RECEIVED

Dec 14 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County

Honorable Maite Murphy, Circuit Court Judge

Lower Court Case No. 2014-CP-07-02994
Appellate Case No. 2019-000529

Abdiyyah ben Alkebulanyahh, #6012
a/k/a Tyree Roberts,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

APPENDIX
VOLUME I OF II
PAGES 1-500

LINDSEY S. VANN
SC Bar No. 101408
EMILY C. PAAVOLA
SC Bar No. 77855
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044
Counsel for Petitioner

Other Counsel of Record:

MELODY JANE BROWN
WILLIAM JOSEPH MAYE
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Counsel for Respondent

Successive PCR Pleadings & Transcripts

Application for Post-Conviction Relief....1

Order Appointing PCR Judge....7

Respondent's Return & Motion to Dismiss....9

Amended Application for Post-Conviction Relief....40

Response in Opposition to Motion to Dismiss....47

Reply to Response in Opposition to Motion to Dismiss....69

Reply in Support of Motion to Stay....86

Return to Amended Application for Post-Conviction Relief & Motion to Dismiss....91

Supplement to Return to Amended Application for Post-Conviction Relief & Motion to Dismiss....122

Response in Opposition to Motion to Dismiss....132

Reply to MTD....195

Special Order Assigning Judge Murphy....204

Order of Dismissal....205

Motion to Alter or Amend....214

Order Denying Motion to Alter or Amend....219

MTD Hearing Transcript....223

Initial PCR Appeal Pleadings

Motion to Remand for Additional Post-Conviction Proceedings....245

Response in Opposition to Motion to Remand for Additional Post-Conviction Proceedings....276

Reply to Response to Motion to Remand for Additional Post-Conviction Proceedings....297

Order Denying Motion for Remand for Additional Post-Conviction Proceedings....312

Petition for Writ of Habeas Corpus.....314

Return to Petition for Writ of Habeas Corpus 407

Petitioner's Reply.....463

Order Denying Petition for Writ of Habeas Corpus 484

Petition for Writ of Certiorari 486

Return to Petition for Writ of Certiorari.....526

Petitioner's Reply.....564

Order Denying Petition for Writ of Certiorari 585

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Abdiyyah ben Alkebulanyahh, 6012)
Aka Tyree Roberts)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)

Case No. 2014-CP-07-2994

APPLICATION FOR POST-CONVICTION RELIEF

2014 NOV 24 PM 3:08
BEAUFORT COUNTY, SC
CLERK OF COURT

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.

2. Name and location of Court which imposed sentence: Beaufort County Court of General Sessions.

3. Name(s) of co-defendant(s) (if any): Not applicable.

4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 02-GS-07-0369 & 0370 – two counts of murder.

5. The date upon which sentence was imposed and the terms of the sentence: October 22, 2003 – death sentence.

6. A finding of guilty was made: after a plea of not guilty.

7. The applicant did appeal from judgment of conviction and sentence.

8. The Courts to which applicant appealed:
   (a) The Supreme Court of South Carolina.
   (b) The Supreme Court of the United States.

   The result in each Court to which applicant appealed:
   (a) Sentence and conviction affirmed.
   (b) Petition for Writ of Certiorari denied.

   The date of each result:
   (a) July 24, 2006, rehearing denied August 11, 2006.
   (b) March 19, 2007.

Citations of any written opinion or orders entered pursuant to such results:

(a) *State v. Roberts*, 369 S.C. 580, 632 S.E.2d 871 (2006).

(b) *Roberts v. South Carolina*, 549 U.S. 1279 (2007).

9. Not applicable.

10 & 11 GROUNDS FOR RELIEF WITH SUPPORTING FACTS

10(a) **Applicant was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.**

11(a) **Supporting Facts:**

(1) The trial judge failed to inquire into Applicant's competency during the penalty phase of the trial despite Applicant's increasingly irrational and bizarre behavior prior to trial, during the guilt-or-innocence phase of the proceedings, and during the sentencing phase of the trial, *see Drope v. Missouri*, 420 U.S. 162 (1975);

(2) Applicant was incompetent in fact during the penalty phase of the trial, *see Drope v. Missouri*, 420 U.S. 162 (1975);

(3) The trial judge failed to secure a knowing and intelligent waiver of Applicant's right to present mitigating evidence, *see Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); and

(4) The trial judge failed to terminate Applicant's *pro se* status while simultaneously removing Applicant from the courtroom for his obstreperous behavior and restricting the ability of standby counsel to present evidence, *see Faretta v. California*, 422 U.S. 806, 807 (1975); *Martinez v. Court of Appeals of California*, 528 U.S. 152, 162 (2000).

10(b) **Applicant's death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without an individualized determination by the trial judge.**

11(b) **Supporting Facts:** During the penalty phase of Applicant's trial, without making any findings regarding the need for restraints, the trial judge ordered Applicant's hands and legs be shackled and Applicant remained shackled in the presence of his sentencing jury. *See Deck v. Missouri*, 544 U.S. 622, 624 (2005).

10(c) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the sentencing phase of his capital trial.**

11(c) **Supporting Facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel failed to object to evidence of general prison conditions during the sentencing phase, *see State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007); *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005)

(2) Counsel failed to object to the extensive amount of victim-impact evidence introduced during the sentencing phase, *see Payne v. Tennessee*, 501 U.S. 808 (1991); *Booth v. Maryland*, 482 U.S. 496 (1987); and

(3) Counsel failed to object to inflammatory and imporper statements made during the prosecution's closing argument, rendering the sentencing phase fundamentally unfair, *see Darden v. Wainwright*, 477 U.S. 168, 178-79 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Viereck v. United States*, 318 U.S. 236 (1943).

10(d) **The prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Applicant's rights guaranteed by the Sixth and Fourteenth Amendments.**

11(d) **Supporting Facts:** Following *voir dire*, the State struck four of the five African American jurors that were presented, including Edith Owens, Matthew Young, Antwoine Crosson, and Kerry Brown, and provided pretextual race neutral explanations for striking the challenged jurors. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

10(e) **Applicant was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.**

11(e) **Supporting Facts:** Applicant's sentencing jury was tainted by several extraneous influences, including (1) one juror asked a minister for guidance as to how to make the sentencing phase life or death decision; (2) several jurors held hands and prayed during deliberations; (3) some jurors brought Bibles and copies of scripture into the jury room; (4) jurors relied on specific Biblical passages to help them make their decision—especially the passages advocating *lex talionis* or "an eye for an eye"; (5) some jurors were led to believe the jury was sequestered because of threats made by Applicant's followers; and (6) several jurors entered the jury box one day during trial and discovered dog manure and were told by court personnel that there had been threats from Applicant's "associates" and the manure came from a bomb sniffing dog that was being used daily to inspect the courtroom for bombs. *See Turner v. Louisiana*, 379 U.S. 466 (1965); *Remmer v. United States*, 347 U.S. 227 (1954); *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014); *see also Irvin v. Dowd*, 366 U.S 717 (1961).

12. (a) Prior to this application, Applicant has filed a petition in state court under South Carolina Law.

(b) Prior to this application, Applicant has filed an application for post-conviction relief and a petition for a writ of habeas corpus in State or Federal court.

(c) Applicant has not filed any petitions to the United States Supreme Court other than the petition already specified *supra* in (8).

(d) Applicant has not filed any motions, petitions, or applicants in this or any other Court.

13. Petitions filed in other courts:

(a) Specific nature of petitions:
- i. Application for post-conviction relief
- ii. Petition for writ of habeas corpus (state court)
- iii. Petition for writ of habeas corpus (federal court)

(b) Name and location of the court in which each was filed:
- i. Beaufort County Court of Common Pleas, Case No. 2007-CP-07-0715
- ii. In the original jurisdiction of the Supreme Court of South Carolina, Case No. 2011-185866
- iii. United States District Court, District of South Carolina, Case No. 6:13-cv-918-TLW-KFM.

(c) Disposition:
- i. Application for post-conviction relief was denied.
- ii. Petition for writ of habeas corpus was denied.
- iii. Petition for writ of habeas corpus remains pending.

(d) Date of disposition:
- i. September 17, 2009.
- ii. March 12, 2013.
- iii. N/A

14. All grounds set forth in 10 *supra* have previously been presented to a court.

15. Identify the grounds previously raised:

(a) All grounds set forth in 10 *supra*.

(b) Each ground was raised in Applicant's petition for writ of habeas corpus in the original jurisdiction of the Supreme Court of South Carolina, which was summarily denied, and Applicant's petition for writ of habeas corpus in the District of South Carolina, which remains pending after a recommendation by the Magistrate Judge that the District Court find each of the grounds procedurally defaulted because they were not raised in Applicant's initial PCR Application.

The grounds for relief were not included in the initial PCR application due to Applicant's initial PCR counsel's inexperience and lack of qualification under the state PCR statute, S.C. Code § 17-27-160(B), and failure to obtain trial counsel's files, request funding for investigative or expert services, or conduct any independent investigation. As a result, PCR counsel failed to investigate and present meritorious claims for post-conviction relief which prejudiced Applicant where he was prohibited from raising any claim that his trial counsel were ineffective on direct appeal. *See, e.g., Martinez v. Ryan*, 132 S. Ct. 1309 (2012); Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. 913, 1086 (2003) ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues."); *id.* ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."). The grounds for relief are, therefore, raised in this second-in-time PCR application to allow for consideration and exhaustion in the South Carolina courts.

16. All grounds set forth in 10 *supra* have previously been presented to a court.

17. Applicant was previously represented by counsel.

18. Applicant was previously represented by an attorney:

At preliminary hearing: Gene G. hood, Fourteenth Circuit Public Defender, PO Box 525, Beaufort, SC 29901 and Samuel C. Bauer, PO Box 7965, Hilton Head Island, SC 29938.

At arraignment and plea: Gerald A. Kelly, 4760 Yemassee Hwy. Varnville, SC 29944, and Sean P. Thorton, Fourteenth Circuit Solicitor's Office, PO Box 1880, Blufton, SC 29910.

At trial: *Pro se*

At sentencing: Gerald Kelly and Sean Thornton, see above.

On appeal: Robert M. Dudek and Joseph L. Savitz, III, Office of Appellate Defense, P.O. Box 11589.

In state post-conviction proceedings: Glenn Walters, Sr., PO Box 1346, Orangeburg, SC 29116 and Carl B. Grant, PO Box 1203, Orangeburg, SC 29116.

On appeal from the denial of the application for state post-conviction relief: John H. Blume, Cornell Law School, 158 Myron Taylor Hall, Ithaca, NY 14853.

In federal habeas corpus proceedings: John H. Blume, see above, and Emily C. Paavola, 900 Elmwood Ave., Suite 101, Columbia, SC 29201.

19. Applicant seeks relief from his convictions and sentence.

20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

JOHN H. BLUME
Cornell University
158 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, South Carolina 29201
(803) 765-1044

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

November 21, 2014

The Supreme Court of South Carolina

The State, Respondent,

v.

Abdiyyah Ben Alkebulanyahh,
a/k/a Tyree Roberts, Appellant.

Beaufort County
2014-CP-07-02994

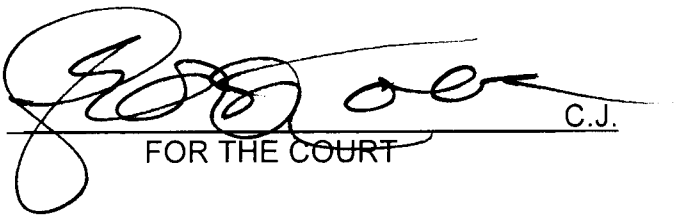
ORDER

Appellant was convicted of two counts of murder and was sentenced to death. State v. Roberts, 369 S.C. 580, 632 S.E.2d 871 (2006). This Court affirmed appellant's convictions and sentence. The United States Supreme Court denied certiorari on March 19, 2007. Roberts v. South Carolina, 549 U.S. 1279, 127 S.Ct. 1828 (2007). Appellant filed an application for post-conviction relief (PCR) on March 12, 2007 which was dismissed with prejudice by the Court of Common Pleas on September 17, 2009. Subsequently, appellant filed an action for habeas corpus in the South Carolina Supreme Court on February 18, 2011. That action, as well as appellant's petition for writ of certiorari, was denied by this Court on February 22, 2013.

Appellant filed a federal habeas petition challenging his convictions and death sentence on February 13, 2014 (C/A No. 6:13-cv-00918-TLW-KFM), as well as another PCR action in the Court of Common Pleas on November 24, 2014 (2014-CP-07-02994). Appellant is currently represented in these actions by Emily C. Paavola and John H. Blume, III.

The Honorable R. Knox McMahon is hereby assigned to the above-captioned PCR action appellant filed on November 24, 2014. Judge McMahon shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled.

Judge McMahon shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge McMahon shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the Status of this matter every sixty days under In re Stays of Execution in Capital Cases, supra, 321 S.C. 544, 471 S.E.2d 140 (1996), Judge McMahon is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.



C.J.

FOR THE COURT

December 17, 2014
Columbia, South Carolina

cc: The Honorable R. Knox McMahon
Donald J. Zelenka, Esq.
Alphonso Simon, Jr., Esq.
John H. Blume, III, Esq.
Emily C. Paavola, Esq.
Jerri Ann Roseneau
Daniel E. Shearouse, Esq.
Tiffany B. Raines

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS)
Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts	) CIVIL ACTION NO. 2014-CP-07-2994)
Applicant,	)
vs.	) **RETURN AND MOTION**) **TO DISMISS**
State of South Carolina,	)
Respondent.	)

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and hereby makes Return to the Application for Post-Conviction Relief filed by the Applicant on November 24, 2014. Respondent moves that this Application be dismissed because this Application is untimely. Furthermore, this Application is successive to the Application filed by the Applicant on March 12, 2007. In support of this Return and Motion to Dismiss, Respondent would show this Court the following:

I. PROCEDURAL HISTORY

Applicant is currently confined at the Lieber Correctional Institution in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Beaufort County. Applicant was initially indicted by the Beaufort County Grand Jury during the March 2002 Term of the Beaufort County Court of General Sessions for two counts of Murder (2002-GS-07-0369, 0370). (App. 4532-33; Attachment No. 2). The State filed a Notice of intent to Seek the Death Penalty in this case on January 22, 2002. (App. 4524). The State also served its Notice of Evidence of Aggravation on March 19, 2002. (App. 4525).

Initially, Applicant was represented by Gerald Kelly, Esquire, and Sean Thornton, Esquire, of the Beaufort County Public Defender's Office. Applicant moved to represent himself during the proceedings. (See App. 3892-3968). His motion was granted, but Mr. Kelly and Mr. Thornton were appointed to stay on the case as standby counsel. Id.

Voir dire in the case began before the Honorable Daniel F. Pieper, Circuit Court Judge, on October 6, 2003. (App. 41-1194). The jury was selected on October 10, 2003. (App. 1320-39). The guilt phase of the trial by jury before Judge Pieper began on October 10, 2003. (App. 1316). Applicant was present and represented himself during this phase of the trial. (App. 1316-3473). Mr. Kelly and Mr. Thornton served as standby counsel. Id. The State was represented by Solicitor Randolph Murdaugh, Esquire and Assistant Solicitors Duffy Stone, Esquire and Angela Tanner, Esquire, all of the Solicitor's Office for the Fourteenth Judicial Circuit. Id. On October 20, 2003, Applicant was convicted him for both murders. (App. 3472-73).

After the statutory twenty-four hour waiting period for sentencing, the sentencing phase of the trial began on October 21, 2003. (App. 3538).

Judge Pieper submitted the following aggravating factors to the jury:

> The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.
>
> Two or more persons were murdered by the defendant by one act or pursuant to on scheme or course of conduct.

(App. 3847; 4529). The following mitigating factors were submitted to the jury:

> Whether the existence of any non-statutory mitigating circumstance was supported by the evidence.

(App. 3851, 4529). On October 22, 2003, Applicant's jury found the existence of the aggravating factors and recommended a sentence of death on the murder counts. That same day, Judge Pieper sentenced Applicant to death. (App. 3861-68; 3873; 4533).

Statement of Facts[1]

In January 2002, Applicant lived in a trailer owned by Brenda Smith on Riley Road in Beaufort County. Also residing at the trailer were Smith's husband, Isaac, and Applicant's wife Nzuri. At the time of the crime in this case, a girl named Kimberly Blake, with whom Applicant had an infant daughter, was also staying there. On January 8, 2002, Kimberly Blake asked her friend, Strawberry Washington, to call police to come to the house to assist her in leaving because Applicant had hit her. Beaufort County Sheriff's Deputies Dyke Coursen and Dana Tate responded. According to Kimberly Blake, when police arrived, Applicant hid in the bedroom closet with his rifle. He gave Kimberly the okay to go out of the bedroom. She left the bedroom and Brenda Smith gave the officers permission to search the bedroom. Officers Coursen and Tate went into the bedroom. Smith and Blake heard gunshots. Blake ran outside and down the road. She was joined shortly after by Applicant coming through the woods with a gun in his hands. Applicant stated, "I just killed those two white bitches and I'm going to say it was self-defense." Blake left Applicant and returned to the scene to talk to police.

When backup officers responded to the scene, they found officers Coursen and Tate dead; Coursen had suffered six gunshot wounds, Tate had seven. Applicant was subsequently found hiding in the mud under a bridge with a shoulder and hip wound.

---

[1] These are the facts as recounted by the South Carolina Supreme Court in its published opinion in the direct appeal. State v. Roberts, 369 S.C. 580, 581-83, 632 S.E.2d 871, 872-73 (2006).

Applicant was arrested. At the time, he had a black fanny pack carrying ammunition for an M-14 assault rifle, a cell phone and a knife. Police subsequently found a rifle magazine and an SKS assault rifle in the area in which Applicant had fled. The bullets and casings recovered from the victims and the scene of the crime were conclusively matched to the assault rifle.

Applicant was charged with capital murder. At the guilt or innocence phase of trial, he chose to represent himself. However, two attorneys remained as stand-by counsel to assist him at trial. While the jury was deliberating, Applicant indicated to the trial court that if the jury returned a guilty verdict, he did not intend to participate at sentencing. He also indicated he did not want his stand-by attorneys to present a defense. Applicant indicated that if the trial court required him to be present at the sentencing hearing, he would be unruly and would have to be restrained.

The jury convicted Applicant of two counts of murder. Applicant advised the court he did not intend to offer any mitigating evidence and expressed his desire to absent himself from the sentencing; he indicated he would probably be unruly if required to be present. Stand-by counsel conferred with Applicant and then advised the court as follows:

> He says that he doesn't agree to any changes in his status as attorney of record, and that if the court makes any change, they'll have to do it on their own motion ... and that if the judge-if the attorneys on stand-by are to perform in any capacity, the judge will have to order that on his own motion ... He says that he doesn't want to be present in this courtroom in order to hear the evidence in the second phase. And that if the judge-but he does not intend to disrupt the proceedings ... but if the judge determines that he should be in one of the side rooms ... that's a decision that his honor will have to make himself. He says that he is withdrawing from any further discussion with the court .... he does not intend to cooperate with stand-by counsel, to bring any witnesses....

The trial court was concerned with Applicant' decision, but was also disturbed that to appoint counsel to represent Applicant at sentencing might compromise his right to proceed *pro se*. Applicant continued to maintain that he did not intend to confront any witnesses, and did not want to see the witnesses. He persisted in advising the court that if forced to remain present, he would be disruptive. As neither party could point to specific case law governing the circumstances, the court determined the best course of action was to proceed with Applicant present in the courtroom, with the condition that if he became disruptive, the trial judge would take such action as necessary. Applicant indicated his desire that counsel not represent him in any way, but ultimately decided counsel could remain as stand-by counsel to object to the introduction of improper evidence.

The sentencing proceeded with Applicant seated at counsel table. As soon as the first witness was sworn, Applicant stood and began to chant aloud, "Blessed be Yahweh, El Shaddai, Jehova, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." He was told by the court to be seated, and when he continued chanting, he was removed and a brief hearing was held in the hearing room at the back of the courtroom. Applicant was brought back into the courtroom and once again began chanting when the witness began to testify. The jury was removed, and Applicant was placed in a conference room at the back of the courtroom which had a glass partition to allow him to hear and see into the courtroom. He was initially restrained, but the restraints were removed before the jury was returned to the courtroom.

Throughout sentencing, the court offered to allow Applicant to come back into the courtroom if he could do so without being disruptive; however, Applicant indicated he

would rather remain in the back room. Applicant ultimately returned to the courtroom to make a closing statement to the jury. After deliberations, the jury found the existence of the two aggravating circumstances and recommended a sentence of death.

Direct Appeal

A timely Notice of Appeal was filed with the South Carolina Supreme Court. (Attachment No. 3). Applicant was represented on direct appeal by Acting Chief Attorney Joseph L. Savitz, III, Esquire and Assistant Appellate Defender Robert M. Dudek, Esquire, both of the South Carolina Office of Appellate Defense.[2] (See Attachment No. 11). On March 7, 2006, Applicant submitted a Final Brief of Appellant to the state supreme court, in which he raised the following issue:

> The judge erred by refusing to allow appellant to waive his right to be present at the sentencing phase, instead confining him to a holding cell attached to the courtroom in which he was visible to the jury, particularly since appellant's absence during sentencing was his pro se trial strategy and the State advanced no countervailing reason for requiring him to be present.

(Attachment No. 11). The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent on February 17, 2006. (Attachment No. 12). Oral argument was held before the South Carolina Supreme Court on May 24, 2006. The South Carolina Supreme Court issued an opinion dated July 24, 2006, affirming the convictions and sentences. State v. Roberts, 369 S.C. 580, 632 S.E.2d 871 (2006). (Attachment No. 13).

[2] After the filing of the initial brief of appellant in the direct appeal, Applicant moved to proceed pro se in his direct appeal. (Attachment No. 4). Both the State and the Office of Appellate Defense opposed the motion. (Attachment Nos. 5, 6). Applicant filed a response to the Return to the motion. (Attachment No. 7). By Order filed June 3, 2005, Applicant's motion to proceed pro se was denied. (App. 4973-81, Attachment No. 8; State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (2005)). Applicant filed a pro se motion for reconsideration; the motion was denied by a letter Order filed July 8, 2005. (Attachments Nos. 9, 10).

Applicant, through counsel, subsequently filed a Petition for Rehearing. (Attachment No. 14). In the Petition for Rehearing, Applicant argued the Supreme Court had misapprehended the nature of the constitutional rights involved and had employed an unconstitutional harmless error analysis to assess the impact of the underlying error at sentencing. By Order filed August 11, 2006, the South Carolina Supreme Court denied the Petition for Rehearing. (Attachment No. 15). The Remittitur was also issued on August 11, 2006. (Attachment No. 16).

On August 17, 2006, Applicant filed a Motion for Stay of Execution to allow for him to seek certiorari from the United States Supreme Court. (Attachment No. 17). The State served its Return to the Motion on August 23, 2006. (Attachment No. 18). The South Carolina Supreme Court granted the Motion on September 7, 2006. (Attachment No. 19).

On November 9, 2006, Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. (Attachment No. 20). In the Petition, Applicant argued a capital defendant may waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reason for requiring him to be present. The State filed its Brief in Opposition on February 5, 2007. (Attachment No. 21). By letter Order filed March 19, 2007, the United States Supreme Court denied the Petition for a Writ of Certiorari. (Attachment No. 22).

PCR Action

On March 12, 2007, Applicant filed an Application for Post-Conviction Relief (2007-CP-07-715). (App. 4535-44). In this Application, Applicant asserted several

claims. First, he contended the verdict was contrary to the law of reasonable doubt, and upon a false prosecution. (App. 4537). Second, he argued the evidence proved that Applicant committed no unlawful act. Mr. Tate killed Coursen. Id. Third, Applicant alleged his Sixth Amendment rights were violated when his petition for speedy trial was denied and ignored and bail was not being granted. (App. 4541). Within that claim, he also alleged he was denied a fair trial on the fact that the alleged victims were honored state-wide as South Carolina heroes and indicted into the South Carolina Law Enforcement Hall of Fame, as well as, the President of the United States of America Mr. George W. Bush appeared on nation-wide television, then honored alleged victims by inducting their names into the National Memorial for Police Officer, on May 15, 2003. Id. Fourth, Applicant argued that in violation of the Eighth Amendment, Applicant was sentenced to death when evidence showed someone other than him killed the alleged victims. Id. Fifth, Applicant asserted that his constitutional rights had been abridged, and the privileges and immunities afforded all citizens, his life, his liberty without due process of law nor equal protection under the law. Id. Sixth, he averred that appellate counsel was ineffective for not asserting that he was denied due process of law, he was denied a fair trial, he was denied equal protection of the law, a Fourth Amendment issue, and an after discovered evidence claim. (App. 4542).

On March 30, 2007, counsel for Applicant filed a Petition for Stay of Execution so that Applicant could seek his available remedies in post-conviction relief. (Attachment No. 23). The State served its Return to Petition for Stay of Execution on April 9, 2007. (Attachment No. 24). Applicant, through counsel, served a Reply to the State's Return on April 12, 2007. (Attachment No. 25). By Order filed May 4, 2007, the South Carolina

Supreme Court granted the motion for a stay and assigned the Honorable Roger M. Young, Circuit Court Judge, to the PCR action. (Attachment No. 26).

Counsel to represent Applicant during the PCR action were appointed on August 8, 2007. (Attachment No. 27). Carl B. Grant, Esquire and Glenn Walters, Esquire were appointed to represent Applicant.

The State served its Return, Motion to Dismiss, and/or Motion for Summary Judgment on October 9, 2007. (App. 4569-98; Attachment No. 28).[3]

On February 8, 2008, Applicant filed an amended Application for Post-Conviction Relief. (App. 4562-68). In this amended Application, Applicant contended the trial judge failed to make the proper findings to determine if the Applicant knowingly and intelligently understood the implications of proceeding pro se. (App. 4564). Specifically, Applicant asserted

> Under the Sixth Amendment, an accused may waive the right to counsel and proceed pro se. Foretta v. California, 422 US 806. 95 S. Ct 2524, L Ed 2d 562 (1975); State v. Reed, 332 SC 35, 503 S.E. 2d 747 (1998). The trial Judge has the responsibility to ensure that the accussed[sic] is informed of the dangers and disadvantages of self representation and makes a knowingly and intelligent waiver of the right to counsel. The ultimate test of whether a Defendant has made a knowing and intelligent waiver of the right to counsel is the Defendant's understanding Graves v. State, 422 S.E. 2d 125 (1992).
>
> In the present case, the trial Court failed to impress upon the Applicant the dangers and disadvantages of self representation, In addition, the trial Court failed to determine if the Applicant knowingly and intelligently waived his right to counsel. Further, the trial Court failed to determine that the Applicant understood what it meant to represent himself.
>
> The inquiry by the Court was insufficient to determine if the Applicant understood what it meant to represent himself and waive the representation of experienced counsel.

[3] There were pages missing from the copy of the Return in the Appendix. Thus, a full copy of the Return is attached hereto as Attachment No. 28).

(App. 4564). The State served its Amended Return, Motion to Dismiss, and/or Motion for Summary Judgment on March 21, 2008. (App. 4545-57; Attachment No. 29).[4]

An evidentiary hearing in this PCR action was held before the Honorable Roger M. Young, Circuit Court Judge, on October 12-13, 2008.[5] (App. 4599-4920). Applicant was present and was represented by Mr. Grant and Mr. Walters. Id. The State was represented by Assistant Attorneys General S. Creighton Waters and Alphonso Simon, Jr. Id.

By Order filed by the South Carolina Supreme Court on December 17, 2008, the Honorable Carmen T. Mullen, Circuit Court Judge was assigned jurisdiction over the PCR action, and the Order assigning Judge Young was rescinded. (Attachment No. 30). The parties provided Judge Mullen with proposed Orders. (Attachment Nos. 31, 32). On September 17, 2009, the PCR Court filed its Order of Dismissal with Prejudice. (App. 5176-5229).

PCR Appeal

Applicant timely served and filed a notice of appeal on November 2, 2009. (Attachment No. 33). On appeal, Applicant was represented by John Blume, Esquire. (See Attachment No. 34).

On July 21, 2010, Applicant filed a Motion to Remand for Additional Post-Conviction Proceedings. (App. 5230-60). The State filed its Response in Opposition to Motion to Remand for Additional Post-Conviction Relief Proceedings on August 2, 2010. (App. 5261-81). Applicant filed a Reply to Response to Motion to Remand for Additional

[4] There were pages missing from the copy of the amended Return in the Appendix. Thus, a full copy of the Return is attached hereto as Attachment No. 29).
[5] The depositions of Robert Dudek, Joseph L. Savitz, III, and Dr. Donna Schwartz-Watts were also introduced into evidence at the hearing.

Post-Conviction Proceedings on August 9, 2010. (App. 5282-92). On August 16, 2010, Applicant also filed a Motion for Recusal requesting Chief Justice Toal recuse herself from considering the Motion to Remand. (App. 5299-5302). By Order filed August 30, 2010, Chief Justice Toal denied the Motion for Recusal. (App. 5303-08). By Order filed October 20, 2010, the Motion to Remand was denied. (App. 5297-98).

Applicant's appeal to the PCR Court's Order was perfected with the filing of a Petition for Writ of Certiorari on February 18, 2011. (Attachment No. 34). In the Petition, Applicant raised three grounds. First, he asserted the trial court erred in denying Applicant's motion under Batson v. Kentucky, 106 U.S. 1712 (1986). Second, he contended the trial court abused its discretion and thereby denied Applicant's constitutional rights to due process and a fundamentally fair trial by failing to *sua sponte* order a new competency hearing prior to sentencing and/or terminate Applicant's pro se status, and Applicant was in fact incompetent during his trial proceedings. Third, Applicant argued he was denied due process and equal protection of the law and is thus entitled to a new post-conviction relief proceeding where: (a) Applicant's PCR counsel were not qualified under S.C. Code 5 17-27-160(B); (b) PCR counsel were ineffective; and, (c) Judge Carmen Mullen signed the state's order denying post-conviction relief, which contained numerous credibility findings, even though Judge Mullen was not present during the PCR hearing and did not hear the testimony of any witness. The State served its Return to Petition for Writ of Certiorari on June 6, 2011. (Attachment No. 35).

By Order filed February 22, 2013, the South Carolina Supreme Court denied the petition for writ of certiorari. (Attachment No. 36).

The Remittitur was issued on March 28, 2013. (Attachment No. 37).

State Habeas Petition

On February 18, 2011, Applicant also filed a Petition for Writ of Habeas Corpus with the South Carolina Supreme Court. (Attachment No. 38). In the state habeas petition, Applicant raised five issues. First, he contended Applicant was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitutional and South Carolina law because a) the trial judge failed to inquire into Applicant's competency; b) Applicant was incompetent in fact; c) the trial judge failed to secure a knowing and intelligent waiver of Applicant's right to present mitigating evidence and d) the trial judge failed to terminate Applicant's *pro* se status. Second, he argued his death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without individualized determination by the trial judge. Third, Applicant alleged he was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel during the penalty phase of the proceedings. Fourth, Applicant averred the prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Applicant's rights guaranteed by the Sixth and Fourteenth Amendments. Fifth, Applicant asserted he was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.

The State filed its Return to Petition for Writ of Habeas Corpus on March 21, 2011. (Attachment No. 39). Applicant filed a Reply on May 18, 2011. (Attachment No. 40).

By Order filed February 22, 2013, the South Carolina Supreme Court denied the Petition. (Attachment No. 41).

Federal Habeas Action

On March 28, 2013, the South Carolina Supreme Court filed an Order setting Applicant's execution date for the fourth Friday following the date of service, and the Applicant was scheduled for execution on April 19, 2013. Applicant, through proposed counsel John H. Blume, Esquire and Emily C. Paavola, Esquire, filed a Motion for Stay of Execution and Appointment of Counsel, in the United States District Court for the District of South Carolina on March 26, 2013. On March 29, 2013, the State made its Response to the stay request and did not oppose it. The Honorable Terry L. Wooten, Chief United States District Judge for the District of South Carolina, entered an Order granting Applicant's Motion for Stay of Execution on April 4, 2013. In that Order, John H. Blume, III, Esquire, and Emily C. Paavola, Esquire were both appointed to represent Applicant.

Applicant filed his Petition for Writ of Habeas Corpus on February 13, 2014. (Attachment No. 44). In the Petition, Applicant raises the following Grounds:

> Ground One: PETITIONER WAS DEPRIVED OF A FAIR AND RELIABLE DETERMINATION OF THE APPROPRIATE SENTENCE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL JUDGE FAILED TO INQUIRE INTO PETITIONER'S COMPETENCY.
>
> Ground Two: PETITIONER WAS INCOMPETENT THROUGHOUT THE GUILT-OR-INNOCENCE PHASE OF TRIAL VIOLATING THE DUE PROCESS CLAUSE.
>
> Ground Three: PETITIONER'S DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS A RESULT OF THE TRIAL JUDGE'S

FAILURE TO SECURE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF THE RIGHT TO PRESENT MITIGATING EVIDENCE.

Ground Four: THE TRIAL JUDGE ERRED IN FAILING TO TERMINATE PETITIONER'S PRO-SE STATUS.

Ground Five: PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE WAS VISIBLY SHACKLED WITHOUT JUSTIFICATION AND WITHOUT AN INDIVIDUALIZED DETERMINATION BY THE TRIAL JUDGE.

Ground Six: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO EVIDENCE OF GENERAL PRISON CONDITIONS DURING THE PENALTY PHASE.

Ground Seven: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE EXTENSIVE AMOUNT OF VICTIM-IMPACT EVIDENCE INTRODUCED AT THE PENALTY PHASE.

Ground Eight: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO INFLAMMATORY AND IMPROPER STATEMENTS MADE DURING THE PROSECUTION'S CLOSING ARGUMENT, RENDERING THE SENTENCING PHASE FUNDAMENTALLY UNFAIR.

Ground Nine: THE PROSECUTION EXERCISED ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER IN VIOLATION OF PETITIONER'S RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

Ground Ten: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BEFORE TWELVE FAIR AND IMPARTIAL JURORS AS A RESULT OF MULTIPLE PREJUDICIAL EXTRANEOUS INFLUENCES.

The Respondents filed their Return on April 16, 2014, and a Motion for Summary Judgment on April 17, 2014. (Attachment No. 45). Applicant filed a Traverse and Memorandum of Law in Opposition to Summary Judgment on June 20, 2014.

(Attachment No. 46). The Respondents filed a Reply to Response in Opposition to Motion for Summary Judgment on July 14, 2014. (Attachment No. 47).

On November 5, 2014, the Honorable Kevin F. McDonald, United States Magistrate Judge, filed a Report and Recommendation. (Attachment No. 48). In the Report and Recommendation, Judge McDonald recommended that the Respondents' Motion for Summary Judgment be granted because all of the claims raised by Applicant were procedurally barred from federal habeas review. Judge McDonald further recommended that if the claims were not procedurally barred, then the Respondents were entitled to summary judgment on the merits of all of the claims except for a portion of Ground Ten.

Applicant filed his Objections to the Report and Recommendation on November 21, 2014. (Attachment No. 49). The Respondents filed their Objection to the Report and Recommendation on November 24, 2014. (Attachment No. 50).

On November 21, 2014, Applicant also filed a Motion to Stay Proceedings Pending Exhaustion of State Remedies. (Attachment No. 51). The Respondents filed their Response in Opposition to Motion to Stay Proceedings Pending Exhaustion of State Remedies on December 8, 2014. (Attachment No. 52). Applicant filed a Reply on December 15, 2014, and a Supplement to the Motion on December 19, 2014. (Attachment Nos. 53, 54).

Also, in an Order filed December 8, 2014, Judge Wooten requested Applicant file an affidavit from the juror regarding one of the claims in Ground Ten if he wished to continue pursuing relief upon the claim. (Attachment No. 55). Applicant filed the affidavit on December 19, 2014. (Attachment No. 56).

At this time, Applicant is represented by Emily Paavola, Esquire, and John H. Blume, Esquire in the federal habeas action. As of the date of this Return and Motion to Dismiss, the United States District Court for the District of South Carolina has not ruled upon Applicant's Motion to Stay Proceedings Pending Exhaustion of State Remedies or upon the Report and Recommendation.

II. ALLEGATIONS

On November 24, 2014, Applicant filed a second Application for Post-Conviction Relief with the Court of Common Pleas of Beaufort County (2014-CP-07-2994). In that Application, Applicant asserts the following claims:

> 10(a) Applicant was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.
>
> 11(a) Supporting Facts:
>
> > (1) The trial judge failed to inquire into Applicant's competency during the penalty phase of the trial despite Applicant's increasingly irrational and bizarre behavior prior to trial, during the guilt-or-innocence phase of Ae proceedings, and during the sentencing phase of the trial, see Drope v. Missouri, 420 U.S. 162 (1975);
> >
> > (2) Applicant was incompetent in fact during the penalty phase of the trial, see Drope v. Missouri, 420 U.S. 162 (1975);
> >
> > (3) The trial judge failed to secure a knowing and intelligent waiver of Applicant's right to present mitigating evidence, see Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Lockett V. Ohio, 438 U.S. 586, 605 (1978); and
> >
> > (4) The trial judge failed to terminate Applicant's *pro se* status while simultaneously removing Applicant from the courtroom for his obstreperous behavior and restricting the ability of standby counsel to present evidence, see Faretta v. California, 422 U.S. 806, 807 (1975); Martinez v. Court of Appeals of California, 528 U.S. 152,162 (2000).

10(b) Applicant's death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without an individualized determination by the trial judge.

11(b) Supporting Facts: During the penalty phase of Applicant's trial, without making any findings regarding the need for restraints, the trial judge ordered Applicant's hands and legs be shackled and Applicant remained shackled in the presence of his sentencing jury. See Deck v. Missouri, 544 U.S. 622, 624 (2005).

10(c) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the sentencing phase of his capital trial.

11(c) Supporting Facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).
Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel failed to object to evidence of general prison conditions during the sentencing phase, see State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005)

(2) Counsel failed to object to the extensive amount of victim-impact evidence introduced during the sentencing phase, see Payne v. Tennessee, 501 U.S. 808 (1991); Booth v. Maryland, 482 U.S. 496 (1987); and

(3) Counsel failed to object to inflammatory and imporper[sic] statements made during the prosecution's closing argument, rendering the sentencing phase fundamentally unfair, see Darden v. Wainwright, 477 U.S. 168, 178-79 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Viereck v. United States, 318 U.S. 236 (1943).

10(d) The prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Applicant's rights guaranteed by the Sixth and Fourteenth Amendments.

11(d) Supporting Facts: Following voir dire, the State struck four of the five African American jurors that were presented, including Edith Owens, Matthew Young, Antwoine Crosson, and Kerry Brown, and provided pretextual race neutral explanations for striking the challenged jurors. See

Batson v. Kentucky, 476 U.S. 79 (1986); Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 537 U.S. 322 (2003).

10(e) Applicant was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.

11(e) Supporting Facts: Applicant's sentencing jury was tainted by several extraneous influences, including (1) one juror asked a minister for guidance as to how to make the sentencing phase life or death decision; (2) several jurors held hands and prayed during deliberations; (3) some jurors brought Bibles and copies of scripture into the jury room; (4) jurors relied on specific Biblical passages to help them make their decision—especially the passages advocating lex talionis or "an eye for an eye"; (5) some jurors were led to believe the jury was sequestered because of threats made by Applicant's followers; and (6) several jurors entered the jury box one day during trial and discovered dog manure and were told by court personnel that there had been threats from Applicant's "associates" and the manure came from a bomb sniffing dog that was being used daily to inspect the courtroom for bombs. See Turner v. Louisiana, 379 U.S. 466 (1965); Remmer v. United States, 347 U.S. 227 (1954); Barnes v. Joyner, 751 F.3d 229 (4th Cir. 2014); see also Irvin v. Dowd, 366 U.S 717 (1961).

This Return follows. Attached and incorporated by reference are the following documents:

1. Appendix, the Honorable Carmen T. Mullen, Circuit Court Judge
2. Indictments
3. Notice of Appeal
4. Motion to Proceed Pro Se in All Direct Appeal Matters
5 Return to Motion
6. Return to Motion
7. Response to Return to Motion
8. South Carolina Supreme Court Order filed June 3, 2005
9. Pro se Motion for Reconsideration

10. South Carolina Supreme Court letter Order filed July 8, 2005

11. Final Brief of Appellant

12. Final Brief of Respondent

13. South Carolina Supreme Court Opinion filed July 24, 2006

14. Petition for Rehearing

15. South Carolina Supreme Court Order filed August 11, 2006

16. Remittitur

17. Motion for Stay of Execution

18. Return to Motion for Stay of Execution

19. South Carolina Supreme Court Order filed September 7, 2006

20. Petition for Writ of Certiorari to the South Carolina Supreme Court

21. Brief in Opposition to Petition for Writ of Certiorari

22. United States Supreme Court Order

23. Petition for Stay of Execution

24. Return to Petition for Stay of Execution

25. Reply to State's Return to Petition for Stay of Execution

26. South Carolina Supreme Court Order filed May 4, 2007

27. Order from the Honorable Roger M. Young, Circuit Court Judge filed August 12, 2007.

28. Return, Motion to Dismiss, and/or Motion for Summary Judgment

29. Amended Return, Motion to Dismiss, and/or Motion for Summary Judgment

30. South Carolina Supreme Court Order filed December 17, 2008

31. State's Proposed Order

32. Applicant's Proposed Order

33. Notice of Appeal

34. Petition for Writ of Certiorari

35. Return to Petition for Writ of Certiorari

36. South Carolina Supreme Court Order filed February 22, 2013

37. Remittitur

38. Petition for Writ of Habeas Corpus

39. Return to Petition for Writ of Habeas Corpus

40. Reply to Return to Petition for Writ of Habeas Corpus

41. South Carolina Supreme Court Order filed February 22, 2013

42. Pages not included or difficult to read in Appendix from original Record on Appeal[6]

43. Copies of Exhibits from PCR Action

44. Petition for Writ of Federal Habeas Corpus

45. Return and Memorandum of Law in Support of Motion for Summary Judgment, and Motion for Summary Judgment

46. Petitioner's Traverse and Memorandum of Law in Opposition to Summary Judgment

47. Reply to Response in Opposition to Motion for Summary Judgment

48. Report and Recommendation

49. Petitioner's Objection to Report and Recommendation

50. Respondents' Objection to Report and Recommendation

51. Motion to Stay Proceedings Pending Exhaustion of State Court Remedies

[6] The following pages are attached separately because they were not included in the Appendix, but were in the Record on Appeal: page 3878, 3890, and 4144-45. Pages 4329 and 4458 are provided because portions of those two pages are not easy to read in the Appendix.

52. Response in Opposition to Motion to Stay Proceedings Pending Exhaustion of State Court Remedies

53. Reply to Response in Opposition of Motion to Stay

54. Notice of Action in State Court

55. United States District Court Order filed December 8, 2014

56. Juror Affidavit

II. THIS APPLICATION FOR POST-CONVICTION RELIEF SHOULD BE DISMISSED BECAUSE IT IS UNTIMELY, SUCCESSIVE, AND RAISES CLAIMS THAT CANNOT BE RAISED IN POST-CONVICTION RELIEF.

A. This Application for Post-Conviction Relief is untimely.

This Application for Post-Conviction Relief should be dismissed because it is untimely. South Carolina Code Ann. § 17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute). Applicant was convicted on October 20, 2003 and sentenced to death on October 22, 2003. The final decision in the appeal was issued by the United States Supreme Court on March 19, 2007, when it denied the Petition for Writ of Certiorari. Applicant was therefore required to file his application before March 18, 2008. This application was filed on November 24, 2014,[7]

[7] "A proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the conviction took place." S.C. Code Ann. § 17-27-40 "It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by

2442 days; or six years, eight months and six days after the statutory filing period expired.

Applicant cannot show that the Application is timely based upon an argument of recently discovered facts. S.C. Code § 17-27-45 also states:

> If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

These claims could have been ascertained and raised by Applicant through his counsel in the first PCR action. Thus, he cannot show that this Application is timely.

B. This Application is successive to a previously properly filed Application.

This Application for Post-Conviction Relief should be dismissed because it is successive to PCR Action the Applicant initiated on March 12, 2007. South Carolina Code Ann. § 17-27-90 (2003) states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent

---

the proper officer. Fox v. Union-Buffalo Mills, 226 S.C. 561, 86 S.E.2d 253 (1955)." Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001).

application is limited to those grounds that "could not have been raised . . . in the previous application." Id. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

In Aice, the South Carolina Supreme Court expressly declined to interpret the term "sufficient reason" to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase "very narrowly" by Court Rule, and it held that "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. . . . We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not." Id.

While the Court in Aice recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel, as Aice urged, "well may swallow Rule 50(3). It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view." Id. at 451, 409 S.E.2d at 394. Thus, "the contention that prior PCR counsel was ineffective is not per se a 'sufficient reason' allowing for a successive PCR application under § 17 27 90." Id. at 451, 409 S.E.2d at 394.

The Court further explained that:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See Butler v. State, 397 S.E.2d 87 (S.C.1990). **We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish.** For these reasons, we hold the contention that prior PCR counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application under § 17 27 90. This Court has implied such a holding in the past. See Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Id. at 451, 409 S.E.2d at 394. (Emphasis added).

Additionally, the Court in Aice indicated that a successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel, apart from the scenario covered by Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Aice, 305 S.C. at 450 52, 409 S.E.2d at 394 95. The Court concluded as follows:

> We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the Austin and Aice cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While Austin could rely on Rule 50(6) for support of his claim, Aice's request directly conflicts with the language of Rule 50(3). Hence, Austin stands harmonized with the instant case.

Id. at 452, 409 S.E.2d at 395.

While there are exceptions to the rule, Applicant has not shown they are applicable here. For instance, while successive PCRs are allowed for belated direct appeals where a person did not fairly get their "one bite at the apple," see Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant could not seek such review in state court here because he has already clearly litigated his direct appeal in this case. In another situation, the South Carolina Supreme Court heard a successive application, but only because it was one of the "rare cases" where "so many procedural irregularities occurred during the course of [the inmate's judicial process that he has not received due process." Washington v. State, 324 S.C. 232, 478 S.E.2d 833, 835 (1996). There is no evidence Applicant's process in the first PCR action on the whole was so broken that he did not receive due process. To the contrary, the procedural history is clear Applicant had one full bite at the apple on both direct appeal and PCR in which multiple claims were preserved through the process. Finally, it is true that in Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600 (2008), the South Carolina Supreme Court included a footnote in which it noted that a successive PCR had been granted by the trial court because of inadequate PCR counsel. However, Williams was before the state supreme court on state habeas and not on any successive PCR, and the footnote was merely dicta about what happened in a different portion of the proceedings.

The United States Supreme Court's opinion in Martinez v. Ryan, 132 S.Ct. 1309 (2012), does not warrant granting the Applicant permission to seek relief through this successive PCR action. In Martinez, the United States Supreme Court held,

> when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review

> collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue).

Id. at 1318-19. The holding in Martinez does not support a finding that the Applicant is entitled to review of the merits of his claims in this Application for Post-Conviction Relief. The South Carolina Supreme Court has recognized "the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). In dismissing the appeal in Kelly, the South Carolina Supreme Court cited to cases in several other jurisdictions that had interpreted the holding in Martinez similarly:

> See State v. Travis, 2013 WL 1196332 (Del.Super.Ct.2013) (finding the holding in Martinez is "limited only to that narrow procedural situation under federal law concerning habeas corpus."); Gore v. State, 91 So.3d 769 (Fla.2012) ("It appears that Martinez is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context.... Martinez provides Gore with no basis for relief in this Court."); People v. Blackmon, 2013 IL App (1st) 111908–U, 2013 WL 2145922 (2013) (finding Blackmon's reliance on Martinez in attempting to file a successive state PCR application misplaced because Martinez applies to federal habeas review); Logan v. State, 377 S.W.3d 623 (Mo.Ct.App.2012) ("The limited holding of Martinez, while having the potential to aid Logan should he file a future federal habeas action, does not afford Logan a second chance at obtaining relief through a [state post-conviction relief] proceeding."); Rowell v. State, 2013 WL 1501618 (Nev.2013) ("[A]ppellant's reliance upon Martinez was misplaced as Martinez relates to federal procedural bars and not state procedural bars. Thus, the holding in Martinez would not provide good cause because it is inapplicable in state court."); Commonwealth v. Saunders, 60 A.3d 162 (Pa.Super.Ct.2013).

Kelly, 404 S.C. at 365-66, 745 S.E.2d at 377-78. Altogether, Applicant cannot show that this Application should not be dismissed as successive.

C. The Applicant's claims in 10 & 11(b), 10 & 11(c), and 10 & 11(d) cannot be raised in PCR.

In addition to being successive and untimely, two of the Applicant's claims in this action are claims that cannot be properly raised in a PCR action. In Ground 10 & 11 (b), the Applicant asserts his Fifth, Eighth, and Fourteenth Amendment rights were violated because he was visibly shackled without justification and without an individualized determination by the trial judge. In Ground 10 & 11(d), the Applicant asserts his Sixth and Fourteenth Amendment rights were violated when the prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). These freestanding claims could have been asserted at the trial level and then raised on direct appeal, which was not done in this case. Since they were available at trial, they are not reviewable in PCR. See Simmons v. State, 264 S.C. 417, 422-23, 215 S.E.2d 883, 885-86 (1975)(issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517, 519 (1993)(issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); S.C. Code Ann. § 17-27-20(b) ("This remedy[PCR] is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.").

In Ground 10 & 11(c), the Applicant asserts he was denied effective assistance of counsel during the sentencing phase of his trial. A defendant may waive his constitutional right to counsel and choose to represent himself during criminal proceedings, if such waiver is effected willingly and intelligently. See Faretta v. California, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Upon such an election, standby counsel may be appointed to assist the *pro se* defendant. However, there is "no constitutional right to hybrid representation where the defendant shared the duties of conducting [his] defense with a lawyer." United States v. Morrison, 153 F.3d 34, 55 (2d Cir.1998) (internal citations, quotation marks and modification omitted); United States v. Schmidt, 105 F.3d 82, 90 (2d Cir.1997) (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984)); State v. Stuckey, 333 S.C. 56, 57-8, 508 S.E.2d 564 (1998). Accordingly, "without a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel" unless "that title [was held] in name only and, in fact, [standby counsel] acted as the defendant's lawyer throughout the proceedings." Morrison, 153 F.3d at 55; (internal citations and quotation marks omitted). Without a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective. United States v. Cochrane, 985 F.2d 1027, 1029 n. 1 (9th Cir.1993) (rejecting ineffective assistance of standby counsel argument in this context without foreclosing argument in future); United States v. Windsor, 981 F.2d 943, 947 (7th Cir.1992) ("court knows of no constitutional right to effective assistance of standby counsel"); Morrison, supra ("without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel") (citing Schmidt, supra). Here, Petitioner was never relieved from his pro se

status. As a result, Petitioner fails to state a claim upon which post-conviction relief can be granted because Petitioner is not constitutionally entitled to effective assistance of standby counsel. Petitioner was still acting as counsel of record.

Altogether, this Application for Post-Conviction Relief should be denied and dismissed as a matter of law. It was untimely filed and it is successive to a prior Application. The Applicant is not entitled to have the merits of the claims raised in this application reviewed.

III. CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied. In the event this Court disagrees the case should be dismissed as a matter of law, the Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed as a matter of law.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

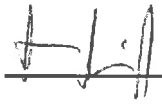
DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
(Counsel of Record)

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENTS

January 5, 2015

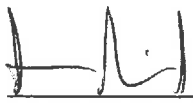
By: 

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
	)	Case No. 2014-CP-07-2994
Abdiyyah ben Alkebulanyahh, #6012 , a/k/a Tyree Roberts,	)	
	)	**CERTIFICATE OF SERVICE**
Applicant,	)	
vs.	)	
State of South Carolina,	)	
Respondent.	)	

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Return to Application for Post-Conviction Relief, together with attachments, on Applicant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Emily C. Paavola, Esq., Death Penalty Resource & Defense Center, 900 Elmwood Avenue, Suite #101, Columbia, South Carolina 29201; John Blume, Esq., Blume, Norris & Franklin-Best, LLC, 900 Elmwood Avenue, Suite #101, Columbia, South Carolina 29201; and Lindsey S. Vann, Esq., Death Penalty Resource & Defense Center, 900 Elmwood Avenue, Suite #101, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 5th day of January, 2015.



ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Abdiyyah ben Alkebulanyahh, 6012) Aka Tyree Roberts)) Applicant,)) vs.)) State of South Carolina,)) Respondent.) _____)	Case No. 2014-CP-07-2994 **AMENDED APPLICATION FOR POST-CONVICTION RELIEF**

2015 FEB 23 P 3:43
BEAUFORT COUNTY, S.C.
CLERK OF COURT

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.

2. Name and location of Court which imposed sentence: Beaufort County Court of General Sessions.

3. Name(s) of co-defendant(s) (if any): Not applicable.

4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 02-GS-07-0369 & 0370 – two counts of murder.

5. The date upon which sentence was imposed and the terms of the sentence: October 22, 2003 – death sentence.

6. A finding of guilty was made: after a plea of not guilty.

7. The applicant did appeal from judgment of conviction and sentence.

8. The Courts to which applicant appealed:
   (a) The Supreme Court of South Carolina.
   (b) The Supreme Court of the United States.

   The result in each Court to which applicant appealed:
   (a) Sentence and conviction affirmed.
   (b) Petition for Writ of Certiorari denied.

   The date of each result:
   (a) July 24, 2006, rehearing denied August 11, 2006.
   (b) March 19, 2007.

Citations of any written opinion or orders entered pursuant to such results:

(a) *State v. Roberts*, 369 S.C. 580, 632 S.E.2d 871 (2006).

(b) *Roberts v. South Carolina*, 549 U.S. 1279 (2007).

9. Not applicable.

10 & 11 GROUNDS FOR RELIEF WITH SUPPORTING FACTS

10(a) **Applicant was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.**

11(a) **Supporting Facts:**

(1) The trial judge failed to inquire into Applicant's competency during the penalty phase of the trial despite Applicant's increasingly irrational and bizarre behavior prior to trial, during the guilt-or-innocence phase of the proceedings, and during the sentencing phase of the trial, *see Drope v. Missouri*, 420 U.S. 162 (1975);

(2) Applicant was incompetent in fact during the penalty phase of the trial, *see Drope v. Missouri*, 420 U.S. 162 (1975);

(3) The trial judge failed to secure a knowing and intelligent waiver of Applicant's right to present mitigating evidence, *see Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); and

(4) The trial judge failed to terminate Applicant's *pro se* status while simultaneously removing Applicant from the courtroom for his obstreperous behavior and restricting the ability of standby counsel to present evidence, *see Faretta v. California*, 422 U.S. 806, 807 (1975); *Martinez v. Court of Appeals of California*, 528 U.S. 152, 162 (2000).

10(b) **Applicant's death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without an individualized determination by the trial judge.**

11(b) **Supporting Facts:** During the penalty phase of Applicant's trial, without making any findings regarding the need for restraints, the trial judge ordered Applicant's hands and legs be shackled and Applicant remained shackled in the presence of his sentencing jury. *See Deck v. Missouri*, 544 U.S. 622, 624 (2005).

10(c) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the sentencing phase of his capital trial.**

11(c) **Supporting Facts:** Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel failed to object to evidence of general prison conditions during the sentencing phase, *see State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007); *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005)

(2) Counsel failed to object to the extensive amount of victim-impact evidence introduced during the sentencing phase, *see Payne v. Tennessee*, 501 U.S. 808 (1991); *Booth v. Maryland*, 482 U.S. 496 (1987); and

(3) Counsel failed to object to inflammatory and imporper statements made during the prosecution's closing argument, rendering the sentencing phase fundamentally unfair, *see Darden v. Wainwright*, 477 U.S. 168, 178-79 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Viereck v. United States*, 318 U.S. 236 (1943).

10(d) **The prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Applicant's rights guaranteed by the Sixth and Fourteenth Amendments.**

11(d) **Supporting Facts:** Following *voir dire*, the State struck four of the five African American jurors that were presented, including Edith Owens, Matthew Young, Antwoine Crosson, and Kerry Brown, and provided pretextual race neutral explanations for striking the challenged jurors. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

10(e) **Applicant was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.**

11(e) **Supporting Facts:** Applicant's sentencing jury was tainted by several extraneous influences, including (1) one juror asked a minister for guidance as to how to make the sentencing phase life or death decision; (2) several jurors held hands and prayed during deliberations; (3) some jurors brought Bibles and copies of scripture into the jury room; (4) jurors relied on specific Biblical passages to help them make their decision—especially the passages advocating *lex talionis* or "an eye for an eye"; (5) some jurors were led to believe the jury was sequestered because of threats made by Applicant's followers; and (6) several jurors entered the jury box one day during trial and discovered dog manure and were told by court personnel that there had been threats from Applicant's "associates" and the manure came from a bomb sniffing dog that was being used daily to inspect the courtroom for bombs. *See Turner v. Louisiana*, 379 U.S. 466 (1965); *Remmer v. United States*, 347 U.S. 227 (1954); *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014); *see also Irvin v. Dowd*, 366 U.S 717 (1961).

10(f) **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the appellate proceedings.**

11(f) **Supporting Facts:** Appellate counsel's performance during the appellate phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial act or omission is counsel failed to raise the issue that the trial court erred in denying Applicant's motion under *Batson v. Kentucky*, 476 U.S. 79 (1986) when, following *voir dire*, the State struck four of the five African American jurors that were presented, including Edith Owens, Matthew Young, Antwoine Crosson, and Kerry Brown, and provided pretextual race neutral explanations for striking the challenged jurors. *See Batson*, 476 U.S. 79; *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

12. (a) Prior to this application, Applicant has filed a petition in state court under South Carolina Law.
    (b) Prior to this application, Applicant has filed an application for post-conviction relief and a petition for a writ of habeas corpus in State or Federal court.
    (c) Applicant has not filed any petitions to the United States Supreme Court other than the petition already specified *supra* in (8).
    (d) Applicant has not filed any motions, petitions, or applicants in this or any other Court.

13. Petitions filed in other courts:

    (a) Specific nature of petitions:
        i. Application for post-conviction relief
        ii. Petition for writ of habeas corpus (state court)
        iii. Petition for writ of habeas corpus (federal court)

    (b) Name and location of the court in which each was filed:
        i. Beaufort County Court of Common Pleas, Case No. 2007-CP-07-0715
        ii. In the original jurisdiction of the Supreme Court of South Carolina, Case No. 2011-185866
        iii. United States District Court, District of South Carolina, Case No. 6:13-cv-918-TLW-KFM.

    (c) Disposition:
        i. Application for post-conviction relief was denied.
        ii. Petition for writ of habeas corpus was denied.
        iii. Petition for writ of habeas corpus remains pending.

    (d) Date of disposition:
        i. September 17, 2009.
        ii. March 12, 2013.
        iii. N/A

14. Yes, grounds set forth in 10(a) through 10(e) have previously been presented to a court.

15. Identify the grounds previously raised:

(a) Grounds set forth in 10(a) through 10(e) *supra*.

(b) Each ground was raised in Applicant's petition for writ of habeas corpus in the original jurisdiction of the Supreme Court of South Carolina, which was summarily denied, and Applicant's petition for writ of habeas corpus in the District of South Carolina, which remains pending after a recommendation by the Magistrate Judge that the District Court find each of the grounds procedurally defaulted because they were not raised in Applicant's initial PCR Application.

The grounds for relief were not included in the initial PCR application due to Applicant's initial PCR counsel's inexperience and lack of qualification under the state PCR statute, S.C. Code § 17-27-160(B), and failure to obtain trial counsel's files, request funding for investigative or expert services, or conduct any independent investigation. As a result, PCR counsel failed to investigate and present meritorious claims for post-conviction relief which prejudiced Applicant where he was prohibited from raising any claim that his trial counsel were ineffective on direct appeal. *See, e.g., Martinez v. Ryan*, 132 S. Ct. 1309 (2012); Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. 913, 1086 (2003) ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues."); *id.* ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."). The grounds for relief are, therefore, raised in this second-in-time PCR application to allow for consideration and exhaustion in the South Carolina courts.

16. Ground 10(f) has not previously been presented to a court.

The ground for relief was not included in the initial PCR application due to Applicant's initial PCR counsel's inexperience and lack of qualification under the state PCR statute, S.C. Code § 17-27-160(B), and failure to obtain trial counsel's files, request funding for investigative or expert services, or conduct any independent investigation. As a result, PCR counsel failed to investigate and present meritorious claims for post-conviction relief which prejudiced Applicant where he was prohibited from raising any claim that his trial counsel were ineffective on direct appeal. *See, e.g., Martinez v. Ryan*, 132 S. Ct. 1309 (2012); Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. 913, 1086 (2003) ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues."); *id.* ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."). The ground for relief is, therefore, raised in this second-in-time PCR application to allow for consideration and exhaustion in the South Carolina courts.

17. Applicant was previously represented by counsel.

18. Applicant was previously represented by an attorney:

At preliminary hearing: Gene G. hood, Fourteenth Circuit Public Defender, PO Box 525, Beaufort, SC 29901 and Samuel C. Bauer, PO Box 7965, Hilton Head Island, SC 29938.

At arraignment and plea: Gerald A. Kelly, 4760 Yemassee Hwy. Varnville, SC 29944, and Sean P. Thorton, Fourteenth Circuit Solicitor's Office, PO Box 1880, Blufton, SC 29910.

At trial: *Pro se*

At sentencing: Gerald Kelly and Sean Thornton, see above.

On appeal: Robert M. Dudek and Joseph L. Savitz, III, Office of Appellate Defense, P.O. Box 11589.

In state post-conviction proceedings: Glenn Walters, Sr., PO Box 1346, Orangeburg, SC 29116 and Carl B. Grant, PO Box 1203, Orangeburg, SC 29116.

On appeal from the denial of the application for state post-conviction relief: John H. Blume, Cornell Law School, 158 Myron Taylor Hall, Ithaca, NY 14853.

In federal habeas corpus proceedings: John H. Blume, see above, and Emily C. Paavola, 900 Elmwood Ave., Suite 101, Columbia, SC 29201.

19. Applicant seeks relief from his convictions and sentence.

20. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, South Carolina 29201
(803) 765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, South Carolina 29201
(803) 765-1044

February 16, 2015

BY: Lindsey S. Vann
ATTORNEYS FOR APPLICANT

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Abdiyyah ben Alkebulanyahh, 6012 Aka Tyree Roberts	)	
	)	Case No. 2014-CP-07-2994
Applicant,	)	
	)	
vs.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

2015 FEB 23 PM 3:43
BEAUFORT COUNTY, S.C.
CLERK OF COURT

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Applicant's Amended Application for Post-Conviction Relief was mailed today by first class United States mail, postage prepaid, this 16th day of February, 2015, upon the following:

Alphonso Simon Jr.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Lindsey S. Vann

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
	)	Case No.: 2014-CP-07-2994
Abdiyyah ben Alkebulanyahh, # 6012	)	
aka Tyree Roberts	)	
Applicant,	)	**RESPONSE IN OPPOSITION**
vs.	)	**TO MOTION TO DISMISS**
State of South Carolina,	)	
Respondent.	)	
	)	

BEAUFORT COUNTY, S.C.
2015 FEB 23 PM 3:43

Applicant, Abdiyyah ben Alkebulanyahh, through undersigned counsel, submits this response in opposition to Respondent's Return and Motion to Dismiss (hereafter, "Motion to Dismiss"). Respondent argues that the Application for Post-Conviction Relief should be summarily dismissed for various reasons. Respondent's arguments are without merit. For the reasons discussed below, this Court should either: (a) deny respondent's Motion to Dismiss and allow this case to proceed to an evidentiary hearing and final adjudication because it is a permissible successive petition under state law; or, (b) deny respondent's Motion to Dismiss and hold this case in abeyance until the South Carolina Supreme Court has resolved *Robertson v. State*, Appellate Case No. 2012-205909, which will likely dictate whether this case will be allowed to go forward as a matter of South Carolina law, regardless of state law rules regarding successive petitions.[1]

[1] The exact question presented in *Robertson v. State* is:

> Whether, in light of *Martinez v. Ryan*, ____ U.S. ____, 132 S. Ct. 1309, 182 L.Ed.2d 272 (2012), and the past treatment of similarly situated South Carolina prisoners, Robertson should be permitted to proceed with a second-in-time application for post-conviction relief asserting colorable claims of ineffective assistance of trial counsel that prior PCR counsel ineffectively failed to investigate or present?

What this Court should not do, however, is dismiss the application since there is no basis to support such a result. In considering respondent's Motion to Dismiss, this Court must assume facts presented by Applicant are true and view those facts in the light most favorable him. *Al-Shabazz v. State*, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000). This Court must deny the Motion to Dismiss "if facts alleged and inferences reasonably deducible therefrom would entitle [Applicant] to any relief on any theory of the case." *Id.* Summary dismissal without a hearing is appropriate only when: (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts; and, (2) the applicant is not entitled to relief. *Id.* Applicant has alleged facts which, if true, entitle him to relief on this application. To the extent that there is any question about those facts, the appropriate step is for this Court to set an evidentiary hearing at which those facts may be fully developed.

I. PROCEDURAL HISTORY

Applicant proceeded *pro se* at his trial in October of 2003 in Beaufort County. Gerald Kelly and Sean Thorton acted as standby counsel for Applicant during the guilt phase of his trial. During the penalty phase, Applicant was removed from the courtroom and the trial judge tasked Kelly and Thorton "to interject objections, handle exhibits, and make the closing argument." After the penalty phase, the jury sentenced Applicant to death. Applicant's convictions and sentence were upheld on direct appeal.[2] *State v. Roberts*, 369 S.C. 580, 632 S.E.2d 871 (2006).

Petition for Writ of Certiorari, *Robertson v. State*, No. 2012-205909 (Sept. 14, 2012). The South Carolina Supreme Court granted certiorari in *Robertson* and briefing on the question presented is currently being completed.

[2] Applicant moved to represent himself on direct appeal, alleging that the Warden of Lieber Correctional Institution and his appellate counsel were conspiring to deny him access to the courts. *State v. Roberts*, 364 S.C. 583, 614 S.E.2d 626 (2005). The South Carolina Supreme Court denied the motion. *Id.* 589, 614 S.E.2d at 628.

Applicant then filed a *pro se* application for post-conviction relief which contained a number of search and seizure and speedy trial issues. Glenn Walters and Carl Grant were appointed by Judge Roger Young to serve as PCR counsel. Neither attorney was qualified to serve as capital post-conviction counsel as required by state statute. S.C. Code § 17-27-160(B). PCR counsel's inexperience worked to Applicant's detriment, since Walters and Grant failed to: (1) conduct any independent investigation; (2) interview trial counsel; (3) seek or obtain a copy of trial counsel's files; (4) secure any expert or investigative assistance; (5) have Petitioner evaluated by a psychiatrist or psychologist to determine: a) whether he was competent to proceed in post-conviction relief proceedings; or, b) whether he was competent at the sentencing phase of the trial; and, (6) even to spend enough time on Petitioner's case to justify submitting a bill for payment of attorneys' fees. PCR counsel filed an amended application raising a single claim for relief.[3] The post-conviction relief hearing, conducted before Judge Young on October 13-14, 2008, consisted primarily of counsel calling Applicant to the stand to state his grievances with trial and appellate counsel. On September 17, 2009, Judge Carmen Mullen signed verbatim the state's order denying post-conviction relief.[4]

Applicant filed a timely notice of appeal. On March 5, 2010, the South Carolina Supreme Court appointed John H. Blume to represent Applicant in connection with his appeal. Counsel conducted what investigation could be completed given the limited timeframe for filing the appeal

---

[3] The issue asserted in the amended application was that the "trial judge failed to make the proper findings to determine if the applicant knowingly and intelligently understood the implications of proceeding *pro se*."

[4] For reasons which are not clear from the record, the South Carolina Supreme Court reassigned the case to Judge Mullen on December 17, 2008, after the PCR hearing. Judge Mullen entered the order denying post-conviction relief. Despite the fact that Judge Mullen did not preside over the post-conviction relief hearing, the order contains a number of credibility findings.

and the unavailability of funding for investigative or expert assistance. Applicant, through counsel, filed a Motion to Remand for Additional Post-Conviction Proceedings on the bases that: (1) PCR counsel were not qualified pursuant to state statute; and, (2) PCR counsel failed to raise a number of potentially meritorious claims for post-conviction relief. The South Carolina Supreme Court denied the Motion to Remand on October 20, 2010. Thereafter, Applicant filed a petition for a writ of certiorari, as well as a petition for a writ of habeas corpus within the original jurisdiction of the South Carolina Supreme Court. The South Carolina Supreme Court summarily denied both petitions on March 12, 2013.

On February 13, 2014, Applicant, through appointed counsel Blume and Emily C. Paavola filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. The federal habeas petition raised the same claims presented to the South Carolina Supreme Court in Applicant's state habeas petition. On November 5, 2014, the Magistrate Judge recommended the District Court dismiss Applicant's federal habeas claims as procedurally defaulted because they were not presented in Applicant's initial application for state post-conviction relief. Thus, according to the federal court, no state court has ever reviewed the merits of Applicant's claims. Applicant objected to the Magistrate Judge's recommendation, asserting that if the claims are procedurally defaulted, they are not exhausted because Applicant can raise the claims in a second-in-time PCR application. Concurrent with filing the objections to the Magistrate Judge's recommendation, Applicant filed an application for post-conviction relief in this Court on November 24, 2014. This PCR application contains a number of viable issues which could – and should – have been raised by prior counsel as grounds for post-conviction relief. Due to their lack of experience in death penalty litigation in general, and capital post-conviction

litigation in particular, Applicant's initial PCR counsel failed to raise a number of viable claims for post-conviction relief.

II. ARGUMENT

A. APPLICANT IS ENTITLED TO PURSUE THE PRESENT PCR APPLICATION AS A MATTER OF STATE AND FEDERAL LAW

1. Applicant is entitled to pursue the present PCR application as a matter of state law.

Relying primarily on *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), respondent argues that the PCR Application should be dismissed as impermissibly successive. *See* Motion to Dismiss 22-25. In *Aice*, the South Carolina Supreme Court observed that successive PCR applications generally should not be entertained "'unless the court finds a ground for relief asserted which for *sufficient reason* was not asserted or was inadequately raised in the original, supplemental or amended application.'" *Id.* at 450, 409 S.E.2d at 394 (emphasis in original) (quoting S.C. Code Ann. § 17-27-90). The Court held, however, that there are exceptions to the general rule, including "when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." *Id.* at 451, 509 S.E.2d at 394.

In *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996), the Court invoked this exception and permitted a successive PCR application to go forward because of the ineffective assistance of initial PCR counsel and various other procedural irregularities. *Id.* at 235-36, 478 S.E.2d at 834-35. The Court has also applied similar exceptions in other cases. For example, in *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982), the Court held that a "unique" combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR proceeding. The Court later noted that under these circumstances it was "highly

doubtful" that Case would have been able to raise the appropriate arguments in his initial PCR. *Aice*, 305 S.C. at 451, n.1, 409 S.E.2d at 394, n.1; *see also Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (allowing a successive PCR where initial PCR counsel was the same as trial counsel).

The circuit courts in at least two prior capital PCR cases have also permitted successive PCR applications in the same or similar circumstances. The Honorable Marc H. Westbrook permitted Luke Williams to pursue a second PCR proceeding, over the State's objection, on the basis that Williams' initial PCR counsel were not qualified. *See Williams v. Ozmint*, 494 F.3d 474, 484 (4th Cir. 2007) ("Williams filed two applications for state post-conviction relief, the second of which was granted by the circuit court (PCR court)."). While the South Carolina Supreme Court ultimately reversed the circuit court's grant of relief in that case, it did so on the merits, not on the ground that Williams' second application was procedurally barred. *See Williams v. State*, 363 S.C. 341, 611 S.E.2d 232 (2005). Another capital PCR applicant, Edward Elmore, was also permitted to proceed on a successive PCR application over the State's objection, and the Honorable Mark J. Hayes granted Elmore penalty-phase relief from his death sentence on February 1, 2010. The State did not appeal this order.

This case is directly on par with *Williams* and *Elmore*. Applicant's initial PCR counsel were not qualified to represent him in a capital post-conviction case under the plain language of S.C. Code § 17-27-160(B). Moreover, initial PCR counsel failed to competently represent Applicant in his first post-conviction proceeding. All death-sentenced inmates are entitled to one full and fair opportunity at post-conviction relief with the assistance of qualified and competent counsel. The general rule against successive PCR applications is intended to enforce that limit. But the courts have adopted exceptions to ensure that all PCR applicants actually receive their one

fair chance at meaningful post-conviction review. As in *Williams* and *Elmore*, Applicant is simply asking for his one fair chance. There is no principled distinction between the procedural circumstances in *Williams* and *Elmore* and the circumstances here. It would be fundamentally unfair for this Court to arbitrarily deny Applicant the opportunity that Williams and Elmore rightfully received. This Court should permit Applicant's PCR application to go forward so that he may have the one opportunity to which he is entitled under state law.

2. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) provides additional incentive for this Court to refrain from dispensing with the previously established state court practice.

The recent Supreme Court of the United States decision in *Martinez* reinforces the need for this Court to adhere to the precedent established by *Williams* and *Elmore*. In *Martinez*, the Court expressed a clear preference for the state courts to act as the primary forum for the development and resolution of claims of ineffective assistance of trial counsel. 132 S. Ct. at 1318. Moreover, the Court acknowledged that the assistance of competent collateral counsel is crucial if state prisoners are to obtain meaningful review of such claims. *Id.* at 1317. This is because "claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy," and "[w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id.* "To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney." *Id.* If a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review, then further federal development and merits review will not be precluded. *Id.* at 1320.

While the Court's decision does not require state courts to provide a second PCR proceeding to where initial PCR counsel were ineffective, *Martinez* "permits a State to elect

between appointing [effective] counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings."[5] 132 S. Ct. at 1320. Respondent's contention that *Martinez* and *Kelly v. State*, 745 S.E.2d 377 (S.C. 2013), "do[] not support a finding that Applicant is entitled to review of the merits of his claims in his Application for Post-Conviction Relief" is simply incorrect. Motion to Dismiss 26. The South Carolina Supreme Court's decision *Kelly* was correct in observing that *Martinez* is directed at federal courts, not state courts, but *Kelly* did not reach or resolve the separate question of how state courts themselves should respond to the choice *Martinez* affords them. Instead, the question is now squarely before the South Carolina Supreme Court in *Robertson*, which the court has chosen to consider and decide. Thus, *Kelly* is not the final word – or even a temporarily dispositive word – on the availability of a *Martinez*-related remedy in South Carolina.

Thus, although *Martinez* does not require that this Court provide Applicant the opportunity to present his second PCR application with the aid of competent, qualified counsel, it does establish that if this Court chooses not to do so, the federal courts will take responsibility for the development and resolution of Applicant's claims instead. In order to preserve the role of South Carolina PCR courts as the primary arbitrators of ineffective assistance of trial counsel claims, this Court should grant deny Respondent's motion to dismiss and allow for further PCR proceedings.

[5] To ensure the state's appointment of effective counsel during the initial-review collateral proceedings, and thus the state's ability to assert a procedural default in federal court, a state has the option of creating a state forum for addressing ineffective assistance of initial-review collateral counsel – i.e., a second-in-time PCR application.

C. APPLICANT IS ENTITLED TO PURSUE THE PRESENT PCR APPLICATION BECAUSE HIS INITIAL PCR COUNSEL WERE NOT QUALIFIED UNDER SOUTH CAROLINA LAW AND PROVIDED INEFFECTIVE REPRESENTATION IN APPLICANT'S INITIAL PCR PROCEEDINGS

1. Applicant's initial PCR counsel were not qualified to represent him in a capital post-conviction proceeding pursuant to the requirements of S.C. Code §17-27-160(B).

To ensure that death-sentenced inmates receive a full and fair chance at post-conviction review, the South Carolina legislature has determined that all capital PCR applicants are entitled to the appointment of two attorneys. Moreover, the legislature has established standards for the appointment of counsel in capital post-conviction cases. The standards are codified in S.C. Code §17-27-160(B) and require that at least one of the two attorneys appointed must:

> (1) Have previously represented a death sentenced inmate in state or federal post-conviction relief proceedings; OR
>
> (2) meet the minimum qualifications set forth in S.C. Code §16-3-26(B)[6] & §16-2-26(F)[7] AND have successfully completed within the previous two years not less than twelve hours of approved CLE training involving advocacy in the field of capital appellate and/or post-conviction defense.

S.C. Code Ann. § 17-27-160.

Neither of Applicant's court appointed counsel had capital post-conviction experience and neither satisfied the statutory requirements for appointment in a capital post-conviction case. Applicant's counsel in state and federal habeas contacted both state PCR attorneys who admitted that they did not meet the statutory criterial (of which they were unaware). The statutory language is clear and unambiguous. It is also makes perfect sense. There are several reasons why the

---

[6] Section 16-3-26(B) requires that counsel have been admitted to the bar for at least five years and have three years felony trial experience.

[7] Section 16-3-26(F) requires that counsel meet any other guidelines for the appointment of counsel promulgated by the South Carolina Supreme Court.

legislature would enact a different, and more stringent standard for appointment of counsel in capital post-conviction cases than for appointment at the trial level. First, post-conviction litigation is an unusual combination of trial and appellate practice. Thus, persons competent to represent a death sentenced inmate at trial due to their extensive trial experience as reflected in §16-3-26(B), do not necessarily have the requisite skills to represent an individual in a capital post-conviction proceeding.[8] Second, at trial, the defendant has a Sixth Amendment right to counsel, and thus a Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). Thus, if trial counsel performs incompetently and the incompetence contributes to the conviction or death verdict, the defendant has a remedy. *See, e.g., Rosemond v. Catoe*, 680 S.E. 2d 6 (S.C. 2009) (finding counsel to have rendered ineffective assistance of counsel in a capital case for several different deficiences). However, in post-conviction proceedings, there is no currently recognized federal constitutional right to counsel, *see, e.g., Murray v. Giarratano*, 492 U.S. 1 (1989), and thus there is no clear remedy for substandard representation. Therefore, because Applicant's initial PCR counsel did not meet the clear standard for appointment of counsel contained in S.C. Code§17-27-160(B), he should be allowed to pursue the present PCR application, which represents one fair opportunity at post-conviction review with the assistance of qualified counsel.

2. Applicant's initial PCR counsel did not perform competently.

[8] *See* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases (2003) Guideline 1.1 (commentary) [hereinafter ABA Guidelines] ("Post-conviction proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. . . . . For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers.").

Undersigned counsel's review of the record indicates that Applicant's initial PCR counsel did not perform even the most rudimentary tasks associated with reasonable capital post-conviction representation. A review of the post-conviction file and record indicates that PCR counsel failed to conduct any investigation or secure any assistance whatsoever from investigators or expert witnesses.[9] Counsel did not obtain (and thus review) trial counsel's files. The bulk of the post-conviction relief hearing, which only lasted several hours (as opposed to the norm of multi-day or multi-week capital PCR hearings) consisted of Applicant's testimony expressing his dissatisfaction with trial counsel and setting forth in a rambling, generally incoherent manner, detailed conspiracies involving his attorneys, the police and the prosecution. Furthermore, as the grounds in this PCR application reveal, there were a number of potentially viable claims evident from the record or easily discoverable which could and should have been raised on Applicant's behalf.

Under any measure, PCR counsel's performance was objectively unreasonable and outside the range of competent assistance. *Strickland*, 466 U.S. at 688. The entire purpose of state collateral proceedings is to test the legality of the conviction and (especially in capital cases) the sentence. That can *only* be achieved through a thorough investigation of all aspects of the case,[10]

---

[9] Funding is in capital post-conviction cases for expert and investigative services including, mitigation investigators, fact investigators, social workers, psychologist, psychiatrists, etc. by filing an *ex parte* motion. S.C. Code §17-27-160(B) (adopting the procedures for compensation of counsel contained in S.C. Code §16-3-26(C)(1)). The only requirement is a showing of reasonable necessity, which is liberally construed by PCR judges in capital cases. In Petitioner's case, no such motions were filed and the Office of Indigent Defense has no record of any payment in this case to any investigator, expert or even counsel. Undersigned counsel are not aware of any other capital PCR case where appointed counsel failed to obtain any investigative or expert assistance whatsoever.

[10] *See* ABA Guidelines 10.15.1, commentary ("[C]ollateral counsel cannot rely on the previously compiled [trial counsel] record but must conduct a thorough, independent investigation."). The guidelines have been cited with approval by the Supreme Court of the United States on several

and through the appropriate utilization of investigators and experts. Counsel's basic obligation is to investigate the case and the client's life and background.[11] *Russell Stetler, Capital Cases: Post-Conviction Investigation in Death Penalty Cases*, The Champion, Aug. 1999, at 41-43. That did not happen here. PCR counsel did not retain the services of any investigators or experts, and there is no indication that counsel themselves conducted any meaningful investigation other than spending a minimal amount of time talking to Applicant.[12] Counsel did not interview the jurors, another basic task for counsel in capital post-conviction proceedings. Nor did PCR counsel take the basic step of obtaining and reviewing trial counsel's files in an effort to determine what

---

different occasions, *see, e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and are applicable to trial, appellate and post-conviction counsel. *See* Eric Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. App. Prac. & Process 325 (2003). While set out in the guidelines, this is also a matter of common sense. If PCR counsel could blindly rely on trial counsel's investigation, the process would be pointless. And that is why, in South Carolina, and other jurisdictions, the prevailing professional norms in capital post-conviction practice require a comprehensive re-investigation of the case.

[11] *See* ABA Guidelines 10.15.1, commentary:

> Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items in trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

[12] The time working on the case was so minimal that counsel did not even bother to file a voucher or seek compensation for their efforts.

investigation had been done in connection with the trial.[13] Additionally, PCR counsel failed to reasonably review the trial record and identify and raise claims arising from the record itself.[14] Thus by any and all objective measures, PCR counsel's performance was deficient. Thus, their appointment not only ignored the criteria established by the General Assembly, it also worked to Applicant's clear detriment. For this additional reason, this Court should permit the current PCR application to go forward.

C. THE PCR APPLICATION IS TIMELY.

Respondent argues that the PCR Application is barred by the statute of limitations set forth in S.C. Code Ann. § 17-27-45(A). *See* Motion to Dismiss 21-22. The one-year statute of limitations does not apply to successive PCR applications permitted under the exceptions discussed above. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999) (holding statute of limitations does not apply when a successive PCR application is permitted simply to allow an applicant one "fair 'bite' at the apple."). The South Carolina Supreme Court's policy of permitting successive PCR applications in certain exceptional circumstances would be frustrated if the one-year statute of limitations applied to bar an otherwise permissible successive PCR

---

[13] Undersigned counsel were provided this information by trial counsel when they obtained a copy of trial counsel's files.

[14] ABA Guideline 10.15.1(C), which outlines the responsibilities of post-conviction counsel, explicitly states that:

> C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

application. The court has never applied the one-year statute of limitations to a permissible successive PCR application. *See Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996).

Additionally, it is well within this Court's equitable discretion to toll the limitations period for any appropriate duration. *See Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (equitable tolling of the PCR limitations period may be applied where "circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence"). Applicant had no control over his initial PCR counsel's selection, lack of qualification or failure to perform competently. Since the appointment of qualified and competent counsel, Applicant has diligently pursued these claims.

D. APPLICANTS FREESTANDING CLAIMS SHOULD NOT BE DISMISSED.

Respondent argues that Applicant's claims 10&11(b), 10&11(c), and 10&11(d) cannot be properly raised in a PCR action. Motion to Dismiss 27-29. Claim 10&11(b) alleges Applicant was shackled in the presence of the jury in violation of the Fifth, Eighth, and Fourteenth Amendments and *Deck v. Missouri*, 544 U.S. 622, 624 (2005). Claim 10&11(d) alleges the state struck jurors in Applicant's trial in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Respondent argues these two claims should be dismissed because they could have been raised on direct appeal and are not raised in the context of ineffective assistance of counsel claims. The cases cited by Respondent do not support the argument that these claims in the PCR application are not cognizable in post-conviction.

Claim 10&11(b)

The shackling claim cannot be dismissed because, contrary to Respondent's contention, it could not have been raised on direct appeal. It would be a rare instance in which jurors' knowledge of a petitioner's improperly used shackles would appear on the record. *See Deck*, 544 U.S. at 635

("[T]he practice [of shackling] will often have negative effects, but – like 'the consequences of compelling a defendant to wear prison clothing' or forcing him to stand trial while medicated – those effects 'cannot be shown from the trial transcript.'"). Thus, this claim could not have been raised on direct appeal because it relies on evidence outside of the record. *See* Rule 210, SCACR (generally confining appellate review to the facts appearing within the record on appeal). Thus the evidence necessary to prove a shackling claim is the type typically developed and presented at a collateral evidentiary hearing.

Claim 10&11(d)

Applicant's claim that the state struck jurors in violation of *Batson* should similarly not be dismissed. Concurrently with the filing of this return, Applicant filed an Amended Application for Post-Conviction relief,[15] adding a claim that appellate counsel was ineffective in failing to raise the issue that the state struck jurors in violation of *Batson. See* Ground 10(f). As a result of the amendment, the freestanding *Batson* claim now corresponds to a claim of ineffective assistance of counsel and, therefore, should not be dismissed. In the cases cited by Respondent, the PCR applicant raised one or more free-standing claim of trial error *apart from an allegation of ineffective assistance of trial counsel. See, e.g., Drayton v. Evatt*, 312 S.C. 4, 7, 430 S.E.2d 517, 519 (1993); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983). In each of the cases cited by Respondent, the South Carolina Supreme Court held that a post-conviction court may not

[15] Applicant is entitled to amend his PCR application pursuant to South Carolina Rules of Civil Procedure Rule 15(a), which allows for amendment "as a matter of course at any time before or within 30 days after a responsive pleading is served." Though Respondent filed the Motion to Dismiss with this Court over thirty days ago, on January 5, 2015, counsel for Applicant were not appointed until January 16, 2015. The Motion to Dismiss was, therefore, not served on counsel until the date of their appointment. The amended PCR application was filed within thirty days of counsel's appointment and service of the Motion to Dismiss in accordance with Rule 15(a).

address the underlying substance of such a claim apart from a finding that trial counsel was ineffective for failing to raise it. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 ("Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel"); *Hyman*, 278 S.C. at 502, 299 S.E.2d at 331 (same); *Cummings*, 274 S.C. at 28, 260 S.E.2d at 188 (same).

However, where a PCR applicant, has raised corresponding claims of ineffective assistance of trial and/or appellate counsel with respect to each of these claims, it would be appropriate for the Court to address the merits of the underlying, freestanding claim if it finds counsel were ineffective. *See, e.g., Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001). In *Ezell*, the Court decided: "[w]hat is the appropriate remedy for ineffective assistance of appellate counsel?" *Id.* at 313, 548 S.E.2d at 852. *Ezell* involved a recorded undercover drug transaction. The entire tape of the transaction was admitted into evidence and played for the jury at trial over defense counsel's objection. On appeal, Ezell argued that the trial judge erred in admitting the tape because it contained hearsay testimony and therefore denied Ezell his right to confrontation. The Court of Appeals found that Ezell failed to provide a sufficient record for review since the audio tape was not included in the Record on Appeal. *Id.* at 314, 548 S.E.2d at 853. In post-conviction, the PCR court found that appellate counsel was ineffective for not including the tape in the Record on Appeal and concluded that Ezell was entitled to file a new direct appeal addressing this issue. *Id.* The South Carolina Supreme Court reversed, holding that the appropriate remedy was not to grant Ezell a new direct appeal. Instead, the Court analyzed the merits of the underlying claim, determined that the substantive claim was meritorious, and granted Ezell a new trial. *Id.* at 315-16, 548 S.E.2d at 853-54.

Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999), similarly supports this procedure. In *Southerland*, after determining that appellate counsel was ineffective, the South Carolina Supreme Court likewise looked at the underlying merits of the substantive claim to determine whether or not it merited a new trial. *See also Patrick v. State*, 349 S.C. 203, 209-210, 562 S.E.2d 609, 612 (2002) (holding that appellate counsel was ineffective in failing to raise or brief the issue of prosecutorial retaliation and then addressing the merits of the underlying retaliation claim and, finding the underlying claim meritorious, reversing petitioner's convictions); *Simpkins v. State*, 303 S.C. 364, 368, 401 S.E.2d 142, 143-144 (1991), overruled on other grounds by *State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009) (addressing the underlying merits of petitioner's hearsay argument where appellate counsel was ineffective in failing to raise the claim on appeal). Because a finding of ineffective assistance of counsel requires review of the underlying claims, it would be inappropriate for this Court to dismiss Applicant's freestanding *Batson* claim without first addressing his ineffective assistance of appellate counsel claim.

Claim 10&11(c)

Respondent further asserts that claim 10&11(c) should be dismissed because it asserts ineffective assistance of counsel and Applicant appeared at his trial *pro se*. Applicant's ineffective assistance of counsel claims should not be dismissed because Applicant had a right to effective assistance of counsel during his sentencing hearing. Respondent's argument ignores the fact that during the penalty phase, Applicant was not present in the courtroom and his standby counsel were, in effect, counsel of record for the penalty proceedings.[16] Further, even within the limited range

[16] While the jury deliberated during the guilt phase, Applicant informed the trial judge that he did not intend to participate in a sentencing phase if the jury returned a guilty verdict. The trial judge tried to reason with Applicant to no avail. The judge took a "wait and see" approach, and ordered that Applicant would remain in the courtroom for sentencing. When the prosecution called its first witness, Applicant stood up, in the presence of the jury, and began chanting: "Blessed be the

of duties explicitly imposed upon standby counsel by the trial court, counsel provided ineffective assistance.

Though Applicant clearly acted as his own counsel during the guilt-or-innocence phase of his trial, when Applicant was removed from the courtroom almost immediately after the penalty phase commenced and his standby counsel was tasked by the judge to control the rest of Applicant's case, counsel were no longer acting as standby counsel. In *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997), the Second Circuit recognized that "in a case where standby counsel held that title in name only and, in fact, acted as the defendant's lawyer throughout the proceedings, we would consider a claim of ineffective assistance of standby counsel." During the penalty phase, counsel were standby counsel in name only. Applicant was absent from the courtroom and did not participate in any of the penalty phase.

Even if evaluated within the restrictions imposed on counsel by the court, their performance was deficient and prejudiced Applicant. Courts have recognized the right to effective

---

Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob and Jesus." The judge ordered the State to continue, but when the next question was asked, Applicant again repeated the above refrain. The judge removed Applicant, sent the jury out, and then brought Applicant back into the courtroom for discussion. Applicant stated that he would continue to be disruptive because he "did not wish to engage in the proceedings." The judge stated that if Applicant continued to be disruptive, he would put Petitioner in a room in the back of the courtroom, where he would be "shackled or gagged" if necessary.

When the prosecution again sought to elicit testimony from its first witness, Applicant stood up and again chanted: "Blessed be Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob and Jesus." The judge had Applicant shackled and ordered that he be placed in a "room at the back of the courtroom that has a glass partition to allow him to hear all the proceedings . . . and see the proceedings as he desires."

The judge ordered standby counsel to resume representation to a limited extent; they were ordered to make objections, handle exhibits, and make closing arguments, but they were not allowed to present any evidence because (in the judge's view) Applicant continued to represent himself from the glass portioned room in the back of the court house, and Applicant did not wish to have any mitigating evidence offered on his behalf.

assistance of standby counsel within the role standby counsel plays. *See, e.g.*, *State v. Surber*, 723 S.E.2d 851, 863 (W. Va. 2012) ("To prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently *within the limited scope of the duties assigned to or assumed by counsel.*") (quoting *State v. Layton*, 432 S.E.2d 740, 756 (W. Va. 1993)). During the penalty phase, the trial court explicitly tasked standby counsel "to interject objections, handle exhibits, and make the closing statement." In essence, the court tasked counsel with protecting the record and objecting to inadmissible evidence. Counsel failed to adequately perform either of these duties when they failed to object to (1) evidence of general prison conditions during the penalty phase, *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (S.C. 2007); *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (S.C. 2005); (2) the extensive amount of victim-impact evidence introduced at the penalty phase, *Payne v. Tennessee*, 501 U.S. 808 (1991); and (3) to improper and inflammatory statements made during the prosecution's closing argument, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). In light of the above, Applicant has presented a well-pleaded claim that he received ineffective assistance of counsel in violation of the Sixth Amendment. It has long been settled that a state court cannot dismiss a well-pleaded federal claim without giving the applicant an opportunity for fact development in support of the claim. *See Coleman v. Alabama*, 377 U.S. 129 (1964); *McNeal v. Culver*, 365 U.S. 109 (1961); *Herman v. Claudy*, 350 U.S. 116 (1956); *Palmer v. Ashe*, 342 U.S. 134 (1952).

E. THIS COURT SHOULD STAY APPLICANT'S PCR PROCEEDINGS PENDING THE OUTCOME IN *ROBERTSON V. STATE*.

Most of the threshold questions raised in Respondent's Motion to Dismiss will also be considered and decided in *Robertson*, which is now pending before the South Carolina Supreme Court. In *Robertson*, the court will consider whether (and under what circumstances), can a death

sentenced inmate raise previously unadjudicated claims in a second state PCR application. Because the High Court's decision will almost certainly delimit the existence and scope of an available state remedy for Applicant's claims, this Court should deny Respondent's Motion to Dismiss, at least until *Robertson* is decided. This Court should then stay these PCR proceedings while *Robertson* remains pending in order to preserve judicial resources.

Courts in this State routinely stay proceedings "when there is another issue pending between the same parties in another action and the resolution of that issue will affect the actions sought to be stayed." *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 328 S.E.2d 621 (1985). The interests of judicial and fiscal economy will be served by staying this proceeding until the South Carolina Supreme Court renders its decision in *Robertson*. *See also Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (Court issued procedures to follow in capital cases in order to apply the U.S. Supreme Court *Atkins*[17] decision and noted that multiple cases raising similar claims of mental retardation had their cases stayed pending the Court's decision as to how to proceed).

[17] *Atkins v. Virginia,* 536 U.S. 304 (2005) (Decision barred imposition of the death penalty against a mentally retarded defendant, but left it to the States to establish appropriate judicial procedures).

IV. CONCLUSION

For all of the reasons stated above, this Court should deny Respondent's Motion to Dismiss, and allow this case to proceed in the ordinary course established by South Carolina law and practice.

February 16, 2015

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

STATE OF SOUTH CAROLINA)	
)	
COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Abdiyyah ben Alkebulanyahh, 6012) Aka Tyree Roberts)	
)	Case No. 2014-CP-07-2994
Applicant,)	
)	
vs.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

2015 FEB 23 PM 3:43
JEAN ROULHAC
BEAUFORT COUNTY, S.C.
CLERK OF COURT

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Applicant's Response in Opposition to Motion to Dismiss was mailed today by first class United States mail, postage prepaid, this 16th day of February, 2015, upon the following:

Alphonso Simon Jr.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Lindsey S. Vann

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS)
Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts	) CIVIL ACTION NO. 2014-CP-07-2994)
Applicant,	)
vs.	) **REPLY TO RESPONSE IN**) **OPPOSITION TO MOTION**) **TO DISMISS**
State of South Carolina,	)
Respondent.	)

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and hereby replies to Applicant's Response in Opposition served by Applicant on February 16, 2015. In support of this Reply, Respondent would show this Court the following:

I. Applicant is not entitled to pursue this PCR as a matter of state law.

1. Applicant has failed to provide sufficient reason for why the claims raised in this action were not raised in the original, supplemental or amended application in his first PCR.

Applicant contends he is entitled to purse this action as a matter of state law. Respondent submits he has not provided a sufficient reason for why the claims were not raised in the prior action to support allowing this action to go forward. Applicant's case is unlike the situation presented in Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996). In granting relief in Washington, the Supreme Court stated

> [The applicant] did not have the benefit of a direct appeal, because his attorney failed to file an appellate brief. Moreover, the first PCR court decided, in effect, that Washington was entitled to a new trial, but allowed the relief to be addressed on direct appeal; however, this Court denied certiorari as to the question. Additionally, the second PCR court granted relief, but did so through an improper procedure, specifically, by amending

> the first order. Thus, Washington has never received the benefit of a direct review. Even if his application is successive, the unique combination of facts in this case entitle him to the relief granted below.

Washington, 324 S.C. at 236, 478 S.E.2d at 835.

While the applicant in Washington did assert ineffective assistance of PCR counsel as a basis for why the Application was not successive, there is nothing in the opinion that indicates the case was heard because of the alleged ineffective assistance of PCR counsel. To the contrary, the Supreme Court clearly relied upon the procedural irregularities for its review of the application. Also, Applicant's case does not present any of the procedural mistakes that were present in Washington. Thus, Respondent submits Washington does not support a finding that Applicant has presented a sufficient reason he could not raise these claims in his prior PCR action.

Furthermore, Applicant's reliance upon other circuit courts' allowance of successive applications in two other capital cases is misplaced. First, it must be noted that the orders that ultimately allowed successive PCR actions to go forward have no precedential value upon this action. Second, Applicant has pointed to no similarities between the successive PCR actions filed on behalf of Luke Williams and Edward Elmore, other than they were also capital cases when the successive PCR actions were filed. A closer review of those actions again show that Applicant has not provided sufficient reason for why the cognizable claims raised in this action could not have been raised in his prior action. For instance, in second Elmore PCR action, the primary claim raised in the action was a freestanding mental retardation claim based upon Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002), which was decided after the first PCR action was dismissed by the circuit court. While the State did question whether the

action was successive in its Return and Motion to Dismiss in the second Elmore PCR, the State ultimately moved that the action should be dismissed as untimely because it was not raised for the first time in state court until more than one year after both the United States Supreme Court's decision in Atkins and the denial of certiorari by the United States Supreme Court upon the South Carolina Supreme Court's decision in Franklin v. Maynard, 356 S.C. 276, 278, 588 S.E.2d 604, 605 (2003). The State further argued that the issue was precluded by facts presented and resolved in prior state proceedings. The PCR Court's denial of the Motion to Dismiss was based solely upon a denial of the statute of limitations argument, and that denial was premised upon representations made by the applicant's counsel that indicated there was a factual question as to when the applicant became aware of the facts supporting the mental retardation claim.

The second PCR action in Luke Williams also does not support a finding that Applicant has shown sufficient reason why he was unable to raise these claims in his prior PCR action. In the second Williams' PCR, some of the applicant's claims were dismissed because they were found to be successive by the PCR Court. Altogether, Applicant fails to show that he is entitled to go forward with this action as a matter of state law. He has not shown there is sufficient reason his claims were not raised in the prior PCR action.

2. Martinez v. Ryan does not support Applicant's claim that he is allowed to proceed as a matter of state law.

Applicant contends that the United States Supreme Court decision in Martinez v. Ryan provides incentive for allowing this action to go forward. This is simply not true for several reasons. First, as noted in the Return and Motion to Dismiss, the holding in

Martinez does not support a finding that the Applicant is entitled to review of the merits of his claims in this Application for Post-Conviction Relief. The South Carolina Supreme Court has recognized "the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013).

Second, in Martinez, the remedy afforded by the United States Supreme Court was addressed only towards claims of ineffective assistance of trial counsel. Martinez, 132 S.Ct. at 1315. Applicant represented himself at trial. He could not raise any claims of ineffective assistance of trial counsel.

A defendant may waive his constitutional right to counsel and choose to represent himself during criminal proceedings, if such waiver is effected willingly and intelligently. See Faretta v. California, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Upon such an election, standby counsel may be appointed to assist the *pro se* defendant. However, there is "no constitutional right to hybrid representation where the defendant shared the duties of conducting [his] defense with a lawyer." United States v. Morrison, 153 F.3d 34, 55 (2d Cir.1998) (internal citations, quotation marks and modification omitted); United States v. Schmidt, 105 F.3d 82, 90 (2d Cir.1997) (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984)); State v. Stuckey, 333 S.C. 56, 57-8, 508 S.E.2d 564 (1998). Accordingly, "without a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel" unless "that title [was held] in name only and, in fact, [standby counsel] acted as the defendant's lawyer throughout the proceedings." Morrison, 153 F.3d at 55; (internal citations and quotation marks omitted). Without a constitutional right to standby

counsel, a defendant generally cannot prove standby counsel was ineffective. United States v. Cochrane, 985 F.2d 1027, 1029 n. 1 (9th Cir.1993) (rejecting ineffective assistance of standby counsel argument in this context without foreclosing argument in future); United States v. Windsor, 981 F.2d 943, 947 (7th Cir.1992) ("court knows of no constitutional right to effective assistance of standby counsel"); Morrison, supra ("without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel") (citing Schmidt, supra).

Here, Applicant was never relieved of his pro se status. He cannot raise any viable claims of ineffective assistance of trial counsel. Thus, any relief relating to Martinez that may be available would not apply to this action.

II. Prior PCR Counsel were qualified to represent Applicant during the first PCR action.

As an initial matter, Applicant is incorrect that his PCR counsel were not qualified under the applicable statute. Applicant asserts that under S.C. Code Ann. § 17-27-160 (2003), to be qualified in a capital PCR a lawyer either needs to have either previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief.

However, in her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 15th, 2003, the Chief Justice specifically rejected this interpretation, finding that it would lead to the absurd result that an attorney qualified to represent a capital inmate at trial would not be qualified to represent him in PCR. Thus, it was concluded that the "not less than twelve hours of CLE education" clause and the "or professional training primarily involving advocacy in capital appellate

or PCR defense" clause of S.C. Code Ann. § 17-27-160(B) were independent means through which an otherwise death penalty-qualified attorney could qualify to represent a death row inmate in PCR. Accordingly, an otherwise death-qualified attorney's twelve hours of CLE within the previous two years did not necessarily have to be in the field of capital appellate or PCR defense.

In the first PCR action, Judge Young specifically relied on the statute and this memorandum to conclude that PCR counsel were sufficiently qualified. (App. 5270-72). Counsel Walters had been practicing for 17 years, including stints in the public defenders office and years in private practice handling felony criminal cases. He had previously represented a capital inmate at trial and was at the time of his appointment in this case representing another capital inmate in trial-level proceedings. (App. 5251-53). Similarly, counsel Grant had been practicing law for 22 years, including stints handling criminal law in the JAG Corps and private practice. He had tried some five capital cases, and tried his first one twelve years prior in 1995. (App. 5253-54). Clearly these lawyers were well-versed in what it takes to try a capital case.

Thus, there was no violation of the capital PCR qualification statute, and accordingly no basis for remanding this case and treating the proceedings that have taken place as a nullity. Even if it is assumed that PCR trial counsel in this case were somehow ineffective, this would not matter, as there is simply no constitutional right to counsel in post-conviction proceedings. See generally Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Coleman v. Thompson, 501 U.S. 722 (1991); Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997). Accordingly, there can be no Sixth Amendment claim of ineffective assistance of PCR counsel, and this Court is clear that alleged

ineffectiveness of PCR counsel is not a basis for having a second PCR. See Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (alleged ineffective assistance of first PCR counsel is not a sufficient reason to overcome the bar against successive applications).

Accordingly, Applicant's counsel were qualified under the statute, and his new counsel's complaints about PCR trial counsel are insufficient to justify a second bite at the apple.

Respondent would note that this is not the first time this argument has been raised by Applicant in state court. At the onset of the appeal in his first PCR action, Applicant moved for a remand for further PCR proceedings. (App. 5230-60). In that motion, Applicant made a similar argument that PCR counsel were not qualified to represent Applicant in the first PCR. (App. 5240-44). Ultimately, the South Carolina Supreme Court denied the motion. (App. 5297-98). Respondent submits this argument should be rejected again by this Court. Since prior PCR counsel were qualified, Applicant has not shown sufficient reason these claims could not have been raised in his prior PCR action.[1]

---

[1] Even assuming *arguendo* PCR counsel in the first action were not qualified, Applicant has failed to show that a successive PCR is a proper remedy. In the unpublished order issued by this Court denying the petition for habeas corpus of Kevin Dean Young, this Court pointed out that section 17-27-160(B) does not provide a remedy for its violation. It went on to cite cases for the proposition that the failure to meet statutory standards for death qualification for *trial* counsel did not result in *per se* reversal but still needed to be assessed for prejudice. Kevin Dean Young v. State of South Carolina, Unpub. Order (S.C. Sup. Ct. November 1, 2000) (citing Aeschliman v. State, 973 P.2d 749 (Idaho Ct. App.1999); State v. Misch, 656 N.E.2d 381 (Ohio Ct. App. 1995); and State v. Maletta, 781 P.2d 350 (Or. Ct. App. 1989)).

Thus, even assuming a remedy for a violation of the statute, Applicant would at a minimum have to show some sort of prejudice, and he cannot do so in this case. He tried to fire his PCR counsel and handle the case on his own, but regardless, he had a full and fair hearing in which PCR counsel presented evidence on his decision to

III. This PCR Action is Untimely

Contrary to Applicant's assertions, this application is untimely. There is no case law supporting Applicant's contention that the one year statute of limitations does not apply to successive PCR applications. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999), does not support Applicant's position. In Odom, the Supreme Court held "[t] he one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to Austin v. State." Odom, 337 S.C. at 263, 523 S.E.2d at 756. "Austin appeals are considered 'belated appeals' and are used to rectify unjust procedural defects, such as when an attorney does not file a timely appeal." Odom, 337 S.C. at 263, 523 S.E.2d at 757. The Supreme Court further noted that the claim in the Odom appeal regarded the PCR procedure used in his case, not the merits of his sentence. Id.

Applicant's case is not similar to the situation presented in Odom. Applicant has received one full and fair bite at the apple. He had a PCR hearing in which he was represented by qualified counsel. He was denied PCR relief, and he had a timely appeal.

Further, Applicant is not entitled to having the statute of limitations tolled because he has provided no valid explanation why he could not have filed this action earlier. Respondent cannot comprehend why Applicant would wait this long to file another post-conviction relief action if he sincerely believed there was an available post-conviction relief state remedy, especially in light of the fact that he was aware of the claims as they are the same claims he asserted in his state habeas action in February 2011. This

---

represent himself and the competency determination, and in which Petitioner was then able without limit to give testimony on the issues that were important to him.

delay in filing does not reflect diligence in pursuing these claims, and it does not warrant equitable tolling of the statute of limitations.

IV. Applicant's freestanding claims should be dismissed

Contrary to Applicant's assertions, his freestanding claims should also be dismissed because they cannot be raised in a PCR action. First, due process claims based upon shackling can and should be raised in direct appeal. All that is required is that an objection be made and ruled upon, which was not done by Applicant during his trial. In fact, the case upon which Applicant relies as the basis for this claim was based upon a grant of writ of certiorari by the United States Supreme Court in a direct appeal. See Deck v. Missouri, 544 U.S. 622, 625, 125 S. Ct. 2007, 2010 (2005). Further, our appellate courts have consistently handled allegations of due process and equal protection violations based upon improper shackling in direct appeal. See generally State v. Tucker, 320 S.C. 206, 464 S.E.2d 105 (1995); State v. Moore, 257 S.C. 147, 152, 184 S.E.2d 546, 548 (1971); State v. Murray, No. 2012-UP-228, 2012 WL 10841380, at *1 (S.C.Ct.App. Apr. 18, 2012); State v. Green, No. 2008-UP-592, 2008 WL 9846813, at *1 (S.C.Ct.App. Oct. 17, 2008).

Second, Applicant's amendment to his Application to include a claim of ineffective assistance of appellate counsel does not render his freestanding Batson claim reviewable in PCR.[2] As noted in the Return and Motion to Dismiss, freestanding claims that could have been asserted at the trial level and then raised on direct appeal are not reviewable in PCR. See Simmons v. State, 264 S.C. 417, 422-23, 215 S.E.2d 883, 885-86 (1975)(issues that could have been raised at trial or in direct appeal cannot

[2] Respondent would note that Batson claims were raised in the first PCR action, and they were dismissed because they were improper for PCR. (App. 5216-17).

be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517, 519 (1993)(issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); S.C. Code Ann. § 17-27-20(b) ("This remedy[PCR] is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.").

There is no legal authority supporting Applicant's position on this issue. Applicant cannot point to any case where post-conviction relief was granted on a freestanding claim that could have been raised at an applicant's trial because no such case exists. Instead, Applicant relies upon this Court's determination that a defendant can be granted a new trial if he is successful on an ineffective assistance of appellate counsel claim in Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001). Ezell does not support Applicant's proposition; Ezell does quite the opposite. The issue before this Court in Ezell was what was the appropriate relief in an **ineffective assistance of appellate counsel** claim. Neither the PCR Court nor this Court found the applicant in Ezell was entitled to relief upon the underlying freestanding claim. As with most cases of ineffective assistance of counsel, this Court in Ezell had to assess the merits of the underlying substantive claim in determining whether appellate counsel was ineffective. The same is true in the opinions in Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999) and Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). The fact that an underlying substantive claim has to be reviewed in assessing whether counsel is

deficient and/or whether an applicant is prejudiced does not convert a ruling on an ineffective assistance of counsel claim into a merits finding on a freestanding claim. Nor does it reflect that a freestanding claim can be raised in a post-conviction relief action.

Third, Respondent submits Applicant's argument that he has available ineffective assistance of trial counsel claims is not supported by the record. While Applicant was removed from the defense table, he remained in the courtroom in a back room from where he was able to both observe and hear the proceedings. (See App. 3552). Furthermore, it was Applicant, and not the court, who placed the restrictions on what standby counsel could present. Applicant consistently maintained that he did not want a mitigation case presented at trial. Standby counsel informed both Applicant and the trial court that if they were made counsel of record, they would not abide by Applicant's request not to present a mitigation case. (App. 3525-29). Thus, the only way Applicant could maintain control over the presentation of his defense case in the sentencing phase was to maintain his status as counsel of record.

A defendant who is not willing to abide by courtroom protocol does not automatically forfeit his right to self-representation. See Davis v. Grant, 532 F.3d 132, 149 (2d Cir. 2008) (finding state court's failure to instruct standby counsel to represent defendant when he was removed from courtroom was not an objectively unreasonable application of Supreme Court precedent); see Clark v. Perez, 510 F.3d 382, 395-96 (2d Cir. 2008) (finding no violation of Sixth Amendment rights when court did not revoke pro se status of defendant who removed herself from courtroom through conduct). Applicant indicated he did not want to be relieved as counsel of record, and he did not want to present a case during the sentencing phase. Standby counsel indicated to the

court that they would present a case, contrary to Applicant's wishes, if made counsel of record. In all, Applicant maintained control of his representation throughout his trial. For the reasons stated in the Return and Motion to Dismiss, Applicant is not entitled to raise claims of ineffective assistance of trial counsel; thus, those claims should be dismissed.

V. Applicant is not entitled to a stay

Applicant moves to stay this proceeding pending the outcome of the appeal in [first name] James Robertson v. State, Appellate Case No. 2012-001968. A stay is not warranted in this case.

The circuit court has discretion whether to grant a stay of a matter pending before the court. Talley v. John-Mansville Sales Corp., 285 S.C. 117, 119, 328 S.E.2d 621, 623 (1985); City of Spartanburg v. Belk's Dep't Store of Clinton, 199 S.C. 458, 480, 20 S.E.2d 157, 167 (1942). "An abuse of discretion arises where the [circuit] court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999). Respondent submits that granting a stay, at least before this Court has ruled on the State's Motion to Dismiss, would amount to an abuse of discretion.

First, Applicant's motion for a stay arguably contravenes the South Carolina Supreme Court Order filed December 17, 2014. In the Order, the Supreme Court stated,

> Within sixty days of the date of this order, Judge McMahon shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and

> any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the Status of this matter every sixty days under In re Stays of Execution in Capital Cases, supra, 321 S.C. 544. 471 S.E.2d 140 (1996). Judge McMahon is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

(Order at pg. 2). Clearly, the Supreme Court's Order contemplates a reasonably expeditious resolution of this case.

Delaying the resolution of this case until the resolution of the Robertson case creates concern for several reasons. First, any ruling in the Robertson case would not have any bearing upon this action. The statement of the issue on appeal in Robertson is as follows:

> Whether, in light of Martinez v. Ryan, 132 S.Ct. 1309 (2012), and the past treatment of similarly situated South Carolina prisoners, Robertson should be permitted to proceed with a second-in-time application for post-conviction relief asserting colorable claims of ineffective assistance of trial counsel that prior PCR counsel ineffectively failed to investigate or present?

As already noted, Applicant can raise no viable claims of ineffective assistance of trial counsel because he represented himself at trial, and he was not relieved of his pro se status at any point during his trial.

Further, in light of the limitation of the statement of issue on appeal and the limitation inherent in Martinez, there is no guarantee that the Supreme Court in Robertson will issue an Opinion that "will almost certainly delimit the existence and scope of an available state remedy for Applicant's claims" as Applicant suggests. Furthermore, there is no clear timetable for the resolution of the South Carolina Supreme Court's ruling on Robertson.

Applicant's case differs from the Robertson case in other respects. Robertson claims that one of his original PCR attorneys, Michael L. Brown, "did not competently represent him during his initial PCR proceeding" because Brown was supposedly "abusing alcohol at this time" and violated Court-ordered rehabilitation requirements during the time Robertson's PCR Application was pending. He also relies upon In re Michael Langford Brown, Jr., 396 S.C. 251, 721 S.E.2d 783 (2011), which involved Mr. Brown's arrest and 2011 guilty plea to the charge of resisting arrest, following a July 2007 altercation with police that was the result of counsel's admitted use and abuse of alcohol and which occurred long after the January 29-31, 2007, evidentiary hearing in Robertson. There is no such allegation in this case. Thus, the present case is factually distinguishable from Robertson.

As noted in the Return and Motion to Dismiss, our Supreme Court has recognized "the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). In dismissing the appeal in Kelly, the South Carolina Supreme Court cited to cases in several other jurisdictions that had interpreted the holding in Martinez similarly. Respondent submits there is no meaningful basis upon which to distinguish the rights available to capital PCR applicants from the rights available to non-capital applicants and would note that to date, Applicant has not advanced any such reason. Further, and as argued in the Return and Motion to Dismiss, Respondent has argued that Applicant's Application should be summarily dismissed for several reasons:

a) It is barred by the statute of limitations;

b) It is successive to his original PCR Application (2007-CP-07-715);

c) None of the exceptions to the rule barring successive applications apply to Applicant's case;

d) The United States Supreme Court's decision in Martinez v. Ryan, 132 S.Ct. 1309, 1318-19 (2012) Martinez does not mandate a successive collateral state court proceeding;

e) The South Carolina Supreme Court has held, in a non-capital case, that Martinez does not require a successive state PCR hearing. See Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013); and

f) In the absence of any basis for exercise of a "rare exception" of allowing a successive application, there is no reason to tax an already overburdened judicial system with wasteful litigation which is not constitutionally mandated and that would reward a dilatory filing in this case that is designed to delay the proper course of the appeals process.

g) Two of Applicant's claims are not cognizable for review in post-conviction relief, and three other claims cannot be raised because Applicant represented himself at trial.

Altogether, Respondent submits that a stay is not warranted in this case at this time. A stay until the resolution of the Robertson appeal would likely impose significant delay, and it is not clear that the resolution of the Robertson case would resolve the matters raised in this action.

CONCLUSION

WHEREFORE, premises considered, for the reasons stated above and for the reasons stated in the Return and Motion to Dismiss, Respondent submits that the Application for Post-Conviction Relief should be dismissed as a matter of law.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

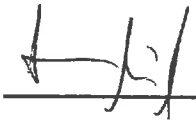
DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
(Counsel of Record)

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENTS

February 26, 2015

By: 

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS)
Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts	) CIVIL ACTION NO. 2014-CP-07-2994)
Applicant,	)
vs.	) **CERTIFICATE OF SERVICE**
State of South Carolina,	)
Respondent.	)

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Reply to Response in Opposition to Motion to Dismiss, on Applicant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Emily C. Paavola, Esq., Death Penalty Resource & Defense Center, 900 Elmwood Avenue, Suite #101, Columbia, South Carolina 29201; and to Lindsey S. Vann, Esq., Death Penalty Resource & Defense Center, 900 Elmwood Avenue, Suite #101, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 26th day of February, 2015.

ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS
	)	
Abdiyyah ben Alkebulanyahh, # 6012	)	Case No.: 2014-CP-07-2994
aka Tyree Roberts	)	
Applicant,	)	**REPLY IN SUPPORT OF MOTION TO STAY**
vs.	)	
State of South Carolina,	)	
Respondent.	)	
	)	

2015 MAR 16 PM 4:14
BEAUFORT COUNTY, S.C.
CLERK OF COURT

I. INTRODUCTION.

Applicant, Abdiyyah ben Alkebulanyahh, a death-sentenced inmate, filed a second application for state post-conviction relief ("PCR") on November 24, 2014, raising claims that were not litigated during his first PCR proceedings because his initial PCR counsel ineffectively failed to investigate and present them for review. Respondent filed a Motion to Dismiss and Applicant responded and moved for a stay of these proceedings pending the outcome of *Robertson v. South Carolina*. In its reply to Applicant's response to the motion to dismiss and motion for stay, Respondent asserted for the first time that Applicant's claims in his second PCR application are untimely because they are the same claims he previously raised in the original jurisdiction of the Supreme Court of South Carolina in a petition for habeas corpus. *See* Reply to Response in Opposition to Motion to Dismiss at 8. In light of Respondent's assertion, Applicant submits that: (1) this Court should dismiss Applicant's PCR action on the specific basis that his claims have previously been adjudicated by the Supreme Court of South Carolina; or, (2) if this Court believes that Applicant's claims have *not* already been adjudicated by a state court, then this Court should stay these proceedings pending the outcome of *Robertson*.

As Respondent notes, Applicant raised the same claims that he seeks to litigate here in a petition for habeas corpus in the original jurisdiction of the South Carolina Supreme Court

the merits," which "may be amended as necessary." Order dated December 17, 2014. This Court held an appointment hearing and appointed undersigned counsel to represent Applicant in this proceeding

As stated above, Applicant believes it would be appropriate for this Court to dismiss his second PCR application on the specific basis that the South Carolina Supreme Court has already adjudicated these claims in its ruling on the State Habeas Petition. However, if this Court does not agree with that position, then the Court should stay these PCR proceedings pending the South Carolina Supreme Court's decision in *Robertson v. South Carolina*, because the outcome of that case will necessarily dictate the appropriate course of action here. Respondent opposes the motion to stay and argues that, instead, this Court should dismiss the PCR application as impermissibly successive. There is no question that Applicant's present PCR application is second-in-time, but whether it is *impermissibly* so is the crux of the matter, and that is exactly the question the South Carolina Supreme Court will consider in *Robertson*:

> Whether, in light of *Martinez v. Ryan*, ___ U.S. ____, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and the past treatment of similarly situated South Carolina prisoners, Robertson should be permitted to proceed with a second-in-time application for post-conviction relief asserting colorable claims of ineffective assistance of trial counsel that prior PCR counsel ineffectively failed to present?

Petition for Writ of Certiorari, *Robertson v. State*, No. 2012-205909 (Sept. 14, 2012) at p.2. This Court should stay Applicant's proceedings pending the outcome of *Robertson* because that is the most sensible, economically responsible course of action, and Respondent offers no compelling reason for this Court to do otherwise.

II. THE OUTCOME OF *ROBERTSON* WILL INFORM THIS COURT'S DECISION IN THIS CASE.

The interests of judicial economy weigh heavily in favor of a stay because *Robertson* will decide (or, at a minimum, provide significant guidance about) whether this Court should dismiss

Applicant's PCR application or allow it to go forward. If the South Carolina Supreme Court concludes that a second-in-time PCR application is permitted where initial PCR counsel performed inadequately, then any order from this Court dismissing Applicant's application will be in error and the case will have to be remanded following the decision in *Robertson*. If, instead, the Supreme Court rejects Robertson's arguments, then it is unlikely that there will be any basis for Applicant's second PCR application to proceed. Any ruling on the State's motion to dismiss Applicant's application prior to the decision in *Robertson* would be premature and risk both reversal and the unnecessary waste of judicial time and resources. For the same reasons, denying the motion to stay and requiring the parties to go forward with an evidentiary hearing would likewise risk needless waste.

Thus, there is no legitimate reason for this Court to press forward without the South Carolina Supreme Court's guidance in *Robertson*. Respondent claims that Applicant's case differs from *Robertson* but, in fact, there are no distinctions of any real import. The primary focus of both *Robertson* and this case is that initial PCR counsel failed to adequately investigate and present legitimate claims for post-conviction review.[2] That is the same argument on which Applicant relies to assert his right to litigate his present PCR application. Thus, any distinction between these two cases does not create a material likelihood that *Robertson* will be decided so narrowly that it will not give this Court guidance on how to proceed in this case. Even if Respondent ultimately turns out to be correct, there is no way to know that until *Robertson* is actually decided.

[2] Robertson also raises a specific allegation that one of his initial PCR attorneys, Michael L. Brown, was abusing alcohol at the time of his first PCR proceedings. But this fact simply offers a partial explanation for the *cause* of Brown's ineffective assistance. Robertson's argument is that it was *the ineffective assistance itself* that entitles him to pursue a second PCR application. This is the same argument that Applicant makes here.

Respondent is simply asking this Court to read the judicial tea leaves (always a dangerous task) in the hope that it correctly reads the South Carolina Supreme Court's mind.

III. THIS COURT HAS AUTHORITY TO ENTER A STAY.

Nothing in the South Carolina Supreme Court's Order appointing this Court to preside over these proceedings prohibits a stay. The Order requires the Court to hold a hearing to determine whether Applicant desires PCR counsel and to issue a scheduling order (which this court has done). The Order explicitly authorizes this Court to amend the scheduling order "*as necessary*." This is a standard order of appointment routinely issued in the normal course of all post-conviction relief proceedings. Thus, the Order gives this Court authority to proceed as it sees fit in the scheduling and disposition of this action. There is no indication that the Order prohibits a stay, as Respondent claims.

Moreover, the decision in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013), is not controlling here. While *Kelly* correctly observed that *Martinez* is directed at federal courts, not state courts, it did not reach or resolve the separate question of how state courts themselves should respond to the choice *Martinez* affords them. *Martinez* "permits a State to elect between appointing [effective] counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings."[3] 132 S. Ct. at 1320. *Robertson* presents that very question. Additionally, Robertson and Applicant both argue that they are entitled to pursue a second-in-time PCR application as a matter of existing state law, independent from the decision in *Martinez*. *See* Petition for Writ of Certiorari, *Robertson v. State*,

[3] To ensure the state's appointment of effective counsel during the initial-review collateral proceedings, and thus the state's ability to assert a procedural default in federal court, a state has the option of creating a state forum for addressing ineffective assistance of initial-review collateral counsel – i.e., a second-in-time PCR application.

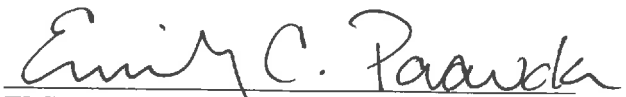
No. 2012-205909 (Sept. 14, 2012) at pp. 10-12 (citing *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996); *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987); *Williams v. Ozmint*, 494 F.3d 478, 483 (4th Cir. 2007)). Thus, *Kelly* is decidedly not the final word – or even a temporarily dispositive word – on the availability of a permissible second-in-time PCR application like the one Applicant seeks to pursue here.

CONCLUSION.

THEREFORE, for the above stated reasons, this Court should either: (1) dismiss the PCR application on the specific basis that the claims it contains have already been adjudicated; or, (2) enter an order staying these proceedings until the South Carolina Supreme Court clearly delineates whether, under what circumstances, and to what extent, South Carolina law permits prisoners in Applicant's and Robertson's position to have a state court consider claims previously not raised by ineffective initial PCR counsel.

March 12, 2015

Respectfully submitted,



EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803-765-1044

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS)
	) CIVIL ACTION NO. 2014-CP-07-2994
Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts	)
Applicant,	)
vs.	) **RETURN TO AMENDED**) **APPLICATION FOR POST-**) **CONVICTION RELIEF AND MOTION**
State of South Carolina,	) **TO DISMISS**
Respondent.	)

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and hereby makes Return to the Amended Application for Post-Conviction Relief filed by the Applicant on February 23, 2015.[1] Respondent moves that this Application be dismissed because this Application is untimely. Furthermore, this Application is successive to the Application filed by the Applicant on March 12, 2007. In support of this Return and Motion to Dismiss, Respondent would show this Court the following:

I. PROCEDURAL HISTORY

Applicant is currently confined at the Lieber Correctional Institution in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Beaufort County. Applicant was initially indicted by the Beaufort County Grand Jury during the March 2002 Term of the Beaufort County Court of General Sessions for two counts of Murder (2002-GS-07-0369, 0370). (App. 4532-33; Attachment No. 2). The State filed a Notice of intent to Seek the Death Penalty in this case on January 22,

[1] The Amended Application was served on February 16, 2015 with Applicant's Response in Opposition to the Motion to Dismiss and Motion for a Stay.

2002. (App. 4524). The State also served its Notice of Evidence of Aggravation on March 19, 2002. (App. 4525).

Initially, Applicant was represented by Gerald Kelly, Esquire, and Sean Thornton, Esquire, of the Beaufort County Public Defender's Office. Applicant moved to represent himself during the proceedings. (See App. 3892-3968). His motion was granted, but Mr. Kelly and Mr. Thornton were appointed to stay on the case as standby counsel. Id.

Voir dire in the case began before the Honorable Daniel F. Pieper, Circuit Court Judge, on October 6, 2003. (App. 41-1194). The jury was selected on October 10, 2003. (App. 1320-39). The guilt phase of the trial by jury before Judge Pieper began on October 10, 2003. (App. 1316). Applicant was present and represented himself during this phase of the trial. (App. 1316-3473). Mr. Kelly and Mr. Thornton served as standby counsel. Id. The State was represented by Solicitor Randolph Murdaugh, Esquire and Assistant Solicitors Duffy Stone, Esquire and Angela Tanner, Esquire, all of the Solicitor's Office for the Fourteenth Judicial Circuit. Id. On October 20, 2003, Applicant was convicted him for both murders. (App. 3472-73).

After the statutory twenty-four hour waiting period for sentencing, the sentencing phase of the trial began on October 21, 2003. (App. 3538).

Judge Pieper submitted the following aggravating factors to the jury:

> The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.
>
> Two or more persons were murdered by the defendant by one act or pursuant to on scheme or course of conduct.

(App. 3847; 4529). The following mitigating factors were submitted to the jury:

Whether the existence of any non-statutory mitigating circumstance was supported by the evidence.

(App. 3851, 4529). On October 22, 2003, Applicant's jury found the existence of the aggravating factors and recommended a sentence of death on the murder counts. That same day, Judge Pieper sentenced Applicant to death. (App. 3861-68; 3873; 4533).

Statement of Facts[2]

In January 2002, Applicant lived in a trailer owned by Brenda Smith on Riley Road in Beaufort County. Also residing at the trailer were Smith's husband, Isaac, and Applicant's wife Nzuri. At the time of the crime in this case, a girl named Kimberly Blake, with whom Applicant had an infant daughter, was also staying there. On January 8, 2002, Kimberly Blake asked her friend, Strawberry Washington, to call police to come to the house to assist her in leaving because Applicant had hit her. Beaufort County Sheriff's Deputies Dyke Coursen and Dana Tate responded. According to Kimberly Blake, when police arrived, Applicant hid in the bedroom closet with his rifle. He gave Kimberly the okay to go out of the bedroom. She left the bedroom and Brenda Smith gave the officers permission to search the bedroom. Officers Coursen and Tate went into the bedroom. Smith and Blake heard gunshots. Blake ran outside and down the road. She was joined shortly after by Applicant coming through the woods with a gun in his hands. Applicant stated, "I just killed those two white bitches and I'm going to say it was self-defense." Blake left Applicant and returned to the scene to talk to police.

When backup officers responded to the scene, they found officers Coursen and Tate dead; Coursen had suffered six gunshot wounds, Tate had seven. Applicant was

[2] These are the facts as recounted by the South Carolina Supreme Court in its published opinion in the direct appeal. State v. Roberts, 369 S.C. 580, 581-83, 632 S.E.2d 871, 872-73 (2006).

subsequently found hiding in the mud under a bridge with a shoulder and hip wound. Applicant was arrested. At the time, he had a black fanny pack carrying ammunition for an M-14 assault rifle, a cell phone and a knife. Police subsequently found a rifle magazine and an SKS assault rifle in the area in which Applicant had fled. The bullets and casings recovered from the victims and the scene of the crime were conclusively matched to the assault rifle.

Applicant was charged with capital murder. At the guilt or innocence phase of trial, he chose to represent himself. However, two attorneys remained as stand-by counsel to assist him at trial. While the jury was deliberating, Applicant indicated to the trial court that if the jury returned a guilty verdict, he did not intend to participate at sentencing. He also indicated he did not want his stand-by attorneys to present a defense. Applicant indicated that if the trial court required him to be present at the sentencing hearing, he would be unruly and would have to be restrained.

The jury convicted Applicant of two counts of murder. Applicant advised the court he did not intend to offer any mitigating evidence and expressed his desire to absent himself from the sentencing; he indicated he would probably be unruly if required to be present. Stand-by counsel conferred with Applicant and then advised the court as follows:

> He says that he doesn't agree to any changes in his status as attorney of record, and that if the court makes any change, they'll have to do it on their own motion ... and that if the judge-if the attorneys on stand-by are to perform in any capacity, the judge will have to order that on his own motion ... He says that he doesn't want to be present in this courtroom in order to hear the evidence in the second phase. And that if the judge-but he does not intend to disrupt the proceedings ... but if the judge determines that he should be in one of the side rooms ... that's a decision that his honor will have to make himself. He says that he is withdrawing

> from any further discussion with the court .... he does not intend to cooperate with stand-by counsel, to bring any witnesses....

The trial court was concerned with Applicant' decision, but was also disturbed that to appoint counsel to represent Applicant at sentencing might compromise his right to proceed *pro se*. Applicant continued to maintain that he did not intend to confront any witnesses, and did not want to see the witnesses. He persisted in advising the court that if forced to remain present, he would be disruptive. As neither party could point to specific case law governing the circumstances, the court determined the best course of action was to proceed with Applicant present in the courtroom, with the condition that if he became disruptive, the trial judge would take such action as necessary. Applicant indicated his desire that counsel not represent him in any way, but ultimately decided counsel could remain as stand-by counsel to object to the introduction of improper evidence.

The sentencing proceeded with Applicant seated at counsel table. As soon as the first witness was sworn, Applicant stood and began to chant aloud, "Blessed be Yahweh, El Shaddai, Jehova, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." He was told by the court to be seated, and when he continued chanting, he was removed and a brief hearing was held in the hearing room at the back of the courtroom. Applicant was brought back into the courtroom and once again began chanting when the witness began to testify. The jury was removed, and Applicant was placed in a conference room at the back of the courtroom which had a glass partition to allow him to hear and see into the courtroom. He was initially restrained, but the restraints were removed before the jury was returned to the courtroom.

Throughout sentencing, the court offered to allow Applicant to come back into the courtroom if he could do so without being disruptive; however, Applicant indicated he would rather remain in the back room. Applicant ultimately returned to the courtroom to make a closing statement to the jury. After deliberations, the jury found the existence of the two aggravating circumstances and recommended a sentence of death.

Direct Appeal

A timely Notice of Appeal was filed with the South Carolina Supreme Court. (Attachment No. 3). Applicant was represented on direct appeal by Acting Chief Attorney Joseph L. Savitz, III, Esquire and Assistant Appellate Defender Robert M. Dudek, Esquire, both of the South Carolina Office of Appellate Defense.[3] (See Attachment No. 11). On March 7, 2006, Applicant submitted a Final Brief of Appellant to the state supreme court, in which he raised the following issue:

> The judge erred by refusing to allow appellant to waive his right to be present at the sentencing phase, instead confining him to a holding cell attached to the courtroom in which he was visible to the jury, particularly since appellant's absence during sentencing was his pro se trial strategy and the State advanced no countervailing reason for requiring him to be present.

(Attachment No. 11). The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent on February 17, 2006. (Attachment No. 12). Oral argument was held before the South Carolina Supreme Court on May 24, 2006. The South Carolina Supreme Court issued an opinion dated July 24, 2006,

[3] After the filing of the initial brief of appellant in the direct appeal, Applicant moved to proceed pro se in his direct appeal. (Attachment No. 4). Both the State and the Office of Appellate Defense opposed the motion. (Attachment Nos. 5, 6). Applicant filed a response to the Return to the motion. (Attachment No. 7). By Order filed June 3, 2005, Applicant's motion to proceed pro se was denied. (App. 4973-81, Attachment No. 8; State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (2005)). Applicant filed a pro se motion for reconsideration; the motion was denied by a letter Order filed July 8, 2005. (Attachments Nos. 9, 10).

affirming the convictions and sentences. State v. Roberts, 369 S.C. 580, 632 S.E.2d 871 (2006). (Attachment No. 13).

Applicant, through counsel, subsequently filed a Petition for Rehearing. (Attachment No. 14). In the Petition for Rehearing, Applicant argued the Supreme Court had misapprehended the nature of the constitutional rights involved and had employed an unconstitutional harmless error analysis to assess the impact of the underlying error at sentencing. By Order filed August 11, 2006, the South Carolina Supreme Court denied the Petition for Rehearing. (Attachment No. 15). The Remittitur was also issued on August 11, 2006. (Attachment No. 16).

On August 17, 2006, Applicant filed a Motion for Stay of Execution to allow for him to seek certiorari from the United States Supreme Court. (Attachment No. 17). The State served its Return to the Motion on August 23, 2006. (Attachment No. 18). The South Carolina Supreme Court granted the Motion on September 7, 2006. (Attachment No. 19).

On November 9, 2006, Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. (Attachment No. 20). In the Petition, Applicant argued a capital defendant may waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reason for requiring him to be present. The State filed its Brief in Opposition on February 5, 2007. (Attachment No. 21). By letter Order filed March 19, 2007, the United States Supreme Court denied the Petition for a Writ of Certiorari. (Attachment No. 22).

PCR Action

On March 12, 2007, Applicant filed an Application for Post-Conviction Relief (2007-CP-07-715). (App. 4535-44). In this Application, Applicant asserted several claims. First, he contended the verdict was contrary to the law of reasonable doubt, and upon a false prosecution. (App. 4537). Second, he argued the evidence proved that Applicant committed no unlawful act. Mr. Tate killed Coursen. Id. Third, Applicant alleged his Sixth Amendment rights were violated when his petition for speedy trial was denied and ignored and bail was not being granted. (App. 4541). Within that claim, he also alleged he was denied a fair trial on the fact that the alleged victims were honored state-wide as South Carolina heroes and indicted into the South Carolina Law Enforcement Hall of Fame, as well as, the President of the United States of America Mr. George W. Bush appeared on nation-wide television, then honored alleged victims by inducting their names into the National Memorial for Police Officer, on May 15, 2003. Id. Fourth, Applicant argued that in violation of the Eighth Amendment, Applicant was sentenced to death when evidence showed someone other than him killed the alleged victims. Id. Fifth, Applicant asserted that his constitutional rights had been abridged, and the privileges and immunities afforded all citizens, his life, his liberty without due process of law nor equal protection under the law. Id. Sixth, he averred that appellate counsel was ineffective for not asserting that he was denied due process of law, he was denied a fair trial, he was denied equal protection of the law, a Fourth Amendment issue, and an after discovered evidence claim. (App. 4542).

On March 30, 2007, counsel for Applicant filed a Petition for Stay of Execution so that Applicant could seek his available remedies in post-conviction relief. (Attachment

No. 23). The State served its Return to Petition for Stay of Execution on April 9, 2007. (Attachment No. 24). Applicant, through counsel, served a Reply to the State's Return on April 12, 2007. (Attachment No. 25). By Order filed May 4, 2007, the South Carolina Supreme Court granted the motion for a stay and assigned the Honorable Roger M. Young, Circuit Court Judge, to the PCR action. (Attachment No. 26).

Counsel to represent Applicant during the PCR action were appointed on August 8, 2007. (Attachment No. 27). Carl B. Grant, Esquire and Glenn Walters, Esquire were appointed to represent Applicant.

The State served its Return, Motion to Dismiss, and/or Motion for Summary Judgment on October 9, 2007. (App. 4569-98; Attachment No. 28).

On February 8, 2008, Applicant filed an amended Application for Post-Conviction Relief. (App. 4562-68). In this amended Application, Applicant contended the trial judge failed to make the proper findings to determine if the Applicant knowingly and intelligently understood the implications of proceeding pro se. (App. 4564). Specifically, Applicant asserted

> Under the Sixth Amendment, an accused may waive the right to counsel and proceed pro se. Foretta v. California, 422 US 806. 95 S. Ct 2524, L Ed 2d 562 (1975); State v. Reed, 332 SC 35, 503 S.E. 2d 747 (1998). The trial Judge has the responsibility to ensure that the accussed[sic] is informed of the dangers and disadvantages of self representation and makes a knowingly and intelligent waiver of the right to counsel. The ultimate test of whether a Defendant has made a knowing and intelligent waiver of the right to counsel is the Defendant's understanding Graves v. State, 422 S.E. 2d 125 (1992).
>
> In the present case, the trial Court failed to impress upon the Applicant the dangers and disadvantages of self representation, In addition, the trial Court failed to determine if the Applicant knowingly and intelligently waived his right to counsel. Further, the trial Court failed to determine that the Applicant understood what it meant to represent himself.

> The inquiry by the Court was insufficient to determine if the Applicant understood what it meant to represent himself and waive the representation of experienced counsel.

(App. 4564). The State served its Amended Return, Motion to Dismiss, and/or Motion for Summary Judgment on March 21, 2008. (App. 4545-57; Attachment No. 29).

An evidentiary hearing in this PCR action was held before the Honorable Roger M. Young, Circuit Court Judge, on October 12-13, 2008.[4] (App. 4599-4920). Applicant was present and was represented by Mr. Grant and Mr. Walters. Id. The State was represented by Assistant Attorneys General S. Creighton Waters and Alphonso Simon, Jr. Id.

By Order filed by the South Carolina Supreme Court on December 17, 2008, the Honorable Carmen T. Mullen, Circuit Court Judge was assigned jurisdiction over the PCR action, and the Order assigning Judge Young was rescinded. (Attachment No. 30). The parties provided Judge Mullen with proposed Orders. (Attachment Nos. 31, 32). On September 17, 2009, the PCR Court filed its Order of Dismissal with Prejudice. (App. 5176-5229).

PCR Appeal

Applicant timely served and filed a notice of appeal on November 2, 2009. (Attachment No. 33). On appeal, Applicant was represented by John Blume, Esquire. (See Attachment No. 34).

On July 21, 2010, Applicant filed a Motion to Remand for Additional Post-Conviction Proceedings. (App. 5230-60). The State filed its Response in Opposition to Motion to Remand for Additional Post-Conviction Relief Proceedings on August 2, 2010.

[4] The depositions of Robert Dudek, Joseph L. Savitz, III, and Dr. Donna Schwartz-Watts were also introduced into evidence at the hearing.

(App. 5261-81). Applicant filed a Reply to Response to Motion to Remand for Additional Post-Conviction Proceedings on August 9, 2010. (App. 5282-92). On August 16, 2010, Applicant also filed a Motion for Recusal requesting Chief Justice Toal recuse herself from considering the Motion to Remand. (App. 5299-5302). By Order filed August 30, 2010, Chief Justice Toal denied the Motion for Recusal. (App. 5303-08). By Order filed October 20, 2010, the Motion to Remand was denied. (App. 5297-98).

Applicant's appeal to the PCR Court's Order was perfected with the filing of a Petition for Writ of Certiorari on February 18, 2011. (Attachment No. 34). In the Petition, Applicant raised three grounds. First, he asserted the trial court erred in denying Applicant's motion under Batson v. Kentucky, 106 U.S. 1712 (1986). Second, he contended the trial court abused its discretion and thereby denied Applicant's constitutional rights to due process and a fundamentally fair trial by failing to *sua sponte* order a new competency hearing prior to sentencing and/or terminate Applicant's pro se status, and Applicant was in fact incompetent during his trial proceedings. Third, Applicant argued he was denied due process and equal protection of the law and is thus entitled to a new post-conviction relief proceeding where: (a) Applicant's PCR counsel were not qualified under S.C. Code 5 17-27-160(B); (b) PCR counsel were ineffective; and, (c) Judge Carmen Mullen signed the state's order denying post-conviction relief, which contained numerous credibility findings, even though Judge Mullen was not present during the PCR hearing and did not hear the testimony of any witness. The State served its Return to Petition for Writ of Certiorari on June 6, 2011. (Attachment No. 35).

By Order filed February 22, 2013, the South Carolina Supreme Court denied the petition for writ of certiorari. (Attachment No. 36).

The Remittitur was issued on March 28, 2013. (Attachment No. 37).

State Habeas Petition

On February 18, 2011, Applicant also filed a Petition for Writ of Habeas Corpus with the South Carolina Supreme Court. (Attachment No. 38). In the state habeas petition, Applicant raised five issues. First, he contended Applicant was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitutional and South Carolina law because a) the trial judge failed to inquire into Applicant's competency; b) Applicant was incompetent in fact; c) the trial judge failed to secure a knowing and intelligent waiver of Applicant's right to present mitigating evidence and d) the trial judge failed to terminate Applicant's *pro* se status. Second, he argued his death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without individualized determination by the trial judge. Third, Applicant alleged he was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel during the penalty phase of the proceedings. Fourth, Applicant averred the prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Applicant's rights guaranteed by the Sixth and Fourteenth Amendments. Fifth, Applicant asserted he was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.

The State filed its Return to Petition for Writ of Habeas Corpus on March 21, 2011. (Attachment No. 39). Applicant filed a Reply on May 18, 2011. (Attachment No. 40).

By Order filed February 22, 2013, the South Carolina Supreme Court denied the Petition. (Attachment No. 41).

Federal Habeas Action

On March 28, 2013, the South Carolina Supreme Court filed an Order setting Applicant's execution date for the fourth Friday following the date of service, and the Applicant was scheduled for execution on April 19, 2013. Applicant, through proposed counsel John H. Blume, Esquire and Emily C. Paavola, Esquire, filed a Motion for Stay of Execution and Appointment of Counsel, in the United States District Court for the District of South Carolina on March 26, 2013. On March 29, 2013, the State made its Response to the stay request and did not oppose it. The Honorable Terry L. Wooten, Chief United States District Judge for the District of South Carolina, entered an Order granting Applicant's Motion for Stay of Execution on April 4, 2013. In that Order, John H. Blume, III, Esquire, and Emily C. Paavola, Esquire were both appointed to represent Applicant.

Applicant filed his Petition for Writ of Habeas Corpus on February 13, 2014. (Attachment No. 44). In the Petition, Applicant raises the following Grounds:

> Ground One: PETITIONER WAS DEPRIVED OF A FAIR AND RELIABLE DETERMINATION OF THE APPROPRIATE SENTENCE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL JUDGE FAILED TO INQUIRE INTO PETITIONER'S COMPETENCY.

Ground Two: PETITIONER WAS INCOMPETENT THROUGHOUT THE GUILT-OR-INNOCENCE PHASE OF TRIAL VIOLATING THE DUE PROCESS CLAUSE.

Ground Three: PETITIONER'S DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS A RESULT OF THE TRIAL JUDGE'S FAILURE TO SECURE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF THE RIGHT TO PRESENT MITIGATING EVIDENCE.

Ground Four: THE TRIAL JUDGE ERRED IN FAILING TO TERMINATE PETITIONER'S PRO-SE STATUS.

Ground Five: PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE WAS VISIBLY SHACKLED WITHOUT JUSTIFICATION AND WITHOUT AN INDIVIDUALIZED DETERMINATION BY THE TRIAL JUDGE.

Ground Six: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO EVIDENCE OF GENERAL PRISON CONDITIONS DURING THE PENALTY PHASE.

Ground Seven: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE EXTENSIVE AMOUNT OF VICTIM-IMPACT EVIDENCE INTRODUCED AT THE PENALTY PHASE.

Ground Eight: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO INFLAMMATORY AND IMPROPER STATEMENTS MADE DURING THE PROSECUTION'S CLOSING ARGUMENT, RENDERING THE SENTENCING PHASE FUNDAMENTALLY UNFAIR.

Ground Nine: THE PROSECUTION EXERCISED ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER IN VIOLATION OF PETITIONER'S RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

Ground Ten: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BEFORE TWELVE FAIR AND IMPARTIAL JURORS AS A RESULT OF MULTIPLE PREJUDICIAL EXTRANEOUS INFLUENCES.

The Respondents filed their Return on April 16, 2014, and a Motion for Summary Judgment on April 17, 2014. (Attachment No. 45). Applicant filed a Traverse and Memorandum of Law in Opposition to Summary Judgment on June 20, 2014. (Attachment No. 46). The Respondents filed a Reply to Response in Opposition to Motion for Summary Judgment on July 14, 2014. (Attachment No. 47).

On November 5, 2014, the Honorable Kevin F. McDonald, United States Magistrate Judge, filed a Report and Recommendation. (Attachment No. 48). In the Report and Recommendation, Judge McDonald recommended that the Respondents' Motion for Summary Judgment be granted because all of the claims raised by Applicant were procedurally barred from federal habeas review. Judge McDonald further recommended that if the claims were not procedurally barred, then the Respondents were entitled to summary judgment on the merits of all of the claims except for a portion of Ground Ten.

Applicant filed his Objections to the Report and Recommendation on November 21, 2014. (Attachment No. 49). The Respondents filed their Objection to the Report and Recommendation on November 24, 2014. (Attachment No. 50).

On November 21, 2014, Applicant also filed a Motion to Stay Proceedings Pending Exhaustion of State Remedies. (Attachment No. 51). The Respondents filed their Response in Opposition to Motion to Stay Proceedings Pending Exhaustion of State Remedies on December 8, 2014. (Attachment No. 52). Applicant filed a Reply on December 15, 2014, and a Supplement to the Motion on December 19, 2014. (Attachment Nos. 53, 54).

Also, in an Order filed December 8, 2014, Judge Wooten requested Applicant file an affidavit from the juror regarding one of the claims in Ground Ten if he wished to continue pursuing relief upon the claim. (Attachment No. 55). Applicant filed the affidavit on December 19, 2014. (Attachment No. 56).

At this time, Applicant is represented by Emily Paavola, Esquire, and John H. Blume, Esquire in the federal habeas action. As of the date of this Return and Motion to Dismiss, the United States District Court for the District of South Carolina has not ruled upon Applicant's Motion to Stay Proceedings Pending Exhaustion of State Remedies or upon the Report and Recommendation.

II. ALLEGATIONS

On November 24, 2014, Applicant filed a second Application for Post-Conviction Relief with the Court of Common Pleas of Beaufort County (2014-CP-07-2994). In that Application, Applicant asserts the following claims:

> 10(a) Applicant was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.
>
> 11(a) Supporting Facts:
>
> > (1) The trial judge failed to inquire into Applicant's competency during the penalty phase of the trial despite Applicant's increasingly irrational and bizarre behavior prior to trial, during the guilt-or-innocence phase of Ae proceedings, and during the sentencing phase of the trial, see Drope v. Missouri, 420 U.S. 162 (1975);
> >
> > (2) Applicant was incompetent in fact during the penalty phase of the trial, see Drope v. Missouri, 420 U.S. 162 (1975);
> >
> > (3) The trial judge failed to secure a knowing and intelligent waiver of Applicant's right to present mitigating evidence, see Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Lockett V. Ohio, 438 U.S. 586, 605 (1978); and

(4) The trial judge failed to terminate Applicant's *pro se* status while simultaneously removing Applicant from the courtroom for his obstreperous behavior and restricting the ability of standby counsel to present evidence, see Faretta v. California, 422 U.S. 806, 807 (1975); Martinez v. Court of Appeals of California, 528 U.S. 152,162 (2000).

10(b) Applicant's death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without an individualized determination by the trial judge.

11(b) Supporting Facts: During the penalty phase of Applicant's trial, without making any findings regarding the need for restraints, the trial judge ordered Applicant's hands and legs be shackled and Applicant remained shackled in the presence of his sentencing jury. See Deck v. Missouri, 544 U.S. 622, 624 (2005).

10(c) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, and S.C. Code § 17-3-20—during the sentencing phase of his capital trial.

11(c) Supporting Facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).
Counsel's specific unreasonable and prejudicial acts or omissions are:

(1) Counsel failed to object to evidence of general prison conditions during the sentencing phase, see State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005)

(2) Counsel failed to object to the extensive amount of victim-impact evidence introduced during the sentencing phase, see Payne v. Tennessee, 501 U.S. 808 (1991); Booth v. Maryland, 482 U.S. 496 (1987); and

(3) Counsel failed to object to inflammatory and imporper[sic] statements made during the prosecution's closing argument, rendering the sentencing phase fundamentally unfair, see Darden v. Wainwright, 477 U.S. 168, 178-79 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Viereck v. United States, 318 U.S. 236 (1943).

10(d) The prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Applicant's rights guaranteed by the Sixth and Fourteenth Amendments.

11(d) Supporting Facts: Following voir dire, the State struck four of the five African American jurors that were presented, including Edith Owens, Matthew Young, Antwoine Crosson, and Kerry Brown, and provided pretextual race neutral explanations for striking the challenged jurors. See Batson v. Kentucky, 476 U.S. 79 (1986); Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 537 U.S. 322 (2003).

10(e) Applicant was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.

11(e) Supporting Facts: Applicant's sentencing jury was tainted by several extraneous influences, including (1) one juror asked a minister for guidance as to how to make the sentencing phase life or death decision; (2) several jurors held hands and prayed during deliberations; (3) some jurors brought Bibles and copies of scripture into the jury room; (4) jurors relied on specific Biblical passages to help them make their decision—especially the passages advocating lex talionis or "an eye for an eye"; (5) some jurors were led to believe the jury was sequestered because of threats made by Applicant's followers; and (6) several jurors entered the jury box one day during trial and discovered dog manure and were told by court personnel that there had been threats from Applicant's "associates" and the manure came from a bomb sniffing dog that was being used daily to inspect the courtroom for bombs. See Turner v. Louisiana, 379 U.S. 466 (1965); Remmer v. United States, 347 U.S. 227 (1954); Barnes v. Joyner, 751 F.3d 229 (4th Cir. 2014); see also Irvin v. Dowd, 366 U.S 717 (1961).

10(f) Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§3 and 14of the South Carolina Constitution, and S.C. Code § 17-3-20—during the appellate proceedings.

11(f) Supporting Facts: Appellate counsel's performance during the appellate phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984). Counsel's specific unreasonable and prejudicial act or omission is counsel failed to raise the issue that the trial court erred in denying Applicant's motion under Batson v. Kentucky, 476 U.S. 79 (1986) when, following voir dire, the State struck four of the five African American jurors that were presented, including Edith Owens, Matthew Young, Antwoine Crosson, and Kerry Brown, and provided pretextual race neutral explanations for striking the challenged jurors. See

Batson, 476 U.S. 79; Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 531 U.S. 322 (2003).

