STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Steven H, John, Circuit Court Judge

Derrick D. Harriott,

Petitioner,

V.

State of South Carolina,

Respondent.

Appellate Case No. 2015-002610

Pro-Se Appellant Brief

By: Derrick D. Harriott, #331760
BRCI-Wateree Unit
4460 Broad River Road
Columbia, S.C. 29210

QUESTIONS PRESENTED

1. WHETHER THE APPELLANT DEFENDER PROPERLY FILED A JOHNSON BRIEF AS OPPOSED TO A MERITS BRIEF ON THE ISSUES OF THE PCR COURT'S FINDING AS TO COUNSEL'S TRIAL PERFORMANCE, AS IT RELATES TO THE STATUTORY FORMS OF THE VERDICT?

2. WHETHER SUCH FAILURE BY THE COURT TO CHARGE "ALL STATUTORY" OPTIONS, RENDERED THE TRIAL FUNDAMENTALLY UNFAIR, AS WELL AS BEING A "STRUCTURAL ERROR", REQUIRING "AUTOMATIC REVERSAL" OF THE CONVICTION AND SENTENCE?

3. WHETHER THE PCR COURT'S RESOLUTION OF THE MATTERS ABOVE INCONSISTENT WITH STATUTORY, CONSTITUTIONAL AND WELL ESTABLISHED RULES OF CRIMINAL AND CIVIL PROCEDURE?

Petitioner adopts the "Procedural History" and "Statement of the case", as if fully reinstated herein, that's accorded within Appellate Counsel's **Johnson**, Brief.

Argument 1.

Since a Johnson, petition is very similar in character to that of an Anders, brief, which essentially serves the identical purpose in direct appeals as it does on appeal from a PCR ruling. Petitioner argues that such a brief in this case is misplaced based on the clear facts, evidence and circumstances.

As the Anders Court noted beginning with Griffin v. Illinois, 351 U.S. 12 (1956); "that equal justice was not afforded an indigent appellant where the nature of the review depends on the amount of money he has", Id at 19.

In Douglas v. California, 372 U.S. 353 (1963), the U.S. Supreme Court has additionally and consistently held invalid those procedures "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself".

Even in light of the above burden being placed on Petitioner as expressed by the Supreme Court. The following arguments in support of granting this certiorari, is clear and deserving of encouragement to proceed further.

"SUMMARY OF ERRORS COMMITTED"

A brief assessment of this case once the Austin appeal was consented to and subsequently granted. Is to consider the issues denied in the original PCR case. See (2013-CP-43-168).

Reviewing the "appealable testimonial evidence" which came before the Honorable R. Ferrell Cothran, on May 29, 2014. PCR counsel Casey Dale Cornwell, elicited testimony from trial counsel that (1) Petitioner was evaluated by two mental health doctors that found Petitioner knew the difference between right and wrong and; (2) on that basis, he had no evidence to support an insanity charge, so he could not request such be included on the verdict form. App. R. 482, II. 12-17.

During the trial phase in which the court charged jurors in Petitioner's instant case. (App. R. 353, lines 7-12) The following colloquy is conveyed by the court:

> "Now in this case ladies and gentleman, there are three possible verdicts as to the charge of murder ; One is **not guilty;** the second is **guilty but mentally ill,** and the third is **guilty.** These are the three choices that you'll have and the choice you will have to make and will be between one of those three" Id. at 353. lines 7-12.

Pursuant to S.C. Code Ann. §17-24-30 (i.e. form of verdict) It states in no uncertain terms involving a case such as this, the following legislative language:

"In a prosecution for a crime when the affirmative defense of insanity is sufficiently raised by a defendant, **or when sufficient evidence of a mental disease or defect of the defendant is admitted into evidence**", the trierof fact **"SHALL"** find under applicable law, and the verdict **"SHALL"** so state, whether the defendant is:

(1) Guilty

(2) Not Guilty

(3) Not Guilty by reason of insanity; or

(4) Guilty but mentally ill.

In accordance with the clear legislative intent above. The **"four (4)"** verdict form is required for two instances at the conclusion of criminal trials. One, is where there is an affirmative defense of insanity; the other is where there is sufficient evidence of a mental disease or defect of the defendant. And such is introduced into evidence.

Argument 2.

Petitioner argues; "if a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Miller v. Doe, 441 S.E.2d 319 (1994). Where the terms of the statute are clear and unambiguous, the court must apply those terms according to their literal meaning. Adkins v. Varn, 439 S.E.2d 822 (1993). This Court cannot construe a statute without regard to its plain and

ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope". Berkebile v. Outen, 426 S.E.2d 760 (1993).

Further, the term **"shall"** in a statute means that the action is mandatory. See Montgomery v. Keziah, 277 S.C. 84, 282 S. E.2d 853 (1981). Thus, there is no reason here to depart from the clear statutory requirement for "all four verdict forms", in favor of subtle or forced rules that differ from the clear legislative intent.

The final diagnosis by the doctors (App. R. 254 lines 1-8), was that Petitioner suffered from a serious mental illness, which caused him to be delusional. That defect qualifies under the statute as being a mental defect or disease. Thus, the court "was without authority to fashion the verdict forms outside of what the legislature intended", which essentially deprived the defendant of any opportunity to a fair trial. While simultaneously aiding the State (two ways to find guilt, but a single way to find not guilty) to obtain a verdict of guilty.

