did not have his medication, Depakote. App. 56, ll. 2 – 16. He “had no mind of his own” and was

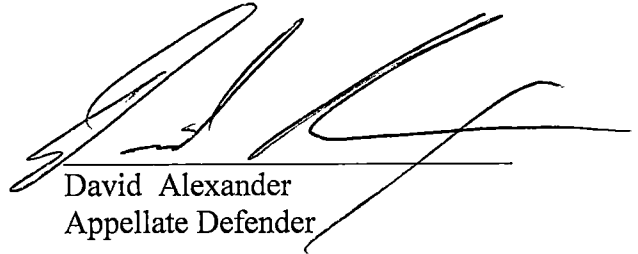
influenced by his co-defendants. App. 55, l. 18 – 60, l. 6. Combined with petitioner’s long history of severe mental illness, petitioner established prejudice and the PCR court erred as a matter of law in requiring expert testimony.

Furthermore, a recent decision by this Court demonstrates that the prejudice standard is relaxed when dealing with a PCR applicant’s mental health. Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017). Ramirez dealt with a PCR applicant’s competency to stand trial. Id. The Court held that Ramirez “need only show a reasonable probability that he was incompetent at the time of the plea.” Id. (internal quotations omitted).

While the question here is criminal responsibility, the Ramirez standard should apply. Petitioner’s long history of severe mental illness and his testimony at the PCR hearing demonstrates a reasonable probability that he was insane at the time he committed the crime. Plea counsel believed there was a reasonable probability petitioner was insane and asked for an evaluation. The PCR court erred in finding no prejudice and this Court should reverse.

**CONCLUSION**

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's convictions.

A handwritten signature in black ink, appearing to read 'D. Alexander', is written over a horizontal line. The signature is stylized and extends to the right of the line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Clarendon County

Honorable Brian M. Gibbons, Circuit Court Judge

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MARCO ANDRE CLARK,

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PETITION TO BE RELIEVED AS COUNSEL

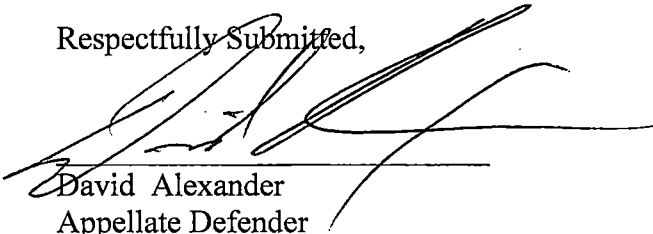
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Counsel for Marco Andre Clark states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Brian M. Gibbons, which was held on November 8, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Marco Andre Clark.

Respectfully Submitted,

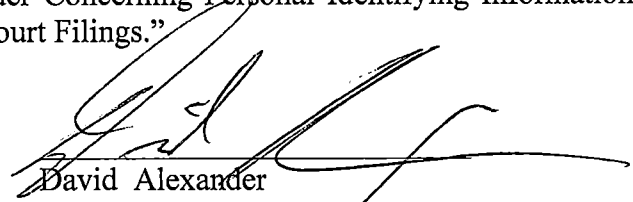


\_\_\_\_\_  
David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 23rd day of February, 2018.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his 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."



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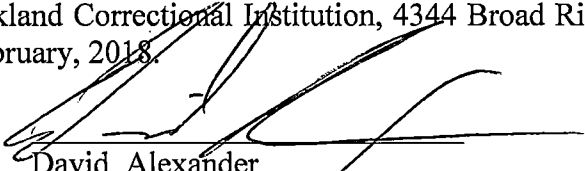
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

—————  
CERTIFICATE OF SERVICE  
—————

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix in the above referenced case has been served upon Julie Coleman, 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, a copy of the Appendix, and a copy of the Supplemental Appendix have been served on Marco Andre Clark, #335713, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 23rd day of February, 2018.

  
David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 23rd day of February, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023