This Return follows. Incorporated by reference are the following documents that were attached to the Return and Motion to Dismiss to the original Application for Post-Conviction Relief:

1. Appendix, the Honorable Carmen T. Mullen, Circuit Court Judge
2. Indictments
3. Notice of Appeal
4. Motion to Proceed Pro Se in All Direct Appeal Matters
5 Return to Motion
6. Return to Motion
7. Response to Return to Motion
8. South Carolina Supreme Court Order filed June 3, 2005
9. Pro se Motion for Reconsideration
10. South Carolina Supreme Court letter Order filed July 8, 2005
11. Final Brief of Appellant
12. Final Brief of Respondent
13. South Carolina Supreme Court Opinion filed July 24, 2006
14. Petition for Rehearing
15. South Carolina Supreme Court Order filed August 11, 2006
16. Remittitur
17. Motion for Stay of Execution
18. Return to Motion for Stay of Execution
19. South Carolina Supreme Court Order filed September 7, 2006

20. Petition for Writ of Certiorari to the South Carolina Supreme Court

21. Brief in Opposition to Petition for Writ of Certiorari

22. United States Supreme Court Order

23. Petition for Stay of Execution

24. Return to Petition for Stay of Execution

25. Reply to State's Return to Petition for Stay of Execution

26. South Carolina Supreme Court Order filed May 4, 2007

27. Order from the Honorable Roger M. Young, Circuit Court Judge filed August 12, 2007.

28. Return, Motion to Dismiss, and/or Motion for Summary Judgment

29. Amended Return, Motion to Dismiss, and/or Motion for Summary Judgment

30. South Carolina Supreme Court Order filed December 17, 2008

31. State's Proposed Order

32. Applicant's Proposed Order

33. Notice of Appeal

34. Petition for Writ of Certiorari

35. Return to Petition for Writ of Certiorari

36. South Carolina Supreme Court Order filed February 22, 2013

37. Remittitur

38. Petition for Writ of Habeas Corpus

39. Return to Petition for Writ of Habeas Corpus

40. Reply to Return to Petition for Writ of Habeas Corpus

41. South Carolina Supreme Court Order filed February 22, 2013

42. Pages not included or difficult to read in Appendix from original Record on Appeal[5]

43. Copies of Exhibits from PCR Action

44. Petition for Writ of Federal Habeas Corpus

45. Return and Memorandum of Law in Support of Motion for Summary Judgment, and Motion for Summary Judgment

46. Petitioner's Traverse and Memorandum of Law in Opposition to Summary Judgment

47. Reply to Response in Opposition to Motion for Summary Judgment

48. Report and Recommendation

49. Petitioner's Objection to Report and Recommendation

50. Respondents' Objection to Report and Recommendation

51. Motion to Stay Proceedings Pending Exhaustion of State Court Remedies

52. Response in Opposition to Motion to Stay Proceedings Pending Exhaustion of State Court Remedies

53. Reply to Response in Opposition of Motion to Stay

54. Notice of Action in State Court

55. United States District Court Order filed December 8, 2014

56. Juror Affidavit

[5] The following pages are attached separately because they were not included in the Appendix, but were in the Record on Appeal: page 3878, 3890, and 4144-45. Pages 4329 and 4458 are provided because portions of those two pages are not easy to read in the Appendix.

II. THIS APPLICATION FOR POST-CONVICTION RELIEF SHOULD BE DISMISSED BECAUSE IT IS UNTIMELY, SUCCESSIVE, AND RAISES CLAIMS THAT CANNOT BE RAISED IN POST-CONVICTION RELIEF.

A. This Application for Post-Conviction Relief is untimely.

This Application for Post-Conviction Relief should be dismissed because it is untimely. South Carolina Code Ann. § 17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute). Applicant was convicted on October 20, 2003 and sentenced to death on October 22, 2003. The final decision in the appeal was issued by the United States Supreme Court on March 19, 2007, when it denied the Petition for Writ of Certiorari. Applicant was therefore required to file his application before March 18, 2008. This application was filed on November 24, 2014,[6] 2442 days; or six years, eight months and six days after the statutory filing period expired.

Applicant cannot show that the Application is timely based upon an argument of recently discovered facts. S.C. Code § 17-27-45 also states:

> If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year

[6] "A proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the conviction took place." S.C. Code Ann. § 17-27-40 "It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer. Fox v. Union-Buffalo Mills, 226 S.C. 561, 86 S.E.2d 253 (1955)." Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001).

> after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

These claims could have been ascertained and raised by Applicant through his counsel in the first PCR action. Thus, he cannot show that this Application is timely.

B. This Application is successive to a previously properly filed Application.

This Application for Post-Conviction Relief should be dismissed because it is successive to PCR Action the Applicant initiated on March 12, 2007. South Carolina Code Ann. § 17-27-90 (2003) states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

In Aice, the South Carolina Supreme Court expressly declined to interpret the term "sufficient reason" to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase "very narrowly" by Court Rule, and it held that "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. . . . We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not." Id.

While the Court in Aice recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel, as Aice urged, "well may swallow Rule 50(3). It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view." Id. at 451, 409 S.E.2d at 394. Thus, "the contention that prior PCR counsel was ineffective is not per se a 'sufficient reason' allowing for a successive PCR application under § 17 27 90." Id. at 451, 409 S.E.2d at 394.

The Court further explained that:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See Butler v. State, 397 S.E.2d 87 (S.C.1990). **We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish.** For these reasons, we hold the contention that prior PCR counsel was ineffective is not per se a "sufficient reason"

> allowing for a successive PCR application under § 17 27 90. This Court has implied such a holding in the past. See Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Id. at 451, 409 S.E.2d at 394. (Emphasis added).

Additionally, the Court in Aice indicated that a successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel, apart from the scenario covered by Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Aice, 305 S.C. at 450 52, 409 S.E.2d at 394 95. The Court concluded as follows:

> We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the Austin and Aice cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While Austin could rely on Rule 50(6) for support of his claim, Aice's request directly conflicts with the language of Rule 50(3). Hence, Austin stands harmonized with the instant case.

Id. at 452, 409 S.E.2d at 395.

While there are exceptions to the rule, Applicant has not shown they are applicable here. For instance, while successive PCRs are allowed for belated direct appeals where a person did not fairly get their "one bite at the apple," see Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant could not seek such review in state court here because he has already clearly litigated his direct appeal in this case.

In another situation, the South Carolina Supreme Court heard a successive application, but only because it was one of the "rare cases" where "so many procedural irregularities occurred during the course of [the inmate's judicial process that he has not received due process." Washington v. State, 324 S.C. 232, 478 S.E.2d 833, 835 (1996). There is no evidence Applicant's process in the first PCR action on the whole was so broken that he did not receive due process. To the contrary, the procedural history is clear Applicant had one full bite at the apple on both direct appeal and PCR in which multiple claims were preserved through the process. Finally, it is true that in Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600 (2008), the South Carolina Supreme Court included a footnote in which it noted that a successive PCR had been granted by the trial court because of inadequate PCR counsel. However, Williams was before the state supreme court on state habeas and not on any successive PCR, and the footnote was merely dicta about what happened in a different portion of the proceedings.

The United States Supreme Court's opinion in Martinez v. Ryan, 132 S.Ct. 1309 (2012), does not warrant granting the Applicant permission to seek relief through this successive PCR action. In Martinez, the United States Supreme Court held,

> when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue).

Id. at 1318-19. The holding in Martinez does not support a finding that the Applicant is entitled to review of the merits of his claims in this Application for Post-Conviction Relief. The South Carolina Supreme Court has recognized "the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). In dismissing the appeal in Kelly, the South Carolina Supreme Court cited to cases in several other jurisdictions that had interpreted the holding in Martinez similarly:

> See State v. Travis, 2013 WL 1196332 (Del.Super.Ct.2013) (finding the holding in Martinez is "limited only to that narrow procedural situation under federal law concerning habeas corpus."); Gore v. State, 91 So.3d 769 (Fla.2012) ("It appears that Martinez is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context.... Martinez provides Gore with no basis for relief in this Court."); People v. Blackmon, 2013 IL App (1st) 111908–U, 2013 WL 2145922 (2013) (finding Blackmon's reliance on Martinez in attempting to file a successive state PCR application misplaced because Martinez applies to federal habeas review); Logan v. State, 377 S.W.3d 623 (Mo.Ct.App.2012) ("The limited holding of Martinez, while having the potential to aid Logan should he file a future federal habeas action, does not afford Logan a second chance at obtaining relief through a [state post-conviction relief] proceeding."); Rowell v. State, 2013 WL 1501618 (Nev.2013) ("[A]ppellant's reliance upon Martinez was misplaced as Martinez relates to federal procedural bars and not state procedural bars. Thus, the holding in Martinez would not provide good cause because it is inapplicable in state court."); Commonwealth v. Saunders, 60 A.3d 162 (Pa.Super.Ct.2013).

Kelly, 404 S.C. at 365-66, 745 S.E.2d at 377-78. Altogether, Applicant cannot show that this Application should not be dismissed as successive.

C. The Applicant's claims in 10 & 11(b), 10 & 11(c), and 10 & 11(d) cannot be raised in PCR.

In addition to being successive and untimely, two of the Applicant's claims in this action are claims that cannot be properly raised in a PCR action. In Ground 10 & 11

(b), the Applicant asserts his Fifth, Eighth, and Fourteenth Amendment rights were violated because he was visibly shackled without justification and without an individualized determination by the trial judge. In Ground 10 & 11(d), the Applicant asserts his Sixth and Fourteenth Amendment rights were violated when the prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). These freestanding claims could have been asserted at the trial level and then raised on direct appeal, which was not done in this case.[7] Since they were available at trial, they are not reviewable in PCR. See Simmons v. State, 264 S.C. 417, 422-23, 215 S.E.2d 883, 885-86 (1975)(issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517, 519 (1993)(issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); S.C. Code Ann. § 17-27-20(b) ("This remedy[PCR] is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.").

In Ground 10 & 11(c), the Applicant asserts he was denied effective assistance of counsel during the sentencing phase of his trial. A defendant may waive his constitutional right to counsel and choose to represent himself during criminal proceedings, if such waiver is effected willingly and intelligently. See Faretta v.

[7] Respondent would note that for the reasons stated in the Reply to Response in Opposition to Motion to Dismiss, the addition of the ineffective assistance of appellate counsel claim does not render the freestanding Batson claim reviewable in PCR. See Reply, pp. 9-11.

California, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Upon such an election, standby counsel may be appointed to assist the *pro se* defendant. However, there is "no constitutional right to hybrid representation where the defendant shared the duties of conducting [his] defense with a lawyer." United States v. Morrison, 153 F.3d 34, 55 (2d Cir.1998) (internal citations, quotation marks and modification omitted); United States v. Schmidt, 105 F.3d 82, 90 (2d Cir.1997) (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984)); State v. Stuckey, 333 S.C. 56, 57-8, 508 S.E.2d 564 (1998). Accordingly, "without a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel" unless "that title [was held] in name only and, in fact, [standby counsel] acted as the defendant's lawyer throughout the proceedings." Morrison, 153 F.3d at 55; (internal citations and quotation marks omitted). Without a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective. United States v. Cochrane, 985 F.2d 1027, 1029 n. 1 (9th Cir.1993) (rejecting ineffective assistance of standby counsel argument in this context without foreclosing argument in future); United States v. Windsor, 981 F.2d 943, 947 (7th Cir.1992) ("court knows of no constitutional right to effective assistance of standby counsel"); Morrison, supra ("without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel") (citing Schmidt, supra). Here, Petitioner was never relieved from his pro se status. As a result, Petitioner fails to state a claim upon which post-conviction relief can be granted because Petitioner is not constitutionally entitled to effective assistance of standby counsel. Petitioner was still acting as counsel of record.

Altogether, this Application for Post-Conviction Relief should be denied and dismissed as a matter of law. It was untimely filed and it is successive to a prior Application. The Applicant is not entitled to have the merits of the claims raised in this application reviewed.

III. CONCLUSION

Each and every allegation in the Amended Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied. In the event this Court disagrees the case should be dismissed as a matter of law, the Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

WHEREFORE, Respondent submits that the Amended Application for Post-Conviction Relief should be dismissed as a matter of law.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
(Counsel of Record)
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENTS

March 18, 2015

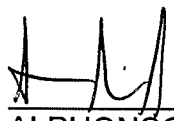
By: _____

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS)
	) CIVIL ACTION NO. 2014-CP-07-2994
Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts	)
Applicant,	)
vs.	) **CERTIFICATE OF SERVICE**
State of South Carolina,	)
Respondent.	)

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Return to Amended Application for Post-Conviction Relief and Motion to Dismiss, on Applicant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Emily C. Paavola, Esq., Death Penalty Resource & Defense Center, 900 Elmwood Avenue, Suite #101, Columbia, South Carolina 29201; and to Lindsey S. Vann, Esq., Death Penalty Resource & Defense Center, 900 Elmwood Avenue, Suite #101, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 18th day of March, 2015.



ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS)
Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts	) CIVIL ACTION NO. 2014-CP-07-2994)
Applicant,	)
vs.	) **SUPPLEMENT TO RETURN TO**) **AMENDED APPLICATION FOR**) **POST-CONVICTION RELIEF AND**
State of South Carolina,	) **MOTION TO DISMISS**
Respondent.	)

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and hereby supplements the Return to the Amended Application for Post-Conviction Relief filed on March 23, 2015. In this Supplement, Respondent would show this Court the following:

I. PROCEDURAL HISTORY

Federal Habeas Action

In the Return to Amended Application for Post-Conviction Relief and Motion to Dismiss, Respondent noted Applicant had filed the affidavit from a juror on December 19, 2014. (Attachment No. 56). Subsequent to the filing of the affidavit, a limited evidentiary hearing regarding the claim relating to the juror's affidavit before the Honorable Kevin F. McDonald, United States Magistrate Judge. Judge McDonald heard the matter on January 29, 2015. (Attachment No. 57). Applicant was present and was represented by Ms. Paavola and Ms. Vann.[1]

[1] A motion to substitute Ms. Vann as counsel in place of Mr. Blume was filed on January 14, 2015. The Order substituting counsel was filed on February 2, 2015.

After both sides presented post-hearing briefs, Judge McDonald issued a Supplemental Report and Recommendation that recommended the remaining portion of Ground Ten be denied. (Attachment Nos. 58, 59, 60). Applicant subsequently filed Objections to the Supplemental Report and Recommendation. (Attachment No. 61).

By Order filed May 18, 2015, the Honorable Terry L. Wooten, Chief United States District Judge, accepted the Report and Supplemental Report, overruled the objections filed by the Applicant, granted the Respondents' motion for summary judgment, and dismissed the federal habeas petition. (Attachment No. 62). In the Order, Judge Wooten also denied the pending Motion to Stay Proceedings Pending Exhaustion of State Remedies. Summary Judgment was filed on May 19, 2015. (Attachment No. 63).

Applicant filed a Motion to Alter or Amend Judgment on June 11, 2015. (Attachment No. 64). A Response to the Motion to Alter or Amend Judgment was filed on August 17, 2015. (Attachment No. 65). Judge Wooten filed an Order denying the Motion to Alter or Amend Judgment on September 30, 2015. (Attachment No. 66).

Applicant subsequently filed a Notice of Appeal on October 29, 2015. (Attachment No. 67). In the appeal in the federal habeas action, Applicant is represented by John Blume, Emily Paavola, and Lindsey Vann. Applicant filed his Opening Brief in the Fourth Circuit Court of Appeals on January 19, 2016. (Attachment No. 68). The Fourth Circuit requested briefing regarding the significance of this post-conviction relief action. (Attachment No. 69). After briefing, the Fourth Circuit Court of Appeals placed the appeal in abeyance pending the South Carolina Supreme Court's decision in Robertson v. State, and resolution of this post-conviction relief action. (Attachment Nos. 70, 71, and 72).

The following documents are attached to this supplement, and supplement the list of documents attached to the Return and Motion to Dismiss:

57. Transcript of Evidentiary Hearing, the Honorable Kevin F. McDonald, United States Magistrate Judge, January 29, 2015

58. Post-Hearing Brief of Petitioner

59. Respondent's Post-Hearing Brief

60. Supplemental Report and Recommendation

61. Petitioner's Objections to Supplemental Report and Recommendation

62. United States District Court Order

63. Summary Judgment

64. Petitioner's Motion to Alter or Amend Judgment

65. Respondents' Response to Petitioner's Motion to Alter or Amend Judgment

66. United States District Court Order filed September 29, 2015

67. Petitioner's Notice of Appeal

68. Opening Brief of Petitioner-Appellant Abdiyyah ben Alkebulanyahh

69. Fourth Circuit Court of Appeals Order on Supplemental Briefing

70. Supplemental Brief of Petitioner-Appellant Abdiyyah ben Alkebulanyahh

71. Supplemental Brief of Appellees

72. Fourth Circuit Court of Appeals Order filed March 16, 2016

II. Supplement to Argument

A. The South Carolina Supreme Court Opinion in Robertson v. State, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 17).

On December 14, 2016, the South Carolina Supreme Court filed its published opinion in Robertson v. State, Op. No. 27691 (S.C.Sup.Ct. filed December 14,

2016)(Shearouse Adv.Sh. No. 47, at 17). In the opinion, the South Carolina Supreme Court held the United States Supreme Court's opinion in Martinez v. Ryan, 566 U.S. - -, 132 S. Ct. 1309, (2012), "does not afford [an Applicant] a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel." Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016) (Shearouse Adv.Sh. No. 47, at 26).

The South Carolina Supreme Court further addressed Robertson's claims that prior PCR counsel were not qualified under S.C. Code § 17-27-160(B). The Supreme Court found the claim was a separate and distinct ground for relief that was not foreclosed by Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 26). The Supreme Court concluded that Robertson's "allegation that he was denied a state-created right to qualified counsel constitutes a 'sufficient reason' to permit a successive PCR application under section 17-27-90." Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 26). In light of that finding, the Supreme Court remanded Robertson's PCR action to the PCR judge for a limited hearing upon whether PCR counsel was qualified, and if not, whether Robertson was prejudiced. Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 31). The Remittitur in Robertson was issued by the South Carolina Supreme Court on December 30, 2016.

B. This Application for Post-Conviction Relief is still untimely after Robertson.

As already noted, in the Robertson opinion, the Supreme Court found that an allegation that an applicant was denied a state created right to qualified counsel

constitutes a sufficient reason to permit a successive PCR application under S.C. Code Ann. § 17-27-90. Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 26). The Supreme Court also recognized that such claims are still subject to the statute of limitations for post-conviction relief actions in S.C. Code Ann. § 17-27-45. The Supreme Court found Robertson's second Application for Post-Conviction Relief was timely because it was filed within one year of the discovery of prior PCR counsel's lack of qualification by Robertson's federal habeas counsel. ("we find that Petitioner's 2011 Application was filed within the one-year statute of limitations provided by section 17-27-45 as prior PCR counsel's alleged lack of qualification was not discovered until federal counsel was appointed in 2011."). Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 26).

Applicant's case is untimely here because he did not file this action within one year of when he knew or should have known that prior PCR counsel were not qualified under S.C. Code Ann. 17-27-160(B). Applicant was aware of the underlying facts regarding his prior PCR counsel's qualifications, at the latest, by July 21, 2010, when he moved to remand his first PCR action (then on appeal) to the circuit court for further PCR proceedings. (App. 5230-60). In that Motion, Applicant asserted that prior PCR counsel were not qualified under the statute, and he attached the transcript from the appointment of counsel hearing as support for his argument. (App. 5234-35, 5240-43, 5246-56). By Order filed October 20, 2010, the Motion to Remand was denied. (App. 5297-98).

Applicant did not file an Application for Post-Conviction Relief "one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. § 17-27-45(C). To be timely filed, Applicant should have filed this action at least by July 21, 2011, 365 days after he was aware of the underlying facts for his claim that PCR counsel was not qualified. This action was not filed until November 24, 2014, 1222 after the statute of limitations had run. Thus, this application is untimely and should be dismissed as a matter of law.

C. If this Court finds the Application is timely, a limited evidentiary hearing regarding whether prior PCR counsel were qualified under S.C. Code § 17-27-160(B) would be warranted.

In the Robertson opinion, the Supreme Court found that a limited evidentiary hearing was warranted to determine whether Robertson's prior PCR counsel were qualified under S.C. Code Ann. § 17-27-160. Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 28). The Supreme Court found

> the Legislature intended for an indigent capital defendant to be appointed counsel who: (1) has previous experience representing a capital defendant in state or federal PCR proceedings, or (2) was qualified to try a capital case and successfully completed at least twelve hours of South Carolina Bar approved (a) CLE specifically involving *capital* appellate or *capital* PCR proceedings or (b) professional training specifically involving *capital* appellate or *capital* PCR proceedings. Simply stated, at least one attorney appointed pursuant to section 17-27-160(B) must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education.

Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 27-8)(internal citation omitted). The Supreme Court found that the PCR Court in Robertson's case had erred in finding counsel was qualified under S.C. Code Ann. § 17-27-160(B) based solely upon PCR counsel's prior capital criminal trial

experience. Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 28). Since there was a genuine question of fact regarding whether PCR counsel was qualified under the statute, a limited evidentiary hearing was warranted. Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 28-9).

In this case, Applicant has similarly contended prior PCR counsel was not qualified under S.C. Code Ann. § 17-27-160(B). It is unclear from the record of the prior proceedings whether prior PCR counsel were qualified under S.C. Code Ann. § 17-27-160(B) as interpreted in Robertson. At the appointment of counsel hearing for the prior PCR action, neither counsel was asked about prior experience representing a capital PCR applicant or about any prior continuing legal education relating to capital collateral actions. (See App. 5246-56). In the order appointing counsel, the PCR judge found counsel were qualified under S.C. Code Ann. §§ 16-3-26 and 17-27-160. (App. 5271). In the Order, the PCR judge noted that each attorney had five years' experience as a lawyer, three years' experience in felony trials, and twelve hours of CLE training within the prior two years. (App. 5271). The Order did not identify what type of CLE training either of the two attorneys had obtained, but it cited to the memorandum from Chief Justice Toal regarding appointment of counsel in capital post-conviction relief cases. (App. 5271).

Altogether, it is unclear from the record whether PCR counsel was properly qualified under S.C. Code Ann. § 17-27-160(B). Thus, as in Robertson, if this Court finds this Application was timely filed, since "there is a genuine issue of fact as to whether prior PCR counsel were statutorily qualified, Applicant should be afforded a

hearing on this limited issue." Robertson, Op. No. 27691 (S.C.Sup.Ct. filed December 14, 2016)(Shearouse Adv.Sh. No. 47, at 31).

III. CONCLUSION

Each and every allegation in the Amended Application not either expressly admitted, denied, qualified or explained in the Return to Amended Application for Post-Conviction Relief and Motion to Dismiss or this Supplement is hereby denied.

WHEREFORE, premises considered, for the reasons stated in the Return to Amended Application for Post-Conviction Relief and Motion to Dismiss and in this Supplement, Respondent submits the Amended Application for Post-Conviction Relief should be dismissed as a matter of law. In the event this Court disagrees the case should be dismissed as a matter of law, the Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Respectfully submitted,

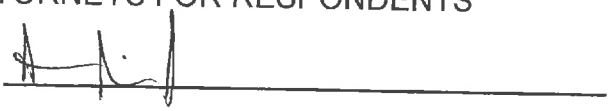
ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
(Counsel of Record)
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEYS FOR RESPONDENTS

January 31, 2017

By: 

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS)
Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts	) CIVIL ACTION NO. 2014-CP-07-2994)
Applicant,	)
vs.	) **CERTIFICATE OF SERVICE**
State of South Carolina,	)
Respondent.	)

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Supplement to Return to Amended Application for Post-Conviction Relief and Motion to Dismiss with attachments, on Applicant by depositing one (1) copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record, Emily C. Paavola, Esq., Justice 360, 900 Elmwood Avenue, Suite #200, Columbia, South Carolina 29201; and to Lindsey S. Vann, Esq., Justice 360, 900 Elmwood Avenue, Suite #200, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 31st day of January, 2017.

ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)	
)	Case No.: 2014-CP-07-2994
Abdiyyah ben Alkebulanyahh, # 6012)	
aka Tyree Roberts)	
Applicant,)	**RESPONSE IN OPPOSITION TO MOTION TO DISMISS**
vs.)	
State of South Carolina,)	
Respondent.)	
)	

2017 SEP 15 PM 12:14

Applicant, Abdiyyah ben Alkebulanyahh, through undersigned counsel, submits this response in opposition to Respondent's Supplement to Return to Amended Application for Post-Conviction Relief and Motion to Dismiss (hereafter, "Supplemental Motion to Dismiss"). Respondent argues that Applicant's Application for Post-Conviction Relief should be summarily dismissed because it is untimely, but concedes that if the application is timely, Applicant is entitled to a hearing on the qualifications of his original post-conviction relief ("PCR") counsel pursuant to *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). As discussed below, Applicant's PCR Application is timely and this Court should hold a hearing on the qualifications of Applicant's initial PCR counsel.[1]

I. ARGUMENT

In *Robertson*, the South Carolina Supreme Court addressed the question of whether, and under what circumstances, a death sentenced inmate could raise previously unadjudicated claims in a second state PCR application. *See id.* The Court held an allegation that qualified PCR counsel

[1] If this Court finds Applicant's initial PCR counsel were not qualified under S.C. Code § 17-27-160(B), the Court must then hold a hearing on the merits of Applicant's current PCR claims. *See Robertson*, 795 S.E.2d at 38 ("If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)], Petitioner was prejudiced.").

were ineffective, without more, was not sufficient reason to justify a second PCR proceeding. *See id.* at 34. However, the Court found an allegation that a PCR Applicant was denied his "state-created right to qualified counsel constitutes a 'sufficient reason' to permit a successive PCR application under section 17-27-90." *Id.* at 35. Applicant's PCR application specifically alleges the claims in his application "were not included in the initial PCR application due to Applicant's PCR counsel's inexperience and lack of qualification under the state PCR statute, S.C. Code § 17-27-160(B)." Applicant, is therefore, entitled to a hearing, initially, on the qualifications of his initial PCR counsel. *See Robertson*, 795 S.E.2d at 38.

A. APPLICANT'S SUCCESSIVE PCR APPLICATION IS TIMELY

Applicant's PCR Application, alleging that his initial PCR counsel were not qualified under S.C. Code § 17-27-160(B), is timely and should not be dismissed. Respondent faults Applicant for failing to file a successive PCR application within one year of discovering that his initial PCR counsel were not qualified. Supplemental Motion to Dismiss, at 5. According to Respondent, Applicant should have filed his successive PCR application before July 21, 2011. *Id.* Respondent's argument ignores that the South Carolina Supreme Court did not recognize a remedy for unqualified PCR counsel until *Robertson* and that, despite the lack of recognized remedy, Applicant raised his PCR counsel's lack of qualification three times in the South Carolina Supreme Court between the time he discovered they were unqualified and when Respondent asserts the statute of limitations expired.

After Applicant's initial PCR application was denied by the circuit court, the South Carolina Supreme Court initially appointed one of Applicant's PCR attorneys, Glenn Walters, to handle the appeal. On March 5, 2010, the South Carolina Supreme Court relieved Mr. Walters and appointed John Blume in his place to represent Applicant on appeal. In the course of reviewing

the case files and the record and speaking with PCR counsel, Mr. Blume determined that prior counsel were not qualified pursuant to S.C. Code § 17-27-160(B) to represent Applicant in his PCR proceedings. Less than five months after appointment, on July 21, 2010, Mr. Blume filed in the South Carolina Supreme Court a Motion to Remand for Additional Post-Conviction Proceedings.[2] One of the grounds asserted in favor of remand was that "Petitioner's PCR counsel were not qualified to represent Petitioner in a capital post-conviction proceeding pursuant to the requirements of S.C. Code § 17-27-160(B)." Exhibit A, at 11. Respondent argued in its Response in Opposition to Motion to Remand[3] that even if PCR counsel were not qualified under the statute and were ineffective, that was "not a basis for having a second PCR." Exhibit B, at 3-4. The South Carolina Supreme Court summarily denied the motion on October 20, 2010.

On February 17, 2011, Applicant filed a Petition for Writ of Certiorari,[4] asking the South Carolina Supreme Court to review the denial of his PCR claims. One of the Issues Presented in the petition was "Whether Petitioner was denied due process and equal protection of the law and is thus entitled to a new post-conviction proceeding where: (a) petitioner's PCR counsel were not qualified under S.C. Code § 17-27-160(B); (b) PCR counsel were ineffective, and, (c) Judge Carmen Mullen signed the state's order denying post-conviction relief, which contained numerous credibility findings, even though Judge Mullen was not present during the PCR hearing and did not hear the testimony of any witness." Petition for Writ of Certiorari, Respondent's Ex. 34, at 1.

---

[2] This motion has not previously been provided to the Court. A copy of the motion is attached as Exhibit A.

[3] Attached as Exhibit B.

[4] The Petition for Writ of Certiorari was attached to Respondent's Return and Motion to Dismiss as Attachment 34.

In Respondent's return to the petition for certiorari,[5] Respondent asserted that Applicant was not entitled to a second PCR action despite his claim that PCR counsel were not qualified under the statute.[6] Return to Petition for Writ of Certiorari, Respondent's Ex. 35, at 34-35. The South Carolina Supreme Court denied the petition for writ of certiorari.

Finally, on February 18, 2011, Petitioner once again raised his PCR counsel's qualifications in a Petition for Writ of Habeas Corpus[7] filed in the original jurisdiction of the South Carolina Supreme Court. In the habeas petition, Applicant asserted "undersigned counsel subsequently contacted both [PCR] attorneys and confirmed that they, in fact, did not have the experience set forth by the statute. Respondent does not contest that [PCR counsel] do not satisfy the criteria set forth in § 17-27-160(B)." Petition for Writ of Habeas Corpus, Respondent's Ex. 38, at 5 & n.4. The South Carolina Supreme Court summarily denied Applicant's Petition for Writ of Habeas Corpus.[8]

---

[5] The Return to Petition for Writ of Certiorari was attached to Respondent's Return and Motion to Dismiss as Attachment 35.

[6] Throughout Applicant's legal proceedings since 2010, Respondent has consistently asserted a second PCR proceeding was not an appropriate remedy for Applicant's allegations that his PCR counsel were not qualified. Respondent continued to make the same argument before this Court until *Robertson* was decided. Thus, Respondent should be equitably estopped from now arguing Applicant should have previously filed a second PCR application and raising the statute of limitations as a defense. *See Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 210, 417 S.E.2d 579, 582 (1992).

[7] The Petition for Writ of Habeas Corpus was attached to Respondent's Return and Motion to Dismiss as Attachment 38.

[8] Applicant believes, and has asserted in federal court and this Court, that the Supreme Court's denial of his state habeas petition was a denial of his claims on the merits. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011). If this Court agrees with that position, this action should be dismissed under res judicata because the claims have already been ruled upon, but not because it is untimely. *See, e.g., Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (holding a court should dismiss a PCR application that "raises grounds previously heard and determined").

Having tried, unsuccessfully, three times to raise the issue of qualification of his PCR counsel before the state courts, Applicant presented his claims in federal court where he continued to assert that his PCR counsel were not qualified under the statute. When the federal court indicated it would find Applicant's claims procedurally defaulted because they were not raised in his initial PCR application, Applicant filed a successive PCR application seeking merits review of his claims in state court. Applicant argued that under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Robertson*, which was then-pending before the South Carolina Supreme Court, he should be entitled to litigate a successive application for post-conviction relief.

The record as a whole reveals that Applicant has diligently pursued his claims, including the claim that his PCR counsel were unqualified, since the appointment of John Blume in 2010. That the South Carolina Supreme Court did not recognize a "remedy for lack of qualified counsel" until *Robertson* does not make Applicant's claims untimely.[9] Applicant filed his application before the decision in *Robertson*, which created a remedy for Applicant, making them timely filed. *See* S.C. Code § 17-27-45(B) (requiring that claims filed based on a newly recognized right be "filed not later than one year after the date on which the standard or right was determined to exist").

Even if Applicant had not diligently presented his claim of unqualified counsel to the South Carolina courts as described above, his claim would not be untimely. In cases allowing successive PCR applications to go forward, the Court has found the statute of limitations does not apply. *See*

[9] *Robertson* does more than simply create a remedy for an individual who had unqualified counsel. The decision also clarified the standard by which counsel's qualifications must be measured. In 2003, prior to initial PCR counsel's appointment, former Chief Justice Jean H. Toal sent a letter to all circuit court judges stating that anyone qualified to represent a defendant at a capital trial would also be qualified to represent a capital inmate in PCR. *Robertson* makes clear that qualification must actually be determined pursuant to S.C. Code § 17-27-160(B), not former Chief Justice Toal's letter. Though Applicant consistently challenged his counsel's qualifications under the statute, not the letter, this change in the law would have further excused any failure to previously challenge PCR counsel's qualifications.

Odom v. State, 337 S.C. 256, 263, 523 S.E.2d 753, 756-57 (1999) (holding the statute of limitations does not apply when a successive PCR application is permitted simply to allow an applicant one "fair 'bite' at the apple"). *Robertson* did not create a rule to the contrary as it did not address the issue of what would happen if the applicant had not raised a claim that his PCR counsel were not qualified within one year of making such a discovery. The *Robertson* Court simply noted that this was not an issue because Robertson did file within one year of making the discovery. To the contrary, the South Carolina Supreme Court has never applied the one-year statute of limitations to a permissible successive PCR application. *See Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996).

Additionally, it is well within this Court's equitable discretion to toll the limitations period for any appropriate duration. *See Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (equitable tolling of the PCR limitations period may be applied where "circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence"); *see also Moses v. State*, No. 2015-000609, 2017 WL 3496440 (S.C. Aug. 16, 2017) ("[I]f a PCR applicant raises the doctrine of equitable tolling as a defense to the statute of limitations, the judge should make the fact-specific determination of whether equitable tolling is justified). Given that Applicant diligently pursued his claim that PCR counsel were not qualified even when there was no recognized remedy for such a claim, this Court should toll the statute of limitations if it finds that Applicant's PCR application is otherwise untimely.

B. APPLICANT IS ENTITLED TO A HEARING ON THE QUALIFICATIONS OF HIS INITIAL PCR COUNSEL

Like the applicant in *Robertson*, Applicant alleged in his PCR Application that his initial PCR counsel were not qualified under S.C. Code § 17-27-160(B) and is, therefore, entitled to a hearing on the qualification of his counsel. *Robertson*, 795 S.E.2d at 38. Should the Court find

Applicant's PCR counsel were not qualified, the Court must then schedule a hearing on the merits of the claims raised in his PCR application. *Id.* Respondent concedes "[i]t is unclear from the record of the prior proceedings whether prior PCR counsel were qualified under S.C. Code Ann. § 17-27-160(B) as interpreted in *Robertson*" and that there should be a hearing on the issue of qualification, assuming the Court finds Applicant's PCR application timely.

III. CONCLUSION

For all of the reasons stated above, this Court should deny Respondent's Motion to Dismiss, and schedule a hearing on the qualification of Applicant's initial PCR counsel.

September 12, 2017

Respectfully submitted,

EMILY C. PAAVOLA
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
803-765-1044

Exhibit A

RECEIVED

JUL 21 2010

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

MOTION TO REMAND FOR ADDITIONAL POST-CONVICTION PROCEEDINGS

I. INTRODUCTION.

Petitioner, through undersigned counsel, hereby files this motion to remand the case to the circuit court for additional post-conviction proceedings. In support of the motion, petitioner apprizes this Court of the following facts and legal principles.

II. PROCEDURAL HISTORY.

A. Pre-trial and Trial Proceedings.

Petitioner was charged with two counts of murder and other offenses arising from the death of two Beaufort County Sheriff's deputies. Prior to trial, petitioner filed a motion to proceed *pro se*.

Petitioner's stated reason for wanting to dismiss his counsel was his belief that both of his court appointed attorneys, Gerald Kelly and Sean Thornton, were actively involved in a conspiracy with the prosecution to insure that he was found guilty and sentenced to death. Tr. 3986.[1] Despite testimony from a respected forensic psychiatrist–Dr. Donna Schwartz Watts–that petitioner suffered from bi-polar disorder with psychosis and paranoia and was not competent to stand trial, the trial judge, the Honorable Daniel Pieper, relying on the Department of Mental Health (DMH) examiner's conclusion that petitioner was competent, granted petitioner's motion to dismiss his counsel and permitted petitioner to discharge counsel and proceed *pro se*. Tr. 4071.[2]

Petitioner's defense at the guilt-or-innocence phase of the trial was based largely on his own rambling, tangential and paranoid testimony. The "gist" of the defense was that law enforcement and the solicitor's office conspired to obtain his conviction based upon false testimony and planted evidence. Not surprisingly, petitioner was found guilty of the charged offenses on October 21, 2003.

Prior to the commencement of the sentencing phase of his capital trial, petitioner informed the trial judge that he did not wish to participate in or attend the sentencing hearing. Petitioner offered no coherent explanation for wishing to absent himself from the proceedings other than he did not think the sentencing phase would "do anything for me to no extent" and that he was not concerned with the outcome. Tr. 3450. Petitioner stated he did not wish to attend:

---

[1] *See also* Tr. 3889 (Petitioner objected to counsel speaking at a pre-trial hearing saying "I am without representation. They are sabotaging my case"). At another pretrial hearing, petitioner stated: "And this late in the stage where I have made openings to the court that the attorneys was sabotaging my case and doing things that were detriment to my defense; that they still continue on to exercise the powers attorney in filing motions and speaking with the prosecutor and speaking with this court under the impression of being in my defense when actually they are not." Tr. 3910.

[2] The trial court designated Mr. Kelly and Mr. Thornton "standby counsel." Tr. 4071.

> Because I – at this – there is nothing that – it has nothing to do with me. It has nothing that – you know, I'm not concerned about it. I don't care about it. It has nothing to do with me. It don't – it won't move me or shake me no matter which way it goes, one way or the other, what is said or done, so.

Tr. 3486.

The trial judge tried to reason with petitioner to no avail. Then, weighing and rejecting various options including terminating petitioner's *pro se* status and re-appointing standby counsel to take over the penalty phase (tr. 3488-3508), the judge concluded that petitioner would a) remain as his own counsel and b) remain in the courtroom for sentencing. Tr. 3504. The trial judge did not, however, seek or obtain any expert opinion or insight into whether petitioner was – at that point in the proceedings – competent to stand trial or to completely waive the presentation of mitigation.

Petitioner informed the court that he would be disruptive if he was required to remain in the courtroom. The trial judge took a "wait and see" approach. When the prosecution called its first witness, petitioner stood up and, in the presence of the jury, said: "Blessed be the Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." Tr. 3550. The trial judge briefly attempted to "plow ahead," but petitioner repeated the above refrain when the next question was asked. The trial judge removed the defendant from the courtroom, sent the jury to the jury room, and brought the defendant back into the courtroom where petitioner informed the court that he would continue to be disruptive because he "did not wish to engage in the proceedings." Tr. 3552. The court told petitioner that he had to attend the sentencing proceeding, and that if he continued to be disruptive he would put petitioner in a room in the back of the courtroom where he could see and hear the proceedings.

When proceedings commenced, both petitioner and the trial judge were true to their word. When the prosecution again sought to elicit testimony from its first witness, petitioner stood up and again said: "Blessed by Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." Tr. 3556. The trial judge ordered that petitioner be placed in the "room at the back of the courtroom that has a glass partition to allow him to hear all the proceedings... and see the proceedings as he desires." Tr. 3556. The court also ordered that petitioner be shackled and said he would gag petitioner if he had another outburst. Tr. 3557. Standby counsel were ordered to resume representation to a limited extent including assuming the responsibility to lodge objections to inadmissible evidence. Petitioner, however, was allowed to control the defense presentation, or non-presentation as it turned out, of evidence.

The penalty phase proceeded and no mitigating or other evidence was presented by the defense. After closing arguments, the jury sentenced petitioner to death.

B. Appellate and Post-Conviction Proceedings.

On direct appeal, petitioner was represented by Joseph Savitz and Robert Dudek of the Office of Appellate Defense. Petitioner moved to represent himself on direct appeal, alleging that the Warden of Leiber Correctional Institution and his appellate counsel were conspiring to deny him access to the courts. *State v. Roberts*, 614 S.E.2d 626, 627 (S.C. 2005). This Court denied the motion. *Id.* at 628. Appellate counsel raised a single issue on appeal, i.e., whether it was error for the trial judge to require petitioner to be present at the penalty phase of the proceedings. This Court affirmed on July 24, 2006. *State v. Roberts*, 632 S.E.2d 871 (S.C. 2007).

Petitioner filed a *pro se* application for post-conviction relief which contained a number of search and seizure and speedy trial issues. His continued belief that his arrest, trial, conviction death

sentence, continued incarceration the present conditions of his confinement were and are part of a vast and growing conspiracy is evident in the PCR application and in documents he has continued to file.[3] Glenn Waters and Carl Grant were appointed by Judge Roger Young to represent petitioner in connection with his post-conviction proceedings. The transcript of the appointment hearing does not indicate that either attorney had ever been involved in a capital post-conviction case in state or federal court, or that they had attended any appropriate CLE programs as defined in S.C. Code § 17-27-160(B).[4] They filed an amended application raising a single claim for relief. The issue asserted in the amended application was that the "trial judge failed to make the proper findings to determine if the applicant knowingly and intelligently understood the implications of proceeding *pro se*." *See* Amended Application for Post-Conviction Relief (filed February 6th 2008).

The post-conviction relief hearing, conducted before Judge Young on October 13-14, 2008, consisted primarily of counsel calling petitioner to the stand to state (in detail) his grievances with trial and appellate counsel. Undersigned counsel's review of the files provided to him by prior counsel does not reveal that petitioner's court appointed post-conviction counsel: a) conducted any independent investigation; b) secured any expert assistance; or, c) had petitioner evaluated by a psychiatrist or psychologist to determine i) whether he was competent to proceed in post-conviction

---

[3]On April 7, 2010, this Court entered an order that clerks of court in South Carolina should no longer accept filings by petitioner unless submitted by an attorney and the filing fee was paid. The Court found the order was necessary due to the "frivolous, repetitive and abusive nature of petitioner's filings."

[4]A transcript of the appointment hearing is attached to this motion as Appendix A. Undersigned counsel also contacted both Mr. Walters and Mr. Grant and confirmed that they were not aware of the additional requirements for appointment of counsel in a capital post-conviction case set out in §17-27-160(B), and that they did not meet the requirements of the relevant statutory provision.

relief proceedings or ii) to do a retrospective assessment of petitioner's competency at the sentencing phase of the proceedings.[5] On September 17, 2009, Judge Carmen Mullen[6] signed verbatim the state's order denying post-conviction relief.

A timely notice of appeal was filed. On January 8, 2010, this Court appointed Glenn Walters to represent petitioner on appeal from the denial of post-conviction relief, finding that the Office of Appellate Defense had a conflict of interest. Mr. Walters subsequently moved to be relieved alleging that petitioner made a verbal threat to harm Mr. Walters and his family. Petitioner also requested that this Court appoint Emily Paavola or John Blume to represent him. On March 5, 2010, this Court relieved Mr. Walters and appointed undersigned counsel to represent petitioner in connection with this appeal.[7]

---

[5]As Mr. Alkebulanyahh is indigent, Undersigned counsel contacted the South Carolina Office of Indigent Defense and confirmed that no funds were expended for investigative and expert services in the post-conviction proceedings. Nor did Mr. Walters or Mr. Grant submit a voucher for attorney's fees. Undersigned counsel is not aware of any other capital post-conviction case in South Carolina since §17-27-140 was enacted where no funds were awarded or spent for investigative and expert services in a capital post-conviction proceeding.

[6]As previously stated, the Honorable Roger Young appointed counsel and presided over the post-conviction relief hearing. For reasons which are not clear from the record, the Office of Court Administration reassigned the case to Judge Carmen Mullen on December 17, 2008, after the PCR hearing was completed. Judge Mullen signed the order denying post-conviction relief. Despite the fact that Judge Mullen did not preside over the post-conviction relief hearing, the order contains a number of credibility findings. Undersigned counsel is not aware of any other capital post-conviction case in this state that was reassigned to a different judge after the post-conviction relief hearing was conducted and prior to an order being filed. The record also does indicate that any post-hearing briefs were filed by either side.

[7]Undersigned counsel was not aware that petitioner had filed a motion requesting that new counsel be appointed or that petitioner had requested that undersigned counsel in particular be appointed. Undersigned counsel had not talked to or corresponded with petitioner at any point during his direct appeal or during the post-conviction proceedings.

III. REASONS REMAND IS APPROPRIATE.

A. Potentially Meritorious Claims For Post-Conviction Relief Were Not Raised Below.

As will be set forth below, there were a number of viable issues which could have – and should have – been raised as grounds for post-conviction relief. However, due to their lack of experience in death penalty litigation in general, and capital post-conviction litigation in particular, petitioner's prior post-conviction counsel failed to identify and raise potentially meritorious post-conviction claims. While current counsel has not conducted a new post-conviction investigation, his review of the trial record has identified, *inter alia*, the following issues which were not included in the amended application for post-conviction relief:

1) Petitioner was not competent to stand trial during the sentencing phase of the proceedings and thus his sentence of death violates the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution as well as the corresponding provisions of the South Carolina Constitution. *Dusky v. United States*, 362 U.S. 401 (1960).[8]

2) The trial judge failed to fulfill his obligation, required by the Due Process Clause of the Fourteenth Amendment and the corresponding provision of the South Carolina

---

[8]Given the current procedural posture of the case, undersigned counsel does not have access to funds for investigative and expert services. However, counsel has met with petitioner on several occasions since his appointment and has consulted with a forensic psychiatrist, Dr. Rikki Lynn Halavonich, who agreed to meet with petitioner and counsel and to review selected portions of the trial record, particularly petitioner's trial testimony and the portions of the trial where defendant asks to not be present at sentencing and his outbursts. While Dr. Halavonich (understandably) indicated she would need to review additional material and interview petitioner and possibly other witnesses, she did inform counsel that there was a significant likelihood that petitioner's mental state had so deteriorated by this point in the proceedings that he was no longer competent to stand trial. Questions also exist as to petitioner's current competency to proceed. An affidavit summarizing Dr. Halavonich's initial impressions are attached to this motion as Appendix B.

Constitution, to make an adequate inquiry into petitioner's competency to stand trial when petitioner began to act in a bizarre and irrational manner prior to and during the sentencing phase of the trial. *Drope v. Missouri*, 420 U.S. 162 (1975) (trial judge's failure to suspend the proceedings and have the defendant evaluated for competency violated due process when there was evidence suggesting the defendants's mental condition had deteriorated).

3) The trial judge deprived petitioner of a fundamentally fair sentencing hearing in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution by failing to terminate petitioner's *pro se* status at the sentencing phase of the trial and appoint standby counsel to represent petitioner and present available mitigating evidence. *See Faretta v. California*, 422 U.S. 806 (1975) (*Pro se* status can be terminated if defendant is disruptive); *Indiana v. Edwards*, 544 U.S. 208 (2008) (trial judge does not have to allow competent but mentally ill defendant to proceed pro se).

4) The trial judge violated petitioner's right to a fundamentally fair sentencing proceeding guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution by shackling petitioner in the presence of the jury during the sentencing phase of the trial. *See Deck v. Missouri*, 544 U.S. 622 (2005) (shacking the defendant in the presence of the jury deprived the defendant of a reliable determination as to whether the death penalty was the appropriate punishment).

5) Petitioner was deprived of a fair and reliable determination of whether the death penalty was the appropriate punishment, guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, due to: a) the admission of excessive and inflammatory victim impact evidence;[9] and, b) the admission of evidence and argument regarding the conditions of confinement in general population.[10] *See Payne*

---

[9]Numerous victim impact witnesses testified extensively without objection during the penalty phase. This included the testimony of co-workers, friends, and family members. Witnesses described, among other things: a) a memorial service in a school auditorium in Ohio purportedly attended by hundreds of individuals (tr. 3698); b) the numerous police officers who attended the funeral (tr. 3705); and c) the military service of the victims (tr. 3718022). Additionally, the victim's family members were all asked to address the jury directly, some of the comments included

> I want to thank you guys for making the choice you made [finding the defendant guilty]. I know it was hard, and I'm proud of you. And I know A.J. [one of the victims] is very, very proud of you. You did the right thing. I just want to thank you.

Tr. 3714. The personal expression of thanks to the jurors for finding the defendant guilty was repeated by other victim impact witnesses. *See. e.g.*, Tr. 3708; 3724.

[10]The prosecution called James Sligh, a classifications officer for the South Carolina Department of Corrections, who described a "typical day in general population" that detailed an inmate's ability to move around the prison, participate in recreation activities, buy food items of the canteen, etc. Tr. 3636 et seq. During summation, the prosecution made the following statements:

> And let's think a minute about what general population in the Department of Corrections is like, because you heard evidence about that, too. They get up in the morning, they're fed, they get recreation time.
>
> They're contained. They have to stay inside, but they have keys to their cells. They get to visit with family 7 and 8 times a month. How much visiting with family do you think Dana Tate and Dyke Coursen are going to do?
>
> General population. Sounds an awful lot like military school.

Tr. 3794. *See State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005) ("how inmates, other than the defendant at trial, are treated in prison . . . is inappropriate evidence in the penalty phase of a capital trial"); *State v. Burkhart*, 371 S.C. 482, 488-89, 640 S.E.2d 450, 453 (2007)

v. Tennessee, 467 U.S. 1025 (1993) (permitting only a "brief glimpse" of the life of the victim); *Darden v. Wainwright*, 477 U.S. 168 (1985) (recognizing that inflammatory comments at the sentencing phase can deprive the defendant of fair sentencing proceeding).

6) Petitioner was denied his right to the effective assistance of counsel at the sentencing phase of the trial guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provision of the South Carolina Constitution when standby counsel, who were ordered to object to any inadmissible evidence or argument, failed to object to a) excessive and inflammatory victim impact evidence and b) improper and inflammatory closing argument. *See, e.g., Hall v. Catoe*, 601 S.E.2d 335 (S.C. 2004) (counsel found ineffective for failing to object to improper victim impact argument).

7) Petitioner was denied his right to the effective assistance of counsel on direct appeal, guaranteed by the Due Process Clause of the Fourteenth Amendment and the corresponding provision of the South Carolina Constitution, due to appellate counsel's failure to raise, *inter alia*, the following issues on direct appeal: a) the trial judge failed to conduct a competency hearing at sentencing; b) the trial judge failed to terminate petitioner's *pro se* status and appoint standby counsel; c) the prosecution exercised its peremptory strike in a racially discriminatory manner d) the trial judge erroneously excluded evidence of third party guilt; and, e) a statement made by

---

(holding the prosecution's "evidence regarding general prison conditions . . . . injected an arbitrary factor into the jury's sentencing considerations," and that the resulting death sentence could not be sustained under S.C. Code Ann. § 16-3-25(C)(1) (2003)).

petitioner was obtained in violation of *Miranda*.[11] *See Southerland v. State*, 524 S.E.2d 833 (S.C. 2002) (Appellate counsel found ineffective for failing to raise meritorious issues on appeal.

B. Petitioner's PCR Counsel Were Not Qualified To Represent Petitioner in a Capital Post-Conviction Proceeding Pursuant to the Requirements of S.C. Code §17-27-160(B).

The South Carolina legislature established standards for the appointment of counsel in capital post-conviction cases. The standards are codified in S.C. Code §17-27-160(B) and require that at least one of the two attorneys appointed must,

(1) Have previously represented a death sentenced inmate in state or federal post-conviction relief proceedings; OR

(2) meet the minimum qualifications set forth in S.C. Code §16-3-26(B)[12] & (F)[13] AND have successfully completed within the previous two years not less than twelve hours of approved CLE training "involving advocacy in the field of capital appellate and/or post-conviction defense."[14]

---

[11]These issues were raised substantively in the petitioner's *pro se* application for post-conviction relief, i.e., petitioner alleged that his conviction should be vacated due to the state's discriminatory use of its peremptory challenges and the exclusion of third party guilt evidence. The PCR court, however, found the claims to be procedurally barred because the issues could have been but were not raised on direct appeal. Order at 42, 48, 51

[12]Section 16-3-26(B) requires that counsel have been admitted to the bar for at least five years and have three years felony trial experience. Petitioner does not dispute that Mr. Walters and Mr. Grant had the requisite experience to meet the requirements of §16-3-26(B).

[13]Section 16-3-26(F) requires that counsel meet any other guidelines for the appointment of counsel promulgated by this Court.

[14]The statute provides:

If the applicant is indigent and desires representation by counsel, two

Neither of petitioner's court appointed counsel satisfied the statutory requirements for appointment in a capital post-conviction case. The statutory language is clear and unambiguous. It is also makes perfect sense. There are several reasons why the legislature would enact a different, and more stringent, standard for appointment of counsel in capital post-conviction cases than for appointment at the trial level. First, post-conviction litigation is an unusual combination of trial and appellate practice. Thus, persons competent to represent a death sentenced inmate at trial due to their extensive trial experience as reflected in §16-3-26(B), do not necessarily have the requisite skills to represent an individual in a capital post-conviction proceeding. *See* AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN CAPITAL CASES (2003) Guideline 1.1 (commentary) ("Post-conviction proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. . . . . For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers."). Second, at trial, the defendant has a Sixth Amendment right to counsel, and thus a Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). Thus, if trial counsel performs incompetently and the incompetence contributes to the conviction or death verdict,

---

> counsel shall be immediately appointed to represent the petitioner in this action. At least one of the attorneys appointed to represent the applicant must have previously represented a death sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

the defendant has a remedy. *See, e.g., Rosemond v. Catoe*, 680 S.E. 2d 6 (S.C. 2009) (finding counsel to have rendered ineffective assistance of counsel in a capital case for several different deficiences). However, in post-conviction proceedings, there is no currently recognized constitutional right to counsel, *see, e.g., Murray v. Giarratano*, 492 U.S. 1 (1989), and thus there is no clear remedy for substandard representation. *Cf. Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991) (finding second post-conviction petition barred as successive and appearing to reject ineffective assistance of post-conviction counsel as a "sufficient reason" for failing to raise issues in the first application); *Washington v. State*, 478 S.E. 2d 833, 835 (S.C. 1996) (allowing second post-conviction application to proceed due to "many procedural irregularities" in the first post-conviction proceedings). Therefore, because petitioner's court appointed counsel did not meet the standards for appointment of counsel contained in S.C. Code§17-27-160(B), petitioner's case should be remanded to the circuit court for the appointment of qualified counsel and for additional post-conviction proceedings. There is no other remedy that would not effectively render the statutory qualifications a nullity.

Furthermore, counsel's inexperience is evident from a review of the post-conviction record. As set forth above, undersigned counsel's review of the post-conviction file does not indicate that petitioner's post-conviction counsel conducted any investigation or secured any assistance from investigators or expert witnesses. While counsel did file an amended application for post-conviction relief, it raised only one claim. The bulk of the post-conviction relief hearing consisted of petitioner's testimony expressing his dissatisfaction with trial counsel. As petitioner has demonstrated, there were a number of other potentially viable claims evident from the record which could and should have been raised on petitioner's behalf. An adequate investigation will likely

almost certainly uncover other viable claims for post-conviction relief.

The American Bar Association Guidelines, referenced above, have been cited with approval by the Supreme Court of the United States on several different occasions, *see, e.g., Rompilla v. Beard*, 545 U.S. 374, (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003), as well as by this Court, *see Council v. State*, 670 S.E. 2d 356, 363 (S.C. 2008); *Ard v. Catoe*, 642 S.E.2d 590, 597 (S.C. 2007), and are applicable to trial, appellate and post-conviction counsel. Guidelines 10.15.1 (C) and (E), which outline the responsibilities of post-conviction counsel, explicitly state that:

> C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.
>
> E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:
>
> 1. maintain close contact with the client regarding litigation developments; and
> 2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;
> 3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and
> 4. continue an aggressive investigation of all aspects of the case.[15]

Thus, in petitioner's case, the appointment of counsel who did not meet the criteria established by the General Assembly worked to petitioner's clear detriment, and for this additional reason, the case should be remanded to the circuit court for the appointment of qualified counsel and additional post-conviction proceedings.

---

[15]The commentary to the guideline states that "collateral counsel cannot rely on the previously compiled record but must conduct a thorough independent investigation. . . .").

IV. CONCLUSION.

For the reasons stated above, petitioner's case should be remanded to the Beaufort Court of Common Pleas for additional post-conviction proceedings including: a) the appointment of counsel who meet the requirements set forth in S.C. Code §17-27-160(B); b) access to funds for investigative and access services to develop and present all viable claims for post-conviction relief; and, c) a new PCR hearing.

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

July 21, 2010

Appendix A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

COURT OF COMMON PLEAS

ABDIYYAH ALKEBULANYAHH
A/K/A TYREE ROBERTS

APPLICANT,

V.

STATE

TRANSCRIPT OF RECORD
07-CP-07-715

AUGUST 8, 2007
COLUMBIA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ROGER M. YOUNG, JUDGE.

A P P E A R A N C E S:

GLENN WALTERS, ESQUIRE
CARL B. GRANT, ESQUIRE
ATTORNEYS FOR THE APPLICANT

SAMUEL CREIGHTON WATERS, ASSIST. ATTORNEY GENERAL
ATTORNEY FOR THE STATE

STACY L. SHEPPARD, RPR
CIRCUIT COURT REPORTER

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS

(There were no witnesses.)

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.

(There were no exhibits.)

(The following proceedings were held on August 8, 2007.)

THE COURT: All right. This is the State of South Carolina -- it's actually Tyree Alphonso Roberts also known as Abdiyyah Alkebulanyahh versus State of South Carolina. It's a post-conviction relief matter.

Let the record reflect Mr. Alkebulanyahh is present in the courtroom. And I know I told you at the last hearing, Mr. Alkebulanyahh, I probably am going to mispronounce your name, but do I have it right this time?

MR. ALKEBULANYAHH: Yes, sir.

THE COURT: Okay. Thank you.

All right. The last hearing we had was to establish whether or not you wanted to represent yourself in your post-conviction relief hearing or whether or not you wished to have counsel appointed. And you indicated to me that you wished to have counsel appointed.

And, at that time, you had the opportunity to talk to Mr. Walters, who is sitting beside you, Glenn Walters. And I believe after discussion with him, you indicated to the Court that you would be glad to have him appointed to represent you.

And I told you in a death penalty post-conviction relief, you're entitled to two lawyers and that Mr. Walters was going to take the initiative to find somebody that he had worked with in the past on death penalty cases and see if that person would be willing to work with you on this as well and that's Mr. Carl Grant, who's also present and sitting with you.

Now, I wanted to then have this hearing today to again make sure that you are okay with the appointment of Mr. Grant as your lawyer as well. And then I have to conduct a hearing to make certain that they are, what we call, death penalty qualified. There's certain minimum qualifications. And both of these gentlemen are well more than minimally qualified to handle such a case, but we do have to just kind of do this as a formality.

And then we'll set a status conference where we'll actually, we have talked about this, what we will then do is set up a timeframe for when they will get the transcripts and when responsive pleadings will be required. And then, at some point in time, we will conduct a hearing.

So you have had the opportunity to meet with Mr. Grant as well?

MR. ALKEBULANYAHH: Yes, sir, I have.

THE COURT: And what are your desires with regards to Mr. Grant representing you?

MR. ALKEBULANYAHH: I would like to have Mr. Grant represent me along with Mr. Walters, yes, sir.

THE COURT: Very well. So you would like Mr. Walters and Mr. Grant to both be appointed as your counsel in this?

MR. ALKEBULANYAHH: I do, sir.

THE COURT: All right. Very well.

Okay. Mr. Walters and Mr. Grant -- Mr. Walters, give me a little bit of your background for the record, please.

MR. WALTERS: My full name is Glenn Walters. I'm a graduate of South Carolina State University, graduated from there in 1986. I graduated from the University of Virginia School of Law in 1989.

I've been practicing law in the State of South Carolina probably about 17 years. I started off as -- with the law firm of Johnson, Toal and Battiste. I later -- my law school had a loan forgiveness program if I worked for indigent people, so I became a public defender here in Richland County. I worked for the public defender's office here in Richland

County for a little over a year and a half.

I left this office, I then went to Orangeburg County, practiced as a public defender there for probably about a year and a half. I then went into private practice.

In the private practice, we continued to handle extensive criminal cases, as a general practice, handling criminal, bankruptcy, real estate, probate, personal injury and things of that nature. As far as the specifics with regards to criminal representation, we've represented from magistrate's court to federal court, all aspects of different types of cases.

With regards to death penalty cases, Mr. Grant and I tried Alfred Walker, the State versus Alfred Walker, and that was in Barnwell several years ago. And recently we were appointed as counsel to represent Mr. Mikal Mahdi and that case was tried in Calhoun County, both death penalty cases.

In this particular case, we'd be glad to represent the defendant. And as far as our criminal background, it's been 17 years of extensive criminal work, murder, armed robbery, death penalty, every aspect of criminal law and, of course, in every court in the State of South Carolina from the

federal courts to state courts and things of that nature.

THE COURT: You have been death penalty qualified in death penalty cases before?

MR. WALTERS: Yes, sir.

THE COURT: First chair, second chair or both?

MR. WALTERS: The first case, I was second chair. The second case, I was first chair.

THE COURT: That would certainly makes sense. All right, thank you.

Mr. Grant.

MR. GRANT: Good morning, Your Honor.

THE COURT: I want you to lay a little of your background on me for the record.

MR. GRANT: Yes, sir. Your Honor, my name is Carl B. Grant. I'm also a graduate of South Carolina State University, class of 1982. In 1985, I graduated from the Ohio State University College of Law.

I began my practice with the U.S. Army JAG Corps as a captain in the U.S. Army prosecuting soldiers as a trial counsel. And then as a trial defense attorney, defending soldiers at U.S. Army court-martials, all levels of court-martial from murder on down, general sessions type charges.

After leaving the JAG Corps, I joined a firm here in Columbia for about two years doing primarily criminal defense for the firm. And since then, I've started my own practice. And my practice has involved primarily criminal defense and personal injury.

I have tried or been appointed, I should say, to at least five death penalty cases in the capacity of lead counsel and second chair. I tried my first death penalty case in, I think, it was March of 1995. And I am indeed death penalty qualified.

I've tried cases in federal court. Every court that you can possibly imagine that I could think of from the Marine Corps to Fort Jackson to the Air Force type courts, all court-martial levels even as a civilian attorney and from death penalty cases on down in the State of South Carolina from the federal courts, I've tried those cases, Judge.

THE COURT: Very well.

Well, I find that both Mr. Walters and Mr. Grant are qualified to represent Mr. Alkebulanyahh in this matter and will appoint them as counsel for him during this post-conviction relief. So, at this point then, the State will then serve upon counsel a copy of the transcript and

provide them with a return to the application.

What I would like to do is I will then give the petitioner 180 days to review the transcripts and file an amended application, if they so desire. And at that point, once the -- well, then the State would have the right to file any responsive pleadings to that. We will then status the case in order to set a trial date at that time.

So let's see, this is August the 8th, so you'll have until February the 8th to file an amended application. And after that, the State will have the opportunity to file any responsive pleadings.

So let's set this for a -- tentatively, we'll set it for status some time around the first of March. I will have my office contact y'all in mid February so that we can set up a status conference then to set a trial date, see if we have any dispositive motions or anything that need to be heard.

As far as any application for expenses, what I would like to have the petitioner's lawyers do is file any application with the court and on the Attorney General's Office so if the Attorney General's Office wants to file an objection, they can do so.

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Beaufort County, South Carolina, on the 8th of August, 2007.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 29, 2010

Stacy L. Sheppard, RPR
Circuit Court Reporter

Appendix B

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Dr. Rikki Lynn Halavonich, who appeared personally before me, affirms and states the following:

1. I am a physician licensed to practice medicine in the state of South Carolina. After medical school I completed a four-year residency in psychiatry and a one-year fellowship in forensic psychiatry, both at the Medical University of South Carolina (MUSC). My area of expertise is forensic psychiatry. I am board certified in both general psychiatry and forensic psychiatry.

2. After completing my forensic fellowship, I joined the faculty at MUSC as an assistant professor of psychiatry. My professional responsibilities focused on training forensic fellows and psychiatry residents, as well as evaluating clients in both criminal and civil legal settings. I was the Associate Fellowship Director of the forensic training program as well as the Director of the Department of Forensic Psychiatry. In 2008, I transitioned form MUSC to private practice and am currently practicing in Charleston, South Carolina, at Lowcountry Forensic Psychiatry.

3. I met with Abidiyyah ben Alkebulanyahh for 2 hours on March 31, 2010 and for 1.25 hours on May 24, 2010. I reviewed records related to Mr. Alkebulanyahh's case including the following transcripts: The portion of his pretrial hearing in which he made a motion to proceed pro se, his testimony during the guilt determination phase of the trial, the presentencing testimony in which he indicated his desire to not be present for the proceedings, the portion of the proceedings during sentencing in which he became unruly, and the PCR hearing. I reviewed the report of Donna Schwartz-Watts, MD dated July 29, 2003 and the deposition of Dr. Schwartz-Watts dated August 13, 2008. I reviewed writings of Mr. Alkebulanyahh including a voluminous narrative titled "Manuscript Part One".

4. It is my understanding that Mr. Alkebulanyahh was evaluated by multiple mental health professionals prior to his trial and subsequently found competent to stand trial, as well as competent to proceed pro se, by the Court. It is further my understanding that there was agreement that, although competent to stand trial and proceed pro se, Mr. Alkebulanyahh suffered from a serious mental illness.

5. It is my professional opinion, to a reasonable degree of medical certainty, that Mr.

Alkebulanyahh's symptoms of mental illness worsened as his trial progressed. The transcripts indicate he became increasingly disorganized, paranoid and delusional over the course of the trial. It is further my opinion that over the course of the trial, and specifically by the time of the penalty phase, Mr. Alkebulanyahh had decompensated to the point that his ability to understand the proceedings against him and assist in his defense were significantly impaired.

FURTHER AFFIANT SAYETH NAUGHT.

Rikki Lynn Halavonich MD

RIKKI LYNN HALAVONICH, M.D.

Sworn to and subscribed before me
this 15th day of July, 2010.

Notary Public for the State of South Carolina
My commission expires: April 17, 2018

SARONNA S. CARTER NOTARY PUBLIC SOUTH CAROLINA COMM. EXP. APRIL 17, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Applicant's Motion to Remand for Additional Post-Conviction Proceedings was mailed today by first class United States mail, postage prepaid, this 21st day of July, 2010, upon the following:

S. Creighton Waters
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

Exhibit B

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RESPONSE IN OPPOSITION TO
MOTION TO REMAND FOR ADDITIONAL
POST-CONVICTION RELIEF PROCEEDINGS

Respondent, above-named, hereby responds as follows to the Motion to Remand for Additional Post-Conviction Proceedings, filed by Petitioner Abidiyyah ben Alekbulanyahh. Respondent would assert the motion should be denied for the following reasons.

I. Petitioner's PCR counsel were qualified under the PCR statute; thus, there is no basis supporting a remand to allow Petitioner a second bite at the apple.

As an initial matter, Petitioner is incorrect that his PCR counsel were not qualified under the applicable statute. Petitioner asserts that under S.C. Code Ann. § 17-27-160 (2003), to be qualified in a capital PCR a lawyer either needs to have either previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate

at trial AND also have within the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief.

However, in her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 15th, 2003, the Chief Justice specifically rejected this interpretation, finding that it would lead to the absurd result that an attorney qualified to represent a capital inmate at trial would not be qualified to represent him in PCR. Thus, it was concluded that the "not less than twelve hours of CLE education" clause and the "or professional training primarily involving advocacy in capital appellate or PCR defense" clause of S.C. Code Ann. § 17-27-160(B) were independent means through which an otherwise death penalty-qualified attorney could qualify to represent a death row inmate in PCR. Accordingly, an otherwise death-qualified attorney's twelve hours of CLE within the previous two years did not necessarily have to be in the field of capital appellate or PCR defense.

Here, Judge Young specifically relied on the statute and this memorandum to conclude that PCR counsel were sufficiently qualified. **{Order Appointing Counsel August 8, 2007}**. Counsel Walters had been practicing for 17 years, including stints in the public defenders office and years in private practice handling felony criminal cases. He had previously represented a capital inmate at trial and was at the time of his appointment in this case representing another capital inmate in trial-level proceedings. **{Appendix A to Petitioner's Motion pp. 6-8}**. Similarly, counsel Grant had been practicing law for 22 years, including stints handling criminal law in the JAG Corps and private practice. He had tried some five capital cases, and tried his first one twelve years prior in 1995. **{Appendix**

A to Petitioner's Motion pp. 8-9}. Clearly these lawyers were well-versed in what it takes to try a capital case.

Thus, there was no violation of the capital PCR qualification statute, and accordingly no basis for remanding this case and treating the proceedings that have taken place as a nullity. Even if it is assumed that PCR trial counsel in this case were somehow ineffective, this would not matter, as there is simply no constitutional right to counsel in post-conviction proceedings. See generally Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Coleman v. Thompson, 501 U.S. 722 (1991); Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997). Accordingly, there can be no Sixth Amendment claim of ineffective assistance of PCR counsel, and this Court is clear that alleged ineffectiveness of PCR counsel is not a basis for having a second PCR. See Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (alleged ineffective assistance of first PCR counsel is not a sufficient reason to overcome the bar against successive applications).

In all, Petitioner's counsel were qualified under the statute, and his new counsel's complaints about PCR trial counsel are insufficient to justify a second bite at the apple.

II. Even if counsel was not qualified under the statute, there is no basis for giving Petitioner a second bite at the apple.

Even if somehow counsel was not qualified under the statute, and even assuming that lack of statutory qualification demanded a remedy on PCR appeal aside from the fact that there is no constitutional right of effective PCR counsel, that remedy is not a *per se* reversal. In the unpublished order issued by this Court denying the petition for habeas corpus of Kevin Dean Young, this Court pointed out that S.C. Code Ann. § 17-27-160(B) does not provide a remedy for its violation. It went on to cite cases for the proposition that

the failure to meet statutory standards for death qualification for *trial* counsel did not result in *per se* reversal but still needed to be assessed for prejudice. Kevin Dean Young v. State of South Carolina, Unpub. Order (S.C. Sup. Ct. November 1, 2000) (citing Aeschliman v. State, 973 P.2d 749 (Idaho Ct. App.1999); State v. Misch, 656 N.E.2d 381 (Ohio Ct. App. 1995); and State v. Maletta, 781 P.2d 350 (Or. Ct. App. 1989)).

Thus, even assuming a remedy for a violation of the statute, Petitioner would at a minimum have to show some sort of prejudice. He cannot do so in this case. Petitioner tried to fire his PCR counsel and handle the case on his own. But regardless, he had a full and fair hearing in which PCR counsel presented evidence on his decision to represent himself and the competency determination. At this hearing Petitioner was then able to, without limit, give testimony on the issues that were important to him.

Petitioner now raises a number of issues that he asserts PCR counsel should have raised; however, none of these are a basis for relief. At this stage, Respondent does not intend to fully brief each alleged issue Petitioner asserts his PCR counsel could have raised, since Petitioner did not brief them and to do so would require an extremely long document. Respondent submits it is sufficient to point out that the supposed issues Petitioner now raises are insufficient for relief. Thus, Petitioner has presented no evidence of prejudice from the supposed lack of qualification of PCR trial counsel.

A. Competence to stand trial

Petitioner first asserts that he was not competent to stand trial during his sentencing phase. He apparently relies on the fact that Petitioner told the judge before the jury returned its guilt phase verdict that if he was found guilty, he did not wish to remain for the sentencing phase, and would be disruptive if he had to stay. Once sentencing began, he

stood and calmly recited a religious phrase until the judge finally ordered him held in a back room where he could see and hear the proceedings. Petitioner ultimately relented and returned to the courtroom. Standby counsel and the solicitor also testified in PCR they saw no evidence of a break from reality or loss of faculties, but rather a deliberate and calm action which was the result of an intention decision that if the jury found him guilty he did not want any more part of the process. See **{Order of Judge Mullen pp. 14-20; 38-40}**.

The record in this case contains a very careful determination by the trial court of Petitioner's competence to stand trial and to represent oneself after very careful and repeated colloquies. Moreover, Judge Mullen determined that not only was it improper to go behind the trial court's ruling on PCR, but that in any event there was no evidence of incompetence from the trial or PCR record. Petitioner litigated pretrial motions and the whole guilt phase without any problems behaving inappropriately or with improper demeanor. His behavior in the sentencing phase only occurred after he calmly told the court he was going to do it and, more importantly, exactly why he was going to do it. **{Order of Judge Mullen pp. 5-40}**. There is no issue of competence.

B. Failure to make inquiry

Petitioner contends the trial judge erred in failing to make an inquiry into is competency at the end of the sentencing phase. Not only is this an issue for direct appeal, the record is clear Petitioner was not incompetent. He made a deliberate and goal-directed decision not to participate in the sentencing phase. His behavior over the course of many pre-trial and guilt phase proceedings belies any contention he was not competent. There is no evidence of incompetence, and Judge Mullen has already found as much.

C. Failure to terminate his pro se status

Again, not only is this an issue for direct appeal, the record is clear Petitioner was not incompetent. He made a calm, deliberate and goal-directed decision not to participate in the sentencing phase. Nothing about Petitioner's decision and demeanor *necessarily as a matter of law required* the judge to terminate his pro se status after he had already been granted it following a detailed procedure. Indeed, State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997) and Reed v. Ozmint, 374 S.C. 19, 647 S.E.2d 209 (2007) would counsel against terminating a competent *pro se* defendant's self-representation, and as Judge Mullen discussed in her order, nothing in Edwards requires the trial court override a competent defendant's wishes. **{Order of Judge Mullen pp. 35-40}.**

D. Shackling

Not only is this a direct appeal issue, but there is no evidence the jury saw Petitioner's feet shackled in the back room. Regardless, there is no reversible error or prejudice under Deck v. Missouri, 544 U.S. 622; 125 S.Ct. 2007 (2005), as argued in the Final Brief of Respondent from pages 32-33. Moreover, Petitioner's own intentional behavior led to any circumstances that existed, and he cannot now use his own misbehavior as a sword.

E. Admission of evidence

Petitioner makes a freestanding claim as to various evidence introduced in the sentencing phase which he asserts was inadmissible. This is clearly a freestanding claim that is only appropriate for direct appeal and not PCR. There was no objection to this evidence that would preserve it for direct appeal. Moreover, as noted in the next ground,

Petitioner cannot push the blame onto standby counsel when he chose to represent himself and he was never relieved of self-representation, even during the sentencing phase. Finally, there was no prejudice, given the horrible nature of this crime and Petitioner's long prior record and misbehavior in prison.

F. Failure to object

Petitioner contends standby counsel was ineffective for failing to object to evidence in the sentencing phase. While it is true that Petitioner agreed to allow standby counsel to make any objections and handle evidence while he was in the back room, he was back there by his choice and still retained ultimate authority for his own representation. Indeed, counsel specifically noted that if they were to do anything they would still remain standby counsel, because if they were made counsel of record and were "on the hook" they would then call mitigation witnesses which Petitioner did not want. **{R. 3526-29}**. Petitioner cannot put into motion this procedure and then complain of standby counsel's performance when Petitioner still retained the ultimate authority for the representation and was pro se. He was amply warned when he chose to go pro se that he would not be able to claim ineffectiveness on himself. **{R. 3900-45}**. Finally, there was no prejudice, given the horrible nature of this crime and Petitioner's long prior record and misbehavior in prison.

G. Ineffective assistance of appellate counsel

Petitioner finally asserts there was ineffective assistance of appellate counsel for failure to raise many of the issues set forth above. Aside from possibly the competence issues, these are all without merit as their either was no objection, or the issues as described in Judge Mullen's Order are simply insufficient for relief.

Thus, since even with a cursory view none of these issues has any merit, Petitioner cannot show prejudice even if it is assumed that PCR trial counsel were not qualified and there is a statutory remedy for the violation.

Indeed, if this Court is changing the interpretation of the qualification statute and also is at all concerned about the merits of any of these issues such that it might find prejudice, then the issues should be addressed with full briefing from both sides on the particular issue to which there is concern. All that has been done below already should not simply be thrown out based on a cursorily discussed laundry list of issues that Petitioner's current PCR counsel thinks he could have raised.

Accordingly, the motion should be denied.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Senior Assistant Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEYS FOR RESPONDENT.

BY: _____
ATTORNEYS FOR RESPONDENT

August 2, 2010.

APPENDIX A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

Abdiyyah ben Alkebulanyahh, #6012) C/A No. 2007-CP-07-0715

Applicant,)

v.) ORDER APPOINTING COUNSEL

The State of South Carolina,)

Respondent.)

07 AUG 13 PM 2:20
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

Applicant, Abdiyyah ben Alkebulanyahh, is a death row inmate who has filed a *pro se* post-conviction relief application. On May 4th, 2007, the South Carolina Supreme Court issued an Order in which it assigned this Court jurisdiction over the case.

Accordingly, as provided in S.C. Code Ann. § 17-27-160, this Court held a hearing to determine Applicant's desires regarding appointed counsel on June 1st, 2007 at the Orangeburg County Courthouse, and on August 8th, 2007, at the Richland County Courthouse. Applicant was present at both hearings; the State was represented at both hearings by Assistant Attorney General S. Creighton Waters.

At the June hearing, Applicant stated that he is indigent and indicated his desire to have appointed counsel. This Court finds that appointed counsel is appropriate in this case.

At the June hearing, Glenn Walters, Esquire, of Orangeburg, South Carolina, was present. At this Court's direction, attorney Walters spoke to Applicant in private during a recess in the hearing, and Applicant subsequently indicated to the Court that attorney Walters was acceptable to him. Attorney Walters was then directed to see if he

could find a second attorney for this case.

At the August hearing, attorney Walters appeared along with attorney Carl B. Grant, Esquire, of Orangeburg, South Carolina. Prior to the hearing, attorneys Walters and Grant spoke to Applicant in private. At the August hearing, Applicant indicated that attorneys Walters and Grant were acceptable to him as his counsel in the PCR action.

At the August hearing, both Walters and Grant stated their qualifications to the Court. Although only one lawyer needs to be statutorily qualified, this Court finds that both attorneys Walters and Grant meet the statutory qualifications, in that they each have at least five years' experience as a lawyer and three years' experience in the trial of felony cases, as well as twelve hours of CLE training within the prior two years. S.C. Code Ann. §§ 16-3-26, 17-27-160 (2003). See also Memorandum of Chief Justice Jean H. Toal Regarding Appointment of Counsel in Capital Post-conviction Cases, dated August 15th, 2003 (opining that that the "not less than twelve hours of CLE education" clause and the "or professional training primarily involving advocacy in capital appellate or PCR defense" clause of S.C. Code Ann. § 17-27-160(B) were independent means through which an attorney could qualify to represent a death row inmate in PCR – thus, an attorney's twelve hours of CLE did not necessarily have to be in the field of capital appellate or PCR defense). Moreover, both attorneys have previously represented defendants in death penalty trials.

Therefore, this Court appoints Glenn Walters, Esquire, and Carl B. Grant, Esquire, as Applicant's attorneys in the capital PCR.

Mr. Waters of the Attorney General's Office has agreed to provide both of

Applicant's lawyers as well as this Court with copies of the trial transcript. This Court orders that Applicant shall have until February 8th, 2008, in which to file an Amended Application. The State shall then have thirty (30) days to file an Amended Return, and within thirty (30) days of that responsive filing the parties and this Court shall convene a status hearing to handle any dispositive motions or to set the case for a final evidentiary hearing on the merits, if necessary. See S.C. Code Ann. § 17-27-160(C) (2003).

Finally, the State has asserted that although funding requests for investigative, expert or other services can be made *ex parte* during a capital trial, such requests cannot be made *ex parte* in PCR proceedings. See generally Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996). While this Court declines to rule either way on the issue at this time, any party intending to approach this Court *ex parte* during the course of this litigation about funding requests for investigative, expert, or other services, shall first give notice of such intent to the opposing party as well as the Court, so that a hearing can be held before this Court with the participation of both parties as to the propriety of such an *ex parte* communication.

IT IS SO ORDERED.

Roger M. Young
Circuit Court Judge

Columbia, South Carolina

August 8, 2007.

APPENDIX B

CLERKS OFFICE PAGE 01/07

177

The Supreme Court of South Carolina

Kevin Dean Young, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

In 1989, petitioner was convicted of murder and armed robbery and sentenced to death. On appeal, this Court reversed the death sentence. State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991). On remand, petitioner was again sentenced to death. This Court affirmed. State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995)(Young II). The United States Supreme Court denied certiorari. Young v. South Carolina, 516 U.S. 1051, 115 S.Ct. 718, 133 L.Ed.2d 671 (1996).

Thereafter, petitioner's application for post-conviction relief (PCR) was denied. On May 15, 1998, this Court denied petitioner's petition for a writ of certiorari. The federal district court denied petitioner's

subsequent petition for a writ of habeas corpus. The Fourth Circuit Court of Appeals affirmed. Young v. Catoe, 205 F.3d 750 (4th Cir. 2000). On October 2, 2000, the United States Supreme Court denied certiorari. Young v. Catoe, 2000 WL 875908, No. 99-10228 (Oct. 2, 2000).

Petitioner is scheduled to be executed on November 3, 2000. He has filed a motion for a stay of execution and a petition for a writ of habeas corpus.

A writ of habeas corpus will issue only if there is a constitutional violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998); Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S.Ct. 442, 112 L.Ed.2d 425 (1990). A request for a stay of execution pending the filing of a successive action for habeas corpus in the original jurisdiction of this Court must demonstrate that there are exceptional circumstances warranting the issuance of the stay. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996).

Petitioner maintains his execution should be stayed because the United States Supreme Court recently granted certiorari in Shafer v. South Carolina, 2000 WL 1057649, No. 00-5250 (Sept. 26, 2000) to review the following question:

Were petitioner's due process rights under Simmons

> v. South Carolina violated by trial court's refusal to instruct sentencing jury that "under South Carolina law, [petitioner] would be ineligible for parole if the jury were to vote for a life sentence." Ramdass v. Angelone, 120 S.Ct. 2113, 2119, 67 CrL 394 (2000)(plurality opinion), and by South Carolina Supreme Court's holding that Simmons no longer applies to South Carolina's capital sentencing scheme?

We disagree.

In Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the United States Supreme Court held that a capital defendant is entitled to a charge on parole ineligibility when future dangerousness is argued and the defendant is not eligible for parole. In Ramdass v. Angelone, ___ U.S. ___, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000), the United States Supreme Court reaffirmed its decision in Simmons, holding it applied only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison.

Shafer was tried under a version of S.C. Code Ann. § 16-3-20 which became effective on January 1, 1996. State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000). Under that version of the statute, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. Relying on Simmons, Shafer requested the trial court instruct the jury he would be ineligible for parole. The trial judge denied the request. This Court held on appeal that since one

of the alternatives to a death sentence was not life without the possibility of parole, Simmons was inapplicable. The United States Supreme Court has now granted certiorari to review that decision.

Petitioner, on the other hand, was tried and re-sentenced at a time when S.C. Code Ann. § 16-3-20(A) stated that a person who is convicted of murder must be punished by death or life imprisonment and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt, and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. Unlike the sentencing scheme in effect at the time of Shafer's trial, the only options available at the time of petitioner's trial and re-sentencing were death or a life sentence with parole eligibility. Indeed, petitioner did not ask the trial judge to charge the jury that he would be ineligible for parole if given a life sentence, but instead requested the judge charge the jury that if sentenced to life imprisonment he would not be eligible for parole until he had served thirty years.

Accordingly, because petitioner would have been parole eligible had he been given a life sentence and because future dangerousness was not an issue in his case, see Young II at 87, the decision of the United States Supreme Court to grant certiorari in Shafer has no bearing on this case.

Petitioner maintains in his petition for a writ of habeas corpus that because the two attorneys appointed to represent him in connection with his PCR application did not meet the qualifications set forth in S.C. Code Ann. § 17-27-160(B), he was denied his constitutional right to due process.[1] Petitioner contends it is reasonably likely that counsel experienced in capital cases would have raised the issue of racial disparity in the jury selected for petitioner's re-sentencing and the issue of a conflict of interest presented by the South Carolina Office of Appellate Defense's representation of petitioner on appeal.[2]

---

[1]Section 17-27-160(B) does not provide a remedy for its violation nor has this Court ever addressed the issue. Petitioner does not argue a violation of the section constitutes prejudice per se. Instead, petitioner essentially concedes that prejudice must be proven by arguing two instances in which he feels PCR counsel were ineffective. Courts that have addressed this issue have held that failure to meet statutory standards for death qualification does not render counsel's assistance ineffective per se, but instead the effectiveness of counsel must be judged under the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See Aeschliman v. State, 973 P.2d 749 (Idaho App. 1999); State v. Misch, 656 N.E.2d 381 (Ohio App. 3d 1995); State v. Maletta, 781 P.2d 350 (Or. App. 1989).

[2]Joseph Savitz of the South Carolina Office of Appellate Defense represented petitioner on his second direct appeal. Tara Dawn Shurling, also of the Office of Appellate Defense, had represented petitioner's co-defendant on direct appeal four years earlier. Ms. Shurling had left the Office of Appellate Defense by the time petitioner's appeal was heard. Mr. Savitz was again appointed to represent petitioner in connection with his petition for a writ of certiorari filed with this Court following the denial of his PCR application.

We find that because the jury venire was selected from lists of registered voters and licensed drivers, petitioner has failed to establish a systemic exclusion of blacks from the jury venire, which is required to establish a prima facie violation of the fair cross-section requirement. Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); United States v. Lewis, 10 F.3d 1086 (4th Cir. 1993); United States v. Cecil, 836 F.2d 1431 (4th Cir. 1988); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); S.C. Code Ann. § 14-7-130 (Supp. 1999). Accordingly, petitioner was not prejudiced by the failure of appellate counsel or PCR counsel to raise this issue.

We find further that petitioner failed to show that an actual conflict of interest resulted from Mr. Savitz's representation of him after Ms. Shurling's representation of his co-defendant. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Therefore, petitioner was not prejudiced by Mr. Savitz's representation of him or by PCR counsel's failure to raise the conflict of interest issue.

In conclusion, we find that petitioner has failed to demonstrate that there are exceptional circumstances which would warrant the issuance of a writ of habeas corpus or a stay of his execution. Accordingly, his motion for

a stay of execution and petition for a writ of habeas corpus are denied.

IT IS SO ORDERED.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

November 1, 2000

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Response in Opposition to Motion to Remand for Additional Post-Conviction Relief Proceedings on Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, John Blume, III, Esq., Blume, Weyble & Norris, LLC, P.O. Box 11744, Columbia, SC 29211.

This 2nd day of August, 2010.



ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
	)	Case No.: 2014-CP-07-2994
Abdiyyah ben Alkebulanyahh, # 6012	)	
aka Tyree Roberts	)	
Applicant,	)	
vs.	)	**CERTIFICATE OF SERVICE**
State of South Carolina,	)	
Respondent.	)	
	)	

The undersigned certifies that a copy of the Response in Opposition to Motion to Dismiss was mailed by first class United State mail, postage prepaid, this 12th day of September, 2017, upon the following:

Alphonso Simon, Jr.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Jill B. Abernethy

2017 SEP 15 PM 12:15
FILED
BEAUFORT COUNTY
CLERK OF COURT

JUSTICE 360 ADVANCING EQUALITY IN CAPITAL CASES
900 ELMWOOD AVENUE
SUITE 200
COLUMBIA, SC 29201
OFFICE 803.765.1044
WWW JUSTICE360SC.ORG

September 12, 2017

2017 SEP 15 PM 12:14
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Jerri Ann Roseneau
Beaufort County Clerk of Court
Post Office Drawer 1128
Beaufort, SC 29901

RE: *Abdiyyah Ben Alkebulanyahh (aka Tyree Roberts), SK 6012 v. State of South Carolina*, Case No. 2014-CP-07-2994

Dear Ms. Roseneau:

Please find enclosed for filing, with proof of service, the original and one copy of (1) Applicant's Response in Opposition to Motion to Dismiss in the above-captioned case. Please clock-in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you have any questions or require any additional information, please do not hesitate to contact me.

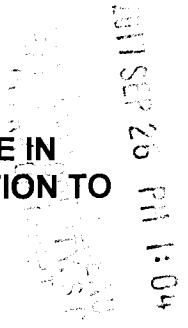
Sincerely,

Jill B. Abernethy
Paralegal

Enclosure

cc: Judge R. Knox McMahon
Alphonso Simon Jr., Esq.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS)
	) CIVIL ACTION NO. 2014-CP-07-2994
Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts	)
Applicant,	)
vs.	) **REPLY TO RESPONSE IN OPPOSITION TO MOTION TO DISMISS**
State of South Carolina,	)
Respondent.	)



Comes now Respondent, above named, by and through the Attorney General of South Carolina, and hereby replies to the Response in Opposition to the Motion to Dismiss served on September 12, 2017. Respondent would show this Court the following:

1. The South Carolina Supreme Court's opinion in Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016) does not create a newly recognized right that would trigger the statute of limitations period under S.C. Code Ann. § 17-27-45(B).

In Robertson, the Supreme Court found an "allegation that [an Applicant] was denied a state-created right to qualified counsel constitutes a 'sufficient reason' to permit a successive PCR application under section 17-27-90." The Supreme Court clearly did not consider this determination as recognizing a new right. To the contrary, in finding Robertson's successive application for post-conviction relief was timely, the Supreme Court applied the statute of limitations term outlined in S.C. Code § 17-27-45(C) in relying upon when Robertson learned of PCR counsel's potential lack of qualifications. See id. at 517, 795 S.E.2d at 35. Furthermore, Applicant's assertion that

S.C. Code § 17-27-45(B) should apply is not supportable by the plain text of the statute.

Section 45(B) applies

> [w]hen a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively. . .

S.C. Code Ann. § 17-27-45. The opinion in Robertson does not impose such a substantive standard on state criminal proceedings that was not previously recognized. Nor does the Robertson opinion create a right not in existence at the time of Applicant's state criminal trial. Further, the Supreme Court did not indicate Robertson was to be applied retroactively.

Respondent respectfully requests this Court abide by the same analysis applied by the Supreme Court in Robertson and determine whether this action was timely filed based upon when Applicant knew or should have known that prior PCR counsel were not qualified under S.C. Code Ann. 17-27-160(B). Applicant was aware of the underlying facts regarding his prior PCR counsel's qualifications, at the latest, by July 21, 2010, when he moved to remand his first PCR action (then on appeal) to the circuit court for further PCR proceedings. Applicant did not file an Application for Post-Conviction Relief "one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. § 17-27-45(C). To be timely filed, Applicant should have filed this action at least by July 21, 2011, 365 days after he was aware of the underlying facts for his claim that PCR counsel was not qualified. This action was

not filed until November 24, 2014, 1222 days after the statute of limitations had run. This application is untimely and should be dismissed as a matter of law.

2. The statute of limitations applies to this application.

Contrary to Applicant's assertions, the statute of limitations does apply to this Application. First, the Supreme Court recognized the statute of limitations applies to successive applications because in Robertson, the Supreme Court applied the statute of limitations in finding the application in Robertson could go forward. See Robertson, 418 S.C. at 516-17, 795 S.E.2d at 35.

Second, this application is not analogous to scenario presented in Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999). In Odom, the Supreme Court held the statute of limitations for post-conviction relief actions contained in S.C. Code § 17-27-45(A) does not apply to applications filed pursuant to Austin v. State.[1] Odom, 337 S.C. at 263, 523 S.E.2d at 756-57. The Supreme Court reasoned that the policy outlined in Austin would be frustrated if the one-year statute of limitations applied to procedural errors made by the PCR Court because Austin was intended to serve as a final safeguard against unjust procedural errors. Id. at 263-64, 523 S.E.2d at 757. Thus, the opinion in Odom seeks to ensure an Applicant receives access to a full procedural round of post-conviction relief. Applicant received a full post-conviction relief process here.

Further, Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996), does not support Applicant's contention that there is no statute of limitations to the filing of a

[1] "Austin appeals are considered 'belated appeals' and are used to rectify unjust procedural defects, such as when an attorney does not file a timely appeal." Odom, 337 S.C. at 263, 523 S.E.2d at 756-57.

successive application for post-conviction relief. In Washington, the South Carolina Supreme Court heard a successive application, but only because it was one of the "rare cases" where "so many procedural irregularities occurred during the course of [the inmate]'s judicial process that he has not received due process." Id. at 236, 478 S.E.2d at 835. In Washington, the applicant did not have a direct appeal because his attorney failed to file a brief; the first PCR Court found the applicant was entitled to a new trial, but allowed the relief to be addressed on direct appeal, and certiorari was denied on appeal; and the second PCR Court granted relief using an improper procedure. Id. The procedural history in this case is clear Applicant had one full bite at the apple on both direct appeal and PCR, and multiple claims were preserved through the process.

Third, the statute of limitations should not be equitably tolled in this case.

> Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations. Hooper v. Ebenezer Senior Svcs. and Rehabilitation Ctr., 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct.App.2008). "Equitable tolling is reserved for extraordinary circumstances." Id.; see, e.g., Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass, "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989) (holding statute of limitations equitably tolled for workers' compensation claim during reliance period in which employer represented to employee that claim compensable and would be taken care of without employee filing claim).

Pelzer v. State, 378 S.C. 516, 520–21, 662 S.E.2d 618, 620 (Ct. App. 2008). Further, equitable tolling has been deemed available where (a) "extraordinary circumstances prevented the plaintiff from filing despite his or her diligence"; (b) "the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory

period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass"; or (c) "the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim." Pelzer, 378 S.C. at 521, 662 S.E.2d at 620-21.

Applicant has not shown equitable tolling is warranted in this case. There were no extraordinary circumstances that prevented Applicant from filing this Application timely. Applicant did not file a defective pleading during the statutory period. He did not pursue this action until well after the statute of limitations had expired. Applicant was not induced or tricked into allowing the filing deadline to pass. Applicant has had all of the vital information bearing on the existence of the claims raised in this action since he filed his Motion to Remand for Additional Post-Conviction Proceedings.

Applicant also fails to show that he was diligently pursuing the claims raised in this action. Respondent submits that neither raising an unpreserved argument in a PCR appeal nor prematurely filing a state habeas action before exhausting any other available state remedies constitutes diligence.[2] Nor does waiting until several months

---

[2] Respondent would note that contrary to Applicant's assertions, Respondent did not assert Applicant was not entitled to a second PCR action in the Return to Petition for Writ of Certiorari filed in the first PCR appeal. Respondent argued that the due process and equal protection claims presented were not preserved for appellate review; PCR counsel were qualified; any violation of the qualification statute did not constitute a violation of due process or equal protection, and Applicant failed to establish a due process violation. The Return to Petition for Writ of Certiorari, filed on June 6, 2011, was attached to the Return and Motion to Dismiss as Attachment No. 35. Also, in the Return to the state habeas petition, the Respondent contended the petition was not properly filed because Applicant had not made the requisite showings that he has fully exhausted all other remedies and that other remedies are either unavailable or inadequate, pointing to the pending petition for writ of certiorari and the fact that Applicant had not shown he had properly exhausted other available state remedies. That Return, filed on March 21, 2011, was attached to the Return and Motion to Dismiss filed in this action as Attachment No. 39. Respondent would note that in his Reply to the Return to the state habeas petition, which was filed on May 18, 2011, Applicant

after receiving notice that these claims were not properly exhausted in state court before filing this action constitute diligence.[3] "[R]easonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). Applicant fails to show he is entitled to equitable tolling. This action should be dismissed because it is untimely.

3. Conclusion

interpreted this response as a suggestion that he "should instead file a second application for post-conviction relief." Attachment No. 40, p. 1.

Applicant's assertion that Respondent should be equitably estopped from asserting a statute of limitations defense is without merit. Respondent did not assert a second post-conviction relief action could not be filed. In regards to claims presented in this action, Respondent has maintained and consistently argued these claims may not be presented in a new post-conviction relief action because such an action would be untimely and successive. Further, some of these claims are not proper claims for post-conviction review. The essential elements of equitable estoppel are (1) lack, on the part of the one claiming estoppel, of the knowledge and means of knowledge of the truth as to the facts and circumstances upon which his claim of estoppel is predicated; (2) conduct, representations, or silence of the party estopped, amounting to misrepresentation or concealment of facts; (3) reliance upon such conduct, representations, or silence; and (4) resulting action, to its detriment, by the party claiming the estoppel. Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 210, 417 S.E.2d 579, 582 (1992). Respondent would note that Applicant fails to show equitable estoppel is applicable. Applicant had the knowledge and means of determining when a timely application needed to be filed. Respondent raised the statute of limitations argument at its first opportunity, and Respondent maintained in filings in other actions that claims raised in a second post-conviction relief action would be dismissed as successive and untimely. Any mistake in Applicant's determination of when this Application needed to be filed was not the result of any action or argument made by Respondent.

[3] The Respondent in the federal habeas action contended the claims presented in this Application were not properly exhausted in state court in its Return and Memorandum of Law in Support of Motion for Summary Judgment filed April 14, 2014. That Return was attached to the Return and Motion to Dismiss as Attachment No. 45.

Each and every allegation in the Amended Application not either expressly admitted, denied, qualified or explained in the Return to Amended Application for Post-Conviction Relief and Motion to Dismiss or this Supplement is hereby denied.

WHEREFORE, premises considered, for the reasons stated in the Return to Amended Application for Post-Conviction Relief and Motion to Dismiss, in the Supplement, and in this Reply, Respondent submits the Amended Application for Post-Conviction Relief should be dismissed as a matter of law.

Respectfully submitted,

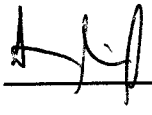
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
(Counsel of Record)
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEYS FOR RESPONDENTS

September 22, 2017

By: 

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)
)
) CIVIL ACTION NO. 2014-CP-07-2994
Abdiyyah Ben Alkebulanyahh, # 6012,)
aka Tyree Roberts,)
)
)
)
Applicant,)
) **CERTIFICATE OF SERVICE**
vs.)
)
State of South Carolina,)
)
Respondent.)
)

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Reply to Response in Opposition to Motion to Dismiss, on Applicant by depositing one (1) copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record, Emily C. Paavola, Esq., Justice 360, 900 Elmwood Avenue, Suite #200, Columbia, South Carolina 29201; and to Lindsey S. Vann, Esq., Justice 360, 900 Elmwood Avenue, Suite #200, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 22nd day of September, 2017.

ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

2017 SEP 26 PM 1:03

September 22, 2017

The Honorable Jerri Ann Roseneau
Clerk of Court, Beaufort County
P.O. Box 1128
Beaufort, South Carolina 29901-1128

Re: Abdiyyah Ben Alkebulanyahh, #6012, aka Tyree Roberts vs. State of South Carolina
C.A. No. 2014-CP-07-2994

Dear Ms. Roseneau:

Enclosed please find an original and one copy of the Respondent's Reply to Response in Opposition to Motion to Dismiss, and Certificate of Service regarding the above-captioned matter.

Please file the Reply to Response in Opposition to Motion to Dismiss in your office and return a copy marked accordingly to the undersigned in the self-addressed stamped envelope provided.

Copies of the Reply to Response in Opposition to Motion to Dismiss is being mailed to opposing counsel today. Thank you for your cooperation in this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures
cc: The Honorable R. Knox McMahon, Circuit Court Judge (w/copy of encls.)
Emily C. Paavola, Esq. (w/copy of encls.)
Lindsey S. Vann, Esq. (w/copy of encls.)

The Supreme Court of South Carolina

The State, Respondent,

v.

Abdiyyah Ben Alkebulanyahh,
a/k/a Tyree Roberts, Appellant.

Beaufort County
2014-CP-07-02994

ORDER

I find that this Post-Conviction Relief action was assigned to the now-retired Honorable R. Knox McMahon by Order dated December 17, 2014 and must be reassigned. Now, therefore,

IT IS ORDERED that the Honorable Maite Murphy be assigned to this Post-Conviction Relief action. Judge Murphy shall retain jurisdiction over this case regardless of where she may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard as to whether there is a term of court scheduled.

Donald W. Beatty
Chief Justice

July 11, 2018
Columbia, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP0702994

Abdiyyah Ben Alkebulanyahh Tyree Roberts	**Abdiyyah Ben Alkebulanyahh**	**South Carolina State Of**	

PLAINTIFF(S) **DEFENDANT(S)**

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☒ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other: **See Attached Order**

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ **See attached order** ☐ Statement of Judgment by the Court:

Order of Dismissal

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ M. Murphy	2166	1/10/2019
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **January 17, 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **January 23, 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

Emily C. Paavola 900 Elmwood Ave. Suite 200 Columbia, SC 29201
Lindsey Vann 300 Elmwood Ave, Ste 200 Columbia, SC 29201

Christian Saville PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

MMK

Court Reporter

Jerri Ann Roseneau - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF COMMON PLEAS)) CIVIL ACTION NO. 2014-CP-07-2994
Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts	)
Applicant,	)
vs.	) **ORDER OF DISMISSAL**
State of South Carolina,	)
Respondent.	)

2019 JAN 17 PM 1:23

This matter comes before this Court on Applicant's PCR application, filed November 24, 2014. Respondent moved to dismiss the action on the basis of statute of limitations. A hearing was held on November 19, 2018, wherein the parties argued strictly as to the question of statute of limitations. The Court informed the parties of its ruling by email dated December 18, 2018. This formal Order of Dismissal follows.

PROCEDURAL HISTORY

Applicant was initially indicted by the Beaufort County Grand Jury during the March 2002 Term of the Beaufort County Court of General Sessions for two counts of Murder (2002-GS-07-0369, 0370). The State filed a Notice to Seek the Death Penalty in this case on January 22, 2002, and served its Notice of Evidence of Aggravation on March 19, 2002. Applicant's trial began on October 10, 2003 and he was convicted for both counts of murder on October 21, 2003. On October 22, 2003, Applicant's jury found the existence of the aggravating factors and

recommended a sentence of death on the murder counts. The Honorable Judge Peiper sentenced Applicant to death.[1]

Applicant next sought direct appeal. The South Carolina Supreme Court affirmed the convictions and sentences by Opinion, dated July 24, 2006. *State v. Roberts*, 369 S.C. 580, 632 S.E.2d 871 (2006). Certiorari to the United State Supreme Court was denied by letter Order filed on March 19, 2007. On March 12, 2007, Applicant sought Post-Conviction Relief (2007-CP-07-715). Attorneys Carl B. Grant, Esquire and Glenn Walters, Esquire, were appointed to represent Applicant in his PCR action. Following amendment to the PCR Application, and an evidentiary hearing was held before the Honorable Roger M. Young on October 12-13, 2008. By Order filed by the South Carolina Supreme Court on December 17, 2008, the Honorable Carmen T. Mullen, Circuit Court Judge, was assigned jurisdiction over the PCR action, and the Order assigning Judge Young was rescinded. The parties provided Judge Mullen with proposed Orders, and on September 17, 2009, the PCR Court filed its Order of Dismissal with Prejudice.

Applicant timely served and filed a notice of appeal on November 2, 2009. On appeal, Applicant was represented by John Blume, Esquire. On July 21, 2010, Applicant filed a Motion to Remand for Additional Post-Conviction Proceedings, alleging that neither PCR counsel (attorneys Grant and Walters) were properly qualified to serve as counsel in a Capital PCR matter under S.C. Code of Laws 17-27-160(B). By Order filed October 20, 2010, the Motion to Remand was denied. Applicant then perfected his appeal to the PCR Court with the filing of the Petitioner for Writ of Certiorari on February 18, 2011. The Petition alleged PCR Counsel's lack of qualifications under S.C. Code of laws 17-27-160(B). Certiorari was denied by Order dated February 22, 2013.

---

[1] At all necessary stages of litigation following Applicant's conviction and sentencing, Applicant's death sentence was periodically and properly stayed so as to allow Applicant to pursue his various direct appeal and collateral challenges to his conviction.

Following the denial of certiorari for PCR Appeal, Applicant filed a Petition for Writ of Habeas Corpus with the South Carolina Supreme Court. Petitioner did not raise the lack of qualifications of PCR counsel as a basis for habeas relief in his Petitioner for Writ. By Order filed February 22, 2013, the South Carolina Supreme Court denied the Petition state habeas relief.

Applicant next filed a Petition for Writ Federal Habeas Corpus relief, wherein attorneys John H. Blume, III, and Emily C. Paavola were appointed to represent Applicant in his federal habeas action. On November 5, 2014, the Honorable Kevin F. McDonald, United States Magistrate Judge, filed a Report and Recommendation finding that Applicant's Motion for Summary Judgment should be granted on the basis that all of Applicant's claims were procedurally defaulted; the Report and Recommendation also found that all grounds, with exception to a portion of Ground Ten, lacked merit and should be dismissed. The remaining portion of Ground Ten was addressed by the filing of a juror's affidavit and limited evidentiary hearing before Magistrate Judge McDonald. A Supplemental Report and Recommendation was issued finding the remaining portion of Ground Ten should be denied.

On November 21, 2014, Applicant filed a Motion to Stay Proceedings Pending Exhaustion of State Remedies. Applicant then filed his second and current PCR Application on November 24, 2014, wherein Applicant asserted the lack of qualifications of his PCR counsel. Respondent filed its Return to the second PCR action, arguing that the action is untimely and successive. In the interim time while this PCR matter was awaiting consideration, the Honorable Terry L. Wooten, Chief United States District Judge, accepted the Report and Supplemental Report, overruled the objections filed by Applicant, and granted the Respondent's motion for summary judgment. In its Order the District Court also denied the pending Motion to Stay

Proceedings Pending Exhaustion of State Remedies. Applicant, while his PCR Application was pending, also sought an appeal to the Fourth Circuit Court of Appeals. The Fourth Circuit requested briefing regarding the significance of the post-conviction relief action. After briefing, the Fourth Circuit Court of Appeals placed the appeal in abeyance pending the South Carolina Supreme Court's decision in *Robertson v. State*, and resolution of this post-conviction relief action.

In the state action, following the ruling of *Robertson v. State*, Respondent filed a Supplemental Return arguing that the PCR application is still beyond the statute of limitations. A hearing was conducted before this Court on November 19, 2018, in order to address Respondent's Summary Judgment motion on the limited ground that Applicant's second PCR Application was filed beyond the statute of limitations, in light of the *Robertson v. State* ruling.[2] As stated above this Court notified the parties by email on December 18, 2018, that it would grant Respondent's Motion to Dismiss.

APPLICABLE LAW

An application for post-conviction relief "must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later. S.C. Code Ann. § 17-27-45(A) (1976). However,"[i]f the applicant contends that here is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. § 17-27-45(C) (1976).

[2] The Honorable R. Knox McMahon was initially appointed to this matter. This Court was appointed to this matter on July 11, 2018, upon Judge McMahon's retirement.

Generally, all grounds for relief available to an applicant "must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application." S.C. Code Ann. § 17-27-90 (1976).

Pursuant to S.C. Code of Laws § 17-27-160(B), a PCR applicant convicted and sentenced to death is entitled to representation by counsel properly qualified to serve as a capital PCR attorney. An Applicant, who discovers his PCR attorney was lacking the necessary qualifications under § 17-27-160(B) has set forth a "sufficient reason" to warrant a successive PCR application under section 17-27-90. *Robertson v. State*, 418 S.C. 505, 516–17, 795 S.E.2d 29, 35 (2016).

"'The [PCR] court may grant a motion by either party for summary disposition of the [PCR] application when ... there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013) (quoting S.C. Code Ann. § 17–27–70(c) (1976)).

FINDINGS

This Court finds that Applicant's second PCR Application was filed beyond the statute of limitations requirements set forth under S.C. Code of Laws § 17-27-45(C), and consequently the application is time-barred. Summary dismissal is therefore warranted.

In review of the law in this case, this Court finds that *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016) does not create a newly recognized right that would trigger the statute of limitations period under S.C. Code of Laws § 17-27-45(B). Instead, the right to qualified PCR

counsel existed before *Robertson*, by way of its codification in S.C. Code of Laws § 17-27-160(B). While the Court in *Robertson* found the allegation that applicant was denied a state-created right to qualified counsel constituted a "sufficient reason" to permit a successive PCR application under § 17-27-90, the Court further held that applicant's successive application was timely under § 17-27-45(C) because it was filed within one year after discovery of prior PCR counsel's lack of qualifications. *Robertson v. State*, 418 S.C. 505, 516-17, 795 S.E.2d 29, 35 (2016). Therein, the Court made clear that statute of limitations requirements must also be met in order to properly set forth a basis for seeking a successive PCR application.

Though distinguishable, *Robertson* is instructive in this matter. This Court finds that Applicant's second PCR Application, initially filed on November 24, 2014, is not timely. Pursuant to S.C. Code Laws § 17-27-45(C), after discovering that his PCR attorneys were not statutorily qualified to represent him in a capital PCR matter under § 17-27-160(B), Applicant had one year in which to file his successive PCR Application. As was demonstrated in *Robertson*, this would have been an appropriate avenue to seek relief under *Aice v. State,* 305 S.C. 448, 409 S.E.2d 392 (1991). *Robertson,* at 516 and 522, 795 S.E.2d at 37. The record indicates that Applicant became aware of the potential claim at least as early as July 21, 2010. However, Applicant raised the claim in other proceedings, and failed to file a successive PCR application until more than four years after discovery of the claim. For these reasons, Respondent's Motion to Dismiss is granted.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is summarily dismissed with prejudice as time-barred; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete the service of his sentence.

AND IT IS SO ORDERED this 10 day of Jan, 2019.

THE HONORABLE MAITE MURPHY
PRESIDING JUDGE

Florence, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT)	Case No.: 2014-CP-07-2994
)	
Abdiyyah ben Alkebulanyahh, # 6012)	**MOTION TO ALTER OR AMEND JUDGMENT**
aka Tyree Roberts)	
Applicant,)	
vs.)	
State of South Carolina,)	
Respondent.)	

2019 JAN 30 PM 12:51
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Pursuant to Rule 59(e), S.C. R. Civ. P., Applicant, Abdiyyah ben Alkebulanyahh, respectfully moves this Court to alter or amend the judgment contained in the Court's Order of Dismissal filed on January 17, 2019. The motion should be granted because this Court failed to give sufficient legal weight to Applicant's consistent and repeated attempts to raise the issue of his initial PCR counsel's lack of qualifications and thus the judgement should be altered, Applicant's PCR application deemed timely or, alternatively, equitable tolling granted.

This Court erroneously found that *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), requires that an individual challenging the qualification of initial PCR counsel file a successive PCR application within one year of determining initial PCR counsel were unqualified. While that will be the case in the "run of the mill" situation, *Robertson* did not hold (directly or indirectly) that a successive PCR application was the sole method for challenging initial PCR counsel's qualifications. Instead, the *Robertson* Court merely acknowledged that Robertson filed a successive PCR application within one year of discovering initial PCR counsel's lack of qualifications, an acceptable method (as determined, for the first time, by *Robertson*) for challenging PCR counsel's qualifications.

Since *Robertson*, the South Carolina Supreme Court has recognized that initial PCR counsel's lack of qualifications may also be challenged by a motion to remand, the precise

procedural vehicle Applicant's counsel attempted to use in this case. In *Stanko v. State*, No. 2017-000211 (S.C. Dec. 14, 2017), the Court remanded a PCR appellate proceeding to the circuit court, ordering a hearing on the qualifications of counsel based on the appellant's Motion to Remand to Determine Qualification of Counsel Pursuant to S.C. Code § 17-27-160(b).[1] In *Stanko*, PCR appellate counsel discovered evidence that initial PCR counsel were not qualified and filed a motion to remand. In *Stanko*, the appellant did not file a successive PCR application, but was granted a hearing on the qualifications of counsel based on his motion to remand the PCR proceedings filed in the South Carolina Supreme Court.

Applicant sought relief in the same manner as Stanko by filing a Motion to Remand for Additional Post-Conviction Proceedings ("Motion to Remand") based on the fact that "Petitioner's PCR counsel were not qualified to represent Petitioner in a capital post-conviction proceeding pursuant to the requirements of S.C. Code § 17-27-160(B)."[2] Applicant filed his motion to remand on July 21, 2010, less than five months after discovery that his initial PCR counsel were not qualified as a matter of law. The Supreme Court of South Carolina's denial of Applicant's Motion to Remand in 2010 demonstrates, contrary to this Court's Order, that *Robertson* did create a new remedy allowing a PCR applicant to file a new PCR application alleging unqualified PCR counsel within one year of the *Robertson* decision. *See* S.C. Code 17-27-45(B). If *Robertson* were not new, the Supreme Court would have granted Applicant's Motion to Remand before *Robertson* like it granted the petition to remand in *Stanko* under identical circumstances after *Robertson*. Effectively, this Court is penalizing Applicant for being "right too soon." This Court should amend

[1] The order remanding is attached as Exhibit 1. The Motion to Remand is attached as Exhibit 2.

[2] The Motion to Remand in this case was attached as Exhibit A to Applicant's September 12, 2017 Response in Opposition to Motion to Dismiss.

its Order, find that Applicant's PCR application is timely, and order a hearing on the qualifications of initial PCR counsel.

This Court also failed to address Applicant's arguments that the statute of limitations does not apply in instances where the Court has determined a successive PCR application is appropriate. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756-57 (1999) (holding the statute of limitations does not apply when a successive PCR application is permitted simply to allow an applicant one "fair 'bite' at the apple"). In this instance, Applicant was not given one "fair bite at the apple" because his initial PCR proceedings occurred without the assistance of qualified counsel as required by the statute and Applicant should be allowed to proceed with his current successive application regardless of when it was filed.

Finally, this Court did not address Applicant's argument that even if the PCR Application was untimely—given Applicant's diligent attempts to challenge counsel's qualifications—equitable tolling should be granted. *See Moses v. State*, No. 2015-000609, 2017 WL 3496440 (S.C. Aug. 16, 2017) ("[I]f a PCR applicant raises the doctrine of equitable tolling as a defense to the statute of limitations, the judge should make the fact-specific determination of whether equitable tolling is justified); *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (equitable tolling of the PCR limitations period may be applied where "circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence"). It is difficult to envision a clearer case for equitable tolling. In addition to the motion to remand, discussed above, counsel filed both a Petition for Writ of Certiorari and a Petition for Writ of Habeas Corpus in the Supreme Court's original jurisdiction challenging the qualifications of initial PCR counsel within the relevant one year period. On each occasion, Respondent argued (as it turns out incorrectly) that that there was no state court remedy for

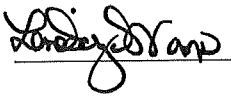
unqualified PCR counsel. Under these circumstances, this court's determination that Applicant is barred from challenging initial PCR counsel's undisputed lack of qualifications is exactly the type of hyper-technical ruling that equitable tolling is intended to prevent. Basic fairness demands that Applicant be able to litigate the issue of counsel's qualifications in light of the fact that he raised the issue in a Motion to Remand over six years prior to *Robertson* and that the Supreme Court approved of that very method for challenging counsel's qualifications in *Stanko* after *Robertson* was decided.

III. CONCLUSION

For all of the reasons stated above and in Applicant's Response in Opposition to Motion to Dismiss, this Court should amend its Order, deny Respondent's Motion to Dismiss, and order a hearing on whether Applicant's initial PCR counsel were qualified pursuant to S.C. Code § 17-27-160(B).

January 28, 2019

Respectfully submitted,



EMILY C. PAAVOLA
LINDSEY S. VANN
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
803-765-1044

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
Abdiyyah ben Alkebulanyahh, # 6012)
aka Tyree Roberts)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case No.: 2014-CP-07-2994

2019 JAN 30 PM 12:52
BEAUFORT COUNTY, S.C.
CLERK OF COURT

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Motion to Alter or Amend Judgment was mailed by first class United State mail, postage prepaid, this 28th day of January, 2019, upon the following:

Melody Brown
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Jill B. Abernethy

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	Civil Action No. 2014-CP-07-02994
	)	
Abdiyyah ben Alkebulanyahh, # 6012 a/k/a Tyree Roberts	)	
	)	
Applicant,	)	**ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND JUDGMENT**
	)	
vs.	)	
	)	
State of South Carolina	)	
	)	
Respondent.	)	

2019 FEB 22 PM 12:47
BEAUFORT CO. CLERK OF COURT

This matter came before the Court on January 31, 2019 upon Applicant's Rule 59(e), SCRCP motion requesting this Court to alter or amend the Court's Order of Dismissal, which was filed on January 17, 2019. Applicant asserts that this motion should be granted because this Court failed to give sufficient legal weight to Applicant's consistent and repeated attempts to raise the issue of his initial PCR counsel's lack of qualifications. Specifically, Applicant asserts that the Court's Order of Dismissal should be altered to reflect either that Applicant's PCR application is timely or, alternatively to grant equitable tolling. For the reasons stated below, Applicant's Motion is Denied, but the Court's January 17, 2019 Order is now amended for the purposes of issuing a ruling on Applicant's argument for equitable tolling.

DISCUSSION

First, Applicant argues that "[t]his Court erroneously found that *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), requires that an individual challenging the qualification of initial PCR counsel file a successive PCR application within one year of determining initial PCR counsel were unqualified." Applicant fails to recognize that provisions the Uniform Post-Conviction Procedure Act, not *Robertson*, set forth this strict time deadline. Specifically, § 17-27-45(C) of the

South Carolina Code provides in pertinent part that "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." (emphasis added). While Applicant made other attempts to raise this issue within one year of discovery, if this Court were to accept his argument, successive PCR applications would always be considered timely so long as the applicant raised the issue in question in *any manner* within one year, in contravention of the clear and unambiguous language of the statute. For these reasons, Applicant's successive PCR application is not timely.

Next, as Applicant correctly stated in his motion, this Court failed to address Applicant's equitable tolling argument but now takes the time to do so. "Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statute of limitations." *Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (2008) (citing *Hooper v. Ebenezer Senior Svcs. And Rehabilitation Ctr.*, 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct. App. 2008). "Equitable tolling is reserved for extraordinary circumstances." *Hooper*, 377 S.C. at 230, 659 S.E.2d at 219. "Equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing depsite his or her diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; or (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim." *Pelzer*, 378 S.C. at 521, 662 S.E.2d at 620-21.

Here, Applicant has not alleged any wrongdoing by the State. Rather, Applicant relies on

his attempts to raise the issue of unqualified in PCR counsel in other forums to demand equitable tolling. However, Applicant did not submit a defective application within the statute of limitations and in fact, did not submit a successive for many years after discovering that initial PCR counsel was unqualified. For these reaons, the Court finds that equitable tolling is not appropriate.

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Alter or Amend is Denied in its entirey.

IT IS SO ORDERED.

Maite' Murphy
The Honorable Maite Murphy

2/19, 2019.

[ELECTRONIC SIGNATURE PAGE TO FOLLOW]

State of South Carolina
The Circuit Court

Maité Murphy
Judge

5200 E. Jim Bilton Boulevard
Post Office Box 802
St. George, SC 29477
Phone: (843) 832-0391
Fax: (843) 832-0392
mmurphyj@sccourts.org

February 19, 2019

Jerri Ann Roseneau
Beaufort County Clerk of Court
Post Office Drawer 1128
Beaufort, SC 29901

Re: *Abdiyyah Ben Alkebulanyahh, # 6012 a/k/a Tyree Roberts v. State of South Carolina*
Case No.: 2014-CP-07-02994

Enclosed for filing is the signed, original Order Denying Applicant's Motion to Alter or Amend Judgment for the above-referenced case. Please let me know if you need anything else.

2019 FEB 22 PM 12:47
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

In the Court of Common Pleas for the
State of South Carolina, County of Dorchester

Case No.: 2014-CP-07-2994

Abdiyyah Ben Alkebulanyahh,
Plaintiff(s),
vs. Transcript of Record
State of South Carolina,
Defendant(s).

November 19, 2018
St. George, South Carolina

BEFORE:
The Honorable Maite Murphy

APPEARANCES

REPRESENTING PLAINTIFF(S):

emily Paavola, Esquire

Lindsey S. Vann, Esquire

Justice 360

900 Elmwood Avenue, Suite 200

Columbia, SC 29201

REPRESENTING DEFENDANT(S):

Melody J. Brown, Esquire

W. Joseph Maye, Esquire

Office of the Attorney General

Post Office Box 11549

Columbia, South Carolina 29211

INDEX

Court's Exhibits: Page:

No. 1 (Waiver of appearance) 4

PROCEEDINGS

THE COURT: Good morning, Counsel.

MR. MAYE: Good morning, Your Honor.

THE COURT: Ready to proceed?

MR. VANN: Yes, Your Honor.

MR. MAYE: We are, Your Honor.

THE COURT: All right. And before we get started, I understand counsel for the defense did file a waiver about your client's presence?

MS. PAAVOLA: Yes, Your Honor, we sent around an email. We also have the original, if you would like to make it a Court's Exhibit.

THE COURT: Sure. That would be great.

(Whereupon, Court's Exhibit No(s). 1 marked for identification and received in evidence.)

THE COURT: All right. You may proceed.

MR. MAYE: Good morning, Your Honor. May it please the Court?

THE COURT: Yes, sir.

MR. MAYE: My name is Joe Maye, to my left is Melody Brown. We're here on behalf of the State of South Carolina. We are here, Your Honor, today for the Respondent's Motion for Summary Judgment in the PCR matter of Abdiyyah Ben Alkebulanyahh, also known as Tyree Roberts vs. the State of South Carolina in the

civil action number 2014-CP-07-2994.

Your Honor, much of the argument today is going to concern the procedural history of this case. But before I get into the really specific details, I want to give the Court just a very broad idea of what's happened from trial to now.

Your Honor, in 2002, Applicant was charged with the murder of Officers Dyke Corson and Dana Tate. He was indicted and tried in Beaufort County for those charges. And he was found guilty on October 20th, 2013 for both murders and sentenced to death on October 22nd. Applicant pursued his direct appeal options after that. And on March, 19th, 2007, his direct appeal concluded and his sentence was considered final when the United States Supreme Court denied certiorari.

Following the direct appeal, Applicant sought a number of different collateral actions. He sought a post-conviction relief action. He sought a PCR appeal of that denial. He sought State habeas relief as well as Federal habeas relief. The Federal habeas matter is currently with the Fourth Circuit and they are holding it in abeyance until the conclusion of this matter.

And the application that we are here today, Your Honor, is the second PCR application for Applicant.

The application, or, at least, for the purposes of the scope of today boils down to a question of whether or not it was filed timely under the statute of limitations.

Now, the substance of the argument is that PCR counsel was not properly qualified under SC code 17-27-160(b). To broad stroke it, basically, requires that PCR counsel have either previous capital murder PCR experience or to be qualified to do a capital murder trial, and in addition, have an additional 12 hours of bar approved either PCR or appellate court capital experience. But for purposes of today, it's strictly a question of dates and whether the application can be considered timely. It's the Respondent's position that it cannot be.

Your Honor, I'm sure you're aware that this case is -- or this motion is going to come down to a discussion of Robertson and Ace and the case law, but it would be putting the cart before the horse to go straight into that. I think it's more pertinent that we discuss the actual statutes that govern the statutory of limitations. And all three can be found under 17-27-45. I've got a copy of that statute, if the Court would like.

THE COURT: Certainly.

MR. MAYE: Thank you so much. And I've got one for y'all.

Your Honor, there's three different subsections under 45. The first is Subsection A, and that is the basic statute of limitations section. And it, basically, says when the conviction becomes final, Applicant has one year in which to file a post-conviction relief action. In this case, the conviction was rendered final March 19th, 2007. And that's the date that the United States Supreme Court denied certiorari. So that's the very first important date in terms of calculating statute of limitations in this matter.

Now, the PCR application that we're here discussing today was not filed until November 24th, 2014, which is a little bit shy of seven years. Now, under the very broad, very generalized statute of limitations, Subsection A, that's well beyond the one year. So, addressing just Subsection A, it's clearly beyond the one year statute of limitations. But the facts of this case requires to, at least, look at Subsections B and Subsection C.

Under Subsection B, Your Honor, it's Respondent's position that this particular subsection just doesn't apply at all. Subsection B requires that an applicant

file a PCR application one year after a change in his rights that were made pursuant to a constitutional right, either, United States Constitution or the State Constitution of South Carolina.

The matter that we're here today on is under state statute, it's 160(b) -- or 17-27-160(b). There's no constitutional rights being changed or added to that would give the Applicant a right to seek a PCR action under Subsection B. It's the Respondent's argument that B just doesn't apply.

However, the meat of this case, and the meat of the discussion today is going to fall under Subsection 45(c). And this serves, Your Honor, as more or less your basic discovery rule type of statute of limitations. It says that when new facts arise that the Applicant did not have access to, they can be brought within one year of discovery or within one year in which those facts could be discovered with reasonable diligence.

Your Honor, after -- when you look at the dates, the question becomes under Subsection 45(c) is when did Applicant know or, at least, should have known that he had a colorable claim for the action that they now bring, which is to say, when did they have an idea that PCR counsel might not have been properly qualified

under 160(b). And the date that we can be most certain that that occurred is July 21st, 2010. And that date signifies the date that Attorney John Blume, who came on to handle the PCR appeal of the first PCR, recognized the claim and sought remand from the Court to tack it onto the procedure that it already just concluded.

So, July 21st, 2010 is that date. The remand was denied. But an additional three and a half, four years went by and there was still no second PCR application. As I've already stated, the second PCR application was filed November 24th, 2014. So, from July 2010 to November 2014 is a degree of time that is double, triple, almost quadruple the amount that is permitted under Subsection C. For that reason, we would argue that it's not timely.

Now, that's where it brings us to the case law. And the case law is certainly worth discussing and the case law supports summary judgment in this matter. Your Honor, the first case is Ace vs. State, and that is 305 S.C. 448, 409 S.E.2d 392. And I've got a copy of that if the Court would like.

THE COURT: Sure.

MR. MAYE: Your Honor, in Ace V. State, there is, basically, three major holdings that have an

application or an influence upon today's considerations. The first is that Ace takes into consideration the statute of 17-27-90, which, basically, says that an Applicant gets one crack at the apple. They can't bring successive applications, those are disfavored. But the Court in Ace made a very specific finding that while it agrees that successive applications are disfavored, it gives room under the phrase sufficient reason for which a successive application might be brought by an Applicant, if the circumstances were to arise that would warrant it. That's basically the window that the Court gave future applicants to say if you give us a reason, you can bring a successive action. Now, we're not going to guarantee that we will give you relief, but that's your vehicle to get a successive PCR application.

In addition to ruling that, they did say that an ineffective assistance of counsel claim based on the -- or excuse me, ineffective assistance of PCR counsel is not per se a sufficient reason for a successive PCR application.

And then the last part of that ruling, and, also, very influential for considerations in this case is that the Court in Ace squared its ruling with that of Austin. And Austin, basically, guaranteeing that a PCR

Applicant is given the right to directly appeal a PCR denial. The Court in Ace said that under statute, 17-27-100, an Applicant is guaranteed the right to seek PCR appeal when that right was not given to Mr. Austin. He was denied his right -- his bite at the apple and therefore, they allowed a successive application in which to claim PCR counsel was not properly acting when he did not secure a PCR appeal.

Your Honor, that, under Ace, is the mechanism for which Applicant in this case should have sought relief. As soon as they recognized that they have a claim or, at least, a colorable claim that PCR counsel was not properly qualified under South Carolina statute, just as was the case in Austin, they should file a successive PCR application under 45(c) saying we discovered this on this date, we are filing it within one year. We are giving this to the Court for consideration under the premise that Ace set forth, that it is a sufficient reason for why successive application should be allowed. But they did not do so. And they did not do so by quite a large margin. For that reason, again, the case law suggests that this would not be timely.

Now, the case law gets a little bit further in when we consider Robertson, which was decided in 2016.

But Robertson is just as much a reason to rule in favor of the State as it is substantively relevant and similar to the case at hand.

In Robertson, just as today, counsel raised the claim that his PCR counsel was not properly qualified under 160(b). And the Court agreed and found that under Ace, that was a sufficient reason to grant the successive application. But what the Court in Robinson also did is that they specifically ruled that that successive application had been filed timely pursuant to Subsection 45(c). New counsel discovered that the PCR attorneys were not properly qualified and within one year, he raised that claim and the Robertson court found it timely.

That is where these two cases are distinguishable. They filed timely. Applicant in this case did not. And we argue that under Robertson and under Ace, neither case supports excusing the failure to file a timely successive PCR application to give the Court an opportunity to hear the arguments.

And Your Honor, just to kind of give you a little bit more procedural history, following the July 21st, 2010 remand where counsel sought to add this claim to an already decided PCR action, the remand was denied on October 20th, 2010, which means that counsel still had

nine months in which to seek a successive PCR application, but instead of doing so, they sought other collateral actions. They sought the State and Federal habeas claim, which was on February 18th, 2011. And both the PCR appeal and State habeas claims were denied on February 22nd, 2013. The remittitur for that action was issued on March 28th, 2013. And then, at that point, counsel sought Federal habeas relief on February 13th, 2014. And Your Honor, with that, the State argues that it's not timely.

THE COURT: Thank you, counsel.

MS. VANN: Good morning. May it please the Court?

THE COURT: Yes, ma'am.

MS. VANN: I'm Lindsay Vann and this is Emily Paavola over here on behalf of the Applicant.

Applicant timely filed his PCR application alleging that his initial PCR counsel failed to meet the statutory qualification requirements by filing his successive PCR application at -- once -- I'm sorry, before there was even a remedy recognized under Robertson. And because the application was timely, this Court should deny the Motion to Dismiss.

Prior to Robertson, which was decided in 2016, there was no remedy for the lack of qualification of initial PCR counsel. Nevertheless, two years before

Robertson was even decided, he filed a post-conviction relief application alleging that his PCR counsel were unqualified.

Additionally, contrary to Respondent's arguments, Applicant has diligently pursued the fact that his initial PCR counsel were not qualified ever since determining that they were not qualified and did so by filing three pleadings with the Supreme Court of South Carolina within a year of discovery that PCR counsel were likely not qualified.

The first of those pleadings was a motion to remand for additional PCR proceedings. That was filed five months after John Blume was appointed in the South Carolina Supreme Court and he had information that counsel were not qualified. He requested additional hearings with the PCR court to determine the qualifications of counsel and to have PCR proceedings with the qualification of counsel.

In another case, where something similar happened, the Stevens Sanko capital post-conviction case, his initial PCR counsel were not qualified. He had new counsel appointed to the appeal. And during the process of the appeal, it was determined that PCR -- initial PCR counsel were not qualified under the statutory requirements.

Mr. Sanko filed a motion to remand for additional PCR proceedings, just like Mr. Alkebulanyahh did in his proceedings in 2010, but because Mr. Sanko filed his after the Robertson decision determined that there was a remedy, he was granted another -- he was granted a remand and is currently undergoing proceedings to determine whether he was prejudiced by counsel's lack of qualification. This was within -- so Mr. Alkebulanyahh did exactly what Mr. Sanko did, but because he filed it before Robertson decided that there was a remedy, he was denied relief in the Supreme Court.

Nevertheless, Mr. Alkebulanyahh also filed a petition for writ of certiorari in the South Carolina Supreme Court where he argued that his initial PCR counsel were not qualified under the statute. Respondent argued that the lack of qualification of counsel was not sufficient to require a second PCR and then, Mr. Alkebulanyahh also filed a petition for writ of certiorari in the original jurisdiction of the Supreme Court. This was also within a year of discovering that his PCR counsel were not qualified. The State in that case argued that the habeas petition was premature and the South Carolina Supreme Court summarily denied all of his requests for further

proceedings based on lack off qualification of counsel.

Nevertheless, Applicant then sought relief in the habeas proceedings. He, again, raised the issue of the fact that he did not have qualified counsel in his initial post-conviction relief hearings. And while Robertson was pending, while the Supreme Court was considering whether there was a remedy for lack of qualified counsel, Mr. Alkebulanyahh filed a successive post-conviction relief application.

And so we submit that Mr. Alkebulanyahh's successive PCR application is timely because he has consistently and diligently pursued a remedy for the lack of qualification ever since it was determined that his counsel were not qualified.

However, there are other contexts where the Supreme Court has found that the statute of limitations doesn't even apply where you are allowed to have a successive PCR application. In Odom vs. State, the Supreme Court held that the statute of limitations did not apply where a successive PCR application was permitted to allow applicant one fair bite at the apple. Applicant in this case did not have a fair bite at the apple because he did not have qualified PCR counsel representing him at his original PCR hearing. And so, we submit that this case is like Odom and the

statute of limitations doesn't even apply.

Robertson is not contrary to this. Robertson simply noted -- the decision in Robertson simply noted that the Applicant in that case had filed within a year of the statute -- or a year of the discovery of the evidence of lack of qualifications. That was not an explicit holding that the statute of limitations did apply, or that it had to fall within that year.

But even if this Court finds that the statute of limitations does apply and that Applicant did not comply with the statute of limitations, this Court has equitable discretion to toll the statute of limitations. Under Ferguson vs. State, the Supreme Court has said that the PCR limitations period may be equitably tolled where circumstances preventing Petitioner from making a timely filing were both beyond the Petitioner's control and were unavoidable despite due diligence. Both of those are satisfied in this case. It was beyond Petitioner's control that there was no remedy for the lack of PCR counsel's qualifications until the Robertson decision was issued. And Applicant diligently pursued his relief despite being repeatedly -- repeated arguments by the State that there was no remedy for the lack of qualifications and decisions from the Supreme Court that seemed to

show the same.

So, for those reasons, we believe that Applicant timely filed his successive post-conviction relief application, or that this Court should equitably toll the statute of limitations and should hold a hearing on whether counsel were qualified.

THE COURT: Counsel, any reply?

MR. MAYE: Yes, Your Honor. Just briefly, Your Honor, Applicant has asserted that there wasn't a remedy available until Robertson, but that's not entirely accurate. Robertson decided that, yes, PCR qualifications satisfies Ace and is a sufficient reason to grant successive application, but Ace is the actual remedy that would be available. Ace is the case law that gives the window in which to seek the successive application. If you go before -- before Robertson came out, if you went before a PCR court, filed a second PCR application and argued this is a sufficient reason under Ace, the Court could say, I agree with you and grant successive application. They failed to do that timely.

Now, it bears mentioning that they did ultimately do exactly that before Robertson came out. The second PCR application was filed November 24th, 2014, which was a solid year and a half, two years before Robertson

was actually decided. So, they sought the proper remedy under Ace, they just didn't do so timely.

Applicant did seek to raise this claim in other avenues, they did seek to make it a remand where they would be adding a new claim onto an old PCR application that had already been decided, that was denied. But that does not prevent them from seeking a successive PCR application after being denied remand. They would still be able to do so. The same holds true for the State habeas and Federal habeas. None of those actions preclude the filing of the second PCR application on newly discovered grounds on 45(c).

Addressing Odom, Your Honor, Odom and -- Odom addresses the right to direct appeal -- excuse me, to PCR appeal in guaranteeing that an Applicant has that right and it's ensuring they're not denied a bite at the apple. But in this case, it's not the Applicant was denied a bite of the apple, they had a chance to seek that bite of the apple, they just failed to timely seek it. If they had filed a successive PCR application, just like Robertson did, they would have had a chance to make their case that PCR qualification is a reason to give them a new PCR application, but they didn't do so timely. And that's what this really comes down to, is they had the vehicle and the case law

to say we deserve a successive PCR application, but they didn't seek it.

And to just address quickly the argument for equitable tolling. Your Honor, there's only been three circumstances in which equitable tolling has been deemed proper and it is consistently referred to as an extraordinary power of the Court that should be exercised very cautiously.

The only one -- none of the three reasons apply, but the first reason is stated that extraordinary circumstances prevented plaintiff from filing. That has nothing to do with whether there is a case that has already been decided that guarantees that a remedy will be provided, simply that were you physically able of drafting and filing the application. And there's nothing in this case that kept counsel from filing the successive application.

And the other two arguments for equitable tolling, that Plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period, they certainly could have filed it and it not be defective.

And the third being, despite due diligence, Applicant would have been unable to obtain vital information. There's nothing preventing an application

based on what they know under 160(b) to be filed.

So it's the Respondent's position that equitable tolling isn't proper here.

THE COURT: Thank you, Counsel. I'll take the matter under advisement and get you an opinion.

MR. MAYE: Thank you, Your Honor.

THE COURT: Y'all have a good day.

(Whereupon, the hearing concluded.)

CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF BEAUFORT:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 14th day of January, 2019.

Mona L. Manley /s/

MONA L. MANLEY
Official South Carolina Court Reporter
Circuit Reporter for the 14th Circuit
(850) 893-6662
mmanley@sccourts.org

RECEIVED

JUL 21 2010

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

MOTION TO REMAND FOR ADDITIONAL POST-CONVICTION PROCEEDINGS

I. INTRODUCTION.

Petitioner, through undersigned counsel, hereby files this motion to remand the case to the circuit court for additional post-conviction proceedings. In support of the motion, petitioner apprizes this Court of the following facts and legal principles.

II. PROCEDURAL HISTORY.

A. Pre-trial and Trial Proceedings.

Petitioner was charged with two counts of murder and other offenses arising from the death of two Beaufort County Sheriff's deputies. Prior to trial, petitioner filed a motion to proceed *pro se*.

Petitioner's stated reason for wanting to dismiss his counsel was his belief that both of his court appointed attorneys, Gerald Kelly and Sean Thornton, were actively involved in a conspiracy with the prosecution to insure that he was found guilty and sentenced to death. Tr. 3986.[1] Despite testimony from a respected forensic psychiatrist--Dr. Donna Schwartz Watts--that petitioner suffered from bi-polar disorder with psychosis and paranoia and was not competent to stand trial, the trial judge, the Honorable Daniel Pieper, relying on the Department of Mental Health (DMH) examiner's conclusion that petitioner was competent, granted petitioner's motion to dismiss his counsel and permitted petitioner to discharge counsel and proceed *pro se*. Tr. 4071.[2]

Petitioner's defense at the guilt-or-innocence phase of the trial was based largely on his own rambling, tangential and paranoid testimony. The "gist" of the defense was that law enforcement and the solicitor's office conspired to obtain his conviction based upon false testimony and planted evidence. Not surprisingly, petitioner was found guilty of the charged offenses on October 21, 2003.

Prior to the commencement of the sentencing phase of his capital trial, petitioner informed the trial judge that he did not wish to participate in or attend the sentencing hearing. Petitioner offered no coherent explanation for wishing to absent himself from the proceedings other than he did not think the sentencing phase would "do anything for me to no extent" and that he was not concerned with the outcome. Tr. 3450. Petitioner stated he did not wish to attend:

---

[1]*See also* Tr. 3889 (Petitioner objected to counsel speaking at a pre-trial hearing saying "I am without representation. They are sabotaging my case"). At another pretrial hearing, petitioner stated: "And this late in the stage where I have made openings to the court that the attorneys was sabotaging my case and doing things that were detriment to my defense; that they still continue on to exercise the powers attorney in filing motions and speaking with the prosecutor and speaking with this court under the impression of being in my defense when actually they are not." Tr. 3910.

[2]The trial court designated Mr. Kelly and Mr. Thornton "standby counsel." Tr. 4071.

> Because I – at this – there is nothing that – it has nothing to do with me. It has nothing that – you know, I'm not concerned about it. I don't care about it. It has nothing to do with me. It don't – it won't move me or shake me no matter which way it goes, one way or the other, what is said or done, so.

Tr. 3486.

The trial judge tried to reason with petitioner to no avail. Then, weighing and rejecting various options including terminating petitioner's *pro se* status and re-appointing standby counsel to take over the penalty phase (tr. 3488-3508), the judge concluded that petitioner would a) remain as his own counsel and b) remain in the courtroom for sentencing. Tr. 3504. The trial judge did not, however, seek or obtain any expert opinion or insight into whether petitioner was – at that point in the proceedings – competent to stand trial or to completely waive the presentation of mitigation.

Petitioner informed the court that he would be disruptive if he was required to remain in the courtroom. The trial judge took a "wait and see" approach. When the prosecution called its first witness, petitioner stood up and, in the presence of the jury, said: "Blessed be the Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." Tr. 3550. The trial judge briefly attempted to "plow ahead," but petitioner repeated the above refrain when the next question was asked. The trial judge removed the defendant from the courtroom, sent the jury to the jury room, and brought the defendant back into the courtroom where petitioner informed the court that he would continue to be disruptive because he "did not wish to engage in the proceedings." Tr. 3552. The court told petitioner that he had to attend the sentencing proceeding, and that if he continued to be disruptive he would put petitioner in a room in the back of the courtroom where he could see and hear the proceedings.

When proceedings commenced, both petitioner and the trial judge were true to their word. When the prosecution again sought to elicit testimony from its first witness, petitioner stood up and again said: "Blessed by Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." Tr. 3556. The trial judge ordered that petitioner be placed in the "room at the back of the courtroom that has a glass partition to allow him to hear all the proceedings. . . and see the proceedings as he desires." Tr. 3556. The court also ordered that petitioner be shackled and said he would gag petitioner if he had another outburst. Tr. 3557. Standby counsel were ordered to resume representation to a limited extent including assuming the responsibility to lodge objections to inadmissible evidence. Petitioner, however, was allowed to control the defense presentation, or non-presentation as it turned out, of evidence.

The penalty phase proceeded and no mitigating or other evidence was presented by the defense. After closing arguments, the jury sentenced petitioner to death.

B. Appellate and Post-Conviction Proceedings.

On direct appeal, petitioner was represented by Joseph Savitz and Robert Dudek of the Office of Appellate Defense. Petitioner moved to represent himself on direct appeal, alleging that the Warden of Leiber Correctional Institution and his appellate counsel were conspiring to deny him access to the courts. *State v. Roberts*, 614 S.E.2d 626, 627 (S.C. 2005). This Court denied the motion. *Id.* at 628. Appellate counsel raised a single issue on appeal, i.e., whether it was error for the trial judge to require petitioner to be present at the penalty phase of the proceedings. This Court affirmed on July 24, 2006. *State v. Roberts*, 632 S.E.2d 871 (S.C. 2007).

Petitioner filed a *pro se* application for post-conviction relief which contained a number of search and seizure and speedy trial issues. His continued belief that his arrest, trial, conviction death

sentence, continued incarceration the present conditions of his confinement were and are part of a vast and growing conspiracy is evident in the PCR application and in documents he has continued to file.[3] Glenn Waters and Carl Grant were appointed by Judge Roger Young to represent petitioner in connection with his post-conviction proceedings. The transcript of the appointment hearing does not indicate that either attorney had ever been involved in a capital post-conviction case in state or federal court, or that they had attended any appropriate CLE programs as defined in S.C. Code § 17-27-160(B).[4] They filed an amended application raising a single claim for relief. The issue asserted in the amended application was that the "trial judge failed to make the proper findings to determine if the applicant knowingly and intelligently understood the implications of proceeding *pro se*." *See* Amended Application for Post-Conviction Relief (filed February 6th 2008).

The post-conviction relief hearing, conducted before Judge Young on October 13-14, 2008, consisted primarily of counsel calling petitioner to the stand to state (in detail) his grievances with trial and appellate counsel. Undersigned counsel's review of the files provided to him by prior counsel does not reveal that petitioner's court appointed post-conviction counsel: a) conducted any independent investigation; b) secured any expert assistance; or, c) had petitioner evaluated by a psychiatrist or psychologist to determine i) whether he was competent to proceed in post-conviction

---

[3]On April 7, 2010, this Court entered an order that clerks of court in South Carolina should no longer accept filings by petitioner unless submitted by an attorney and the filing fee was paid. The Court found the order was necessary due to the "frivolous, repetitive and abusive nature of petitioner's filings."

[4]A transcript of the appointment hearing is attached to this motion as Appendix A. Undersigned counsel also contacted both Mr. Walters and Mr. Grant and confirmed that they were not aware of the additional requirements for appointment of counsel in a capital post-conviction case set out in §17-27-160(B), and that they did not meet the requirements of the relevant statutory provision.

relief proceedings or ii) to do a retrospective assessment of petitioner's competency at the sentencing phase of the proceedings.[5] On September 17, 2009, Judge Carmen Mullen[6] signed verbatim the state's order denying post-conviction relief.

A timely notice of appeal was filed. On January 8, 2010, this Court appointed Glenn Walters to represent petitioner on appeal from the denial of post-conviction relief, finding that the Office of Appellate Defense had a conflict of interest. Mr. Walters subsequently moved to be relieved alleging that petitioner made a verbal threat to harm Mr. Walters and his family. Petitioner also requested that this Court appoint Emily Paavola or John Blume to represent him. On March 5, 2010, this Court relieved Mr. Walters and appointed undersigned counsel to represent petitioner in connection with this appeal.[7]

---

[5]As Mr. Alkebulanyahh is indigent, Undersigned counsel contacted the South Carolina Office of Indigent Defense and confirmed that no funds were expended for investigative and expert services in the post-conviction proceedings. Nor did Mr. Walters or Mr. Grant submit a voucher for attorney's fees. Undersigned counsel is not aware of any other capital post-conviction case in South Carolina since §17-27-140 was enacted where no funds were awarded or spent for investigative and expert services in a capital post-conviction proceeding.

[6]As previously stated, the Honorable Roger Young appointed counsel and presided over the post-conviction relief hearing. For reasons which are not clear from the record, the Office of Court Administration reassigned the case to Judge Carmen Mullen on December 17, 2008, after the PCR hearing was completed. Judge Mullen signed the order denying post-conviction relief. Despite the fact that Judge Mullen did not preside over the post-conviction relief hearing, the order contains a number of credibility findings. Undersigned counsel is not aware of any other capital post-conviction case in this state that was reassigned to a different judge after the post-conviction relief hearing was conducted and prior to an order being filed. The record also does indicate that any post-hearing briefs were filed by either side.

[7]Undersigned counsel was not aware that petitioner had filed a motion requesting that new counsel be appointed or that petitioner had requested that undersigned counsel in particular be appointed. Undersigned counsel had not talked to or corresponded with petitioner at any point during his direct appeal or during the post-conviction proceedings.

III. REASONS REMAND IS APPROPRIATE.

A. Potentially Meritorious Claims For Post-Conviction Relief Were Not Raised Below.

As will be set forth below, there were a number of viable issues which could have – and should have – been raised as grounds for post-conviction relief. However, due to their lack of experience in death penalty litigation in general, and capital post-conviction litigation in particular, petitioner's prior post-conviction counsel failed to identify and raise potentially meritorious post-conviction claims. While current counsel has not conducted a new post-conviction investigation, his review of the trial record has identified, *inter alia*, the following issues which were not included in the amended application for post-conviction relief:

1) Petitioner was not competent to stand trial during the sentencing phase of the proceedings and thus his sentence of death violates the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution as well as the corresponding provisions of the South Carolina Constitution. *Dusky v. United States*, 362 U.S. 401 (1960).[8]

2) The trial judge failed to fulfill his obligation, required by the Due Process Clause of the Fourteenth Amendment and the corresponding provision of the South Carolina

---

[8]Given the current procedural posture of the case, undersigned counsel does not have access to funds for investigative and expert services. However, counsel has met with petitioner on several occasions since his appointment and has consulted with a forensic psychiatrist, Dr. Rikki Lynn Halavonich, who agreed to meet with petitioner and counsel and to review selected portions of the trial record, particularly petitioner's trial testimony and the portions of the trial where defendant asks to not be present at sentencing and his outbursts. While Dr. Halavonich (understandably) indicated she would need to review additional material and interview petitioner and possibly other witnesses, she did inform counsel that there was a significant likelihood that petitioner's mental state had so deteriorated by this point in the proceedings that he was no longer competent to stand trial. Questions also exist as to petitioner's current competency to proceed. An affidavit summarizing Dr. Halavonich's initial impressions are attached to this motion as Appendix B.

Constitution, to make an adequate inquiry into petitioner's competency to stand trial when petitioner began to act in a bizarre and irrational manner prior to and during the sentencing phase of the trial. *Drope v. Missouri*, 420 U.S. 162 (1975) (trial judge's failure to suspend the proceedings and have the defendant evaluated for competency violated due process when there was evidence suggesting the defendants's mental condition had deteriorated).

3) The trial judge deprived petitioner of a fundamentally fair sentencing hearing in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution by failing to terminate petitioner's *pro se* status at the sentencing phase of the trial and appoint standby counsel to represent petitioner and present available mitigating evidence. *See Faretta v. California*, 422 U.S. 806 (1975) (*Pro se* status can be terminated if defendant is disruptive); *Indiana v. Edwards*, 544 U.S. 208 (2008) (trial judge does not have to allow competent but mentally ill defendant to proceed pro se).

4) The trial judge violated petitioner's right to a fundamentally fair sentencing proceeding guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution by shackling petitioner in the presence of the jury during the sentencing phase of the trial. *See Deck v. Missouri*, 544 U.S. 622 (2005) (shacking the defendant in the presence of the jury deprived the defendant of a reliable determination as to whether the death penalty was the appropriate punishment).

5) Petitioner was deprived of a fair and reliable determination of whether the death penalty was the appropriate punishment, guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, due to: a) the admission of excessive and inflammatory victim impact evidence;[9] and, b) the admission of evidence and argument regarding the conditions of confinement in general population. [10] *See Payne*

---

[9]Numerous victim impact witnesses testified extensively without objection during the penalty phase. This included the testimony of co-workers, friends, and family members. Witnesses described, among other things: a) a memorial service in a school auditorium in Ohio purportedly attended by hundreds of individuals (tr. 3698); b) the numerous police officers who attended the funeral (tr. 3705); and c) the military service of the victims (tr. 3718022). Additionally, the victim's family members were all asked to address the jury directly, some of the comments included

> I want to thank you guys for making the choice you made [finding the defendant guilty]. I know it was hard, and I'm proud of you. And I know A.J. [one of the victims] is very, very proud of you. You did the right thing. I just want to thank you.

Tr. 3714. The personal expression of thanks to the jurors for finding the defendant guilty was repeated by other victim impact witnesses. *See, e.g.*, Tr. 3708; 3724.

[10]The prosecution called James Sligh, a classifications officer for the South Carolina Department of Corrections, who described a "typical day in general population" that detailed an inmate's ability to move around the prison, participate in recreation activities, buy food items of the canteen, etc. Tr. 3636 et seq. During summation, the prosecution made the following statements:

> And let's think a minute about what general population in the Department of Corrections is like, because you heard evidence about that, too. They get up in the morning, they're fed, they get recreation time.
>
> They're contained. They have to stay inside, but they have keys to their cells. They get to visit with family 7 and 8 times a month. How much visiting with family do you think Dana Tate and Dyke Coursen are going to do?
>
> General population. Sounds an awful lot like military school.

Tr. 3794. *See State v. Bowman*, 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005) ("how inmates, other than the defendant at trial, are treated in prison . . . is inappropriate evidence in the penalty phase of a capital trial"); *State