HARMLESS VS. STRUCTURAL ERROR.

In addition, State v. Jefferises, 446 S.E.2d 427 (S.C. 1994), illuminated the distinction between harmless and structural error situations. That some errors are so fundamentally prejudicial to the defendant, they defy harmless error analysis and once exposed, are "automatically reversible".

The U.S. Supreme Court has delineated several areas which are not subject to a harmless error analysis. See Arizona v. Fulminae, 499 U.S. 279, 111 S. Ct. 1246 (1991)(delineating examples); Sullivan v. Louisiana, 113 S. Ct. 2078 (1993)(Shifting the burden of proof in definition of reasonable doubt); McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944 (1984)(Right to Self-Representation); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963)(Total lack of counsel); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437 (1927)(Biased Judge).

Most recently the Court reversed its prior holding in Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990), and held that a jury charge on reasonable doubt identical to the one given in Cage, supra, was not subject to harmless error analysis. Sullivan v. Louisiana, 113 S. Ct. 2073 (1993).

In Sullivan, the Court held a harmless error analysis could not be made "where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings". Id at 113 S. Ct. 2082. In that case, the error is a **"structural defect"** in the constitution of the trial mechanism, which [defies] analysis by "harmless error standards". **Id.** at 113 S. Ct. 2082.

And certainly, constitutional errors, no less than other errors, may have been harmless in terms of their effect on the fact finding process at trial. Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431 (1986). Yet, the Court is not ready to declare

the one found in the instant case at bar, to be subject to harmless error analysis. And for that reason, "the failure to charge the jury in accordance with the statute", which had the effect of eliminating "reasonable doubt by reason of insanity". Had aa damaging as well as detrimental effect of the jury's fact-finding process.

Not only did the lower court not charge an integral part of the verdict form. But it erroneously deprived "through colloquy", any opportunity for the defense to "prove insanity". When such proof or the establishment of such proof does not rely on expert testimony. And is a matter which fits squarely within the province of jurors to decide. See State v. Lewis, 328 S.E.2d 273, 278, 494 S.E.2d 115, 117 (1997)("A defendant may rely on lay testimony to establish insanity"). See (App. R. 482, II 12-17).

Clearly the above provided a clear route for the PCR court to find trial counsel was ineffective for both reasons above, and the denial of relief was contrary to controlling authority.

ARGUMENT 3.

Finally, Petitioner argues that the PCR court's resolution of the matters on the record was inconsistent with statutory, constitional law, as well as rules of criminal and civil procedure. That trends of the edge of exposing a clear "miscarriage of justice".

In otherwords, it is well established a criminal defendant, under the Constitution of the United States (i.e. Sixth Amendment), is guaranteed "the right to effective assistance of counsel". See Strickland v. Washington, 466 U.S. 668 (1984). Where claims are raised as to counsel's performance, court's look to "whether the attorney's conduct was so poor that such deprived the defendant of the proper functioning of the adversarial process, that the trial court cannot rely upon as having produced a just result". See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

First, rather than "object to the missing verdict form", counsel went with the state and the court's suggestion not to include "not guilty by reason of insanity". A form in which "the jurors", as opposed to the court, according to §17-24-30, had a right to pass upon. But moreover, the statute's clear and unambiuous language "does not limit the four (4) verdict form only to insanity defenses". It's inclusive language 'to the contrary', also includes "all four (4) to be charged whenever sufficient evidence of a mental disease of defect of the defendant is admitted into evidence".

Courts when called upon to interpret a statue presume the legislature "says what is meant and mean what it says". Miller v. Doe, 441 S.E.2d 319 (1994); whereas, there's absolutely no support for the trial court's omission of "Not guilty by reason of insanity", except that of counsel's poor performance, and the court's abuse of discretion, which rendered the trial fundamen-

tally unfair. And the verdict being a misdecription, which vitiates all the jury's findings. Id at 113 S. Ct. 2082.

In conclusion, even where the Petitioner appeared at the PCR hearing to testify on his own behalf in order for the PCR court to determine whether relief should be granted. The trial court instructed the Department of Corrections, at sentencing, to administer mental treatment. Such treatment includes administering mental medication. Of which, could have impaired the Petitioner's ability to testify, or aid and assist during his PCR case.

There was no mental examination to determine whether the Petitioner was competent to testify and is another ground worth investigating. For these and the inclosed reasons, the Petitioner prays that certiorari is granted, and relief is afforded as the law and facts require.

Respectfully Submitted,

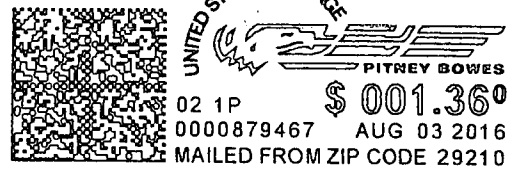
/s/ Derrick D. Harriott

Derrick D. Harriott, #331760
BRCI-Wateree Unit
4460 Broad River Road
Columbia, S.C. 29210

8/3/16

cc: filed
7/29/2016

Derrick D. Harriott #335160
BRCI Wateree 165
Columbia, S.C. 29210



The supreme Court of South Carolina
DANiel E. SHARouse, CLeRK of Court
Post oFFice BOX 11330
ColumbiA, South carolina 29211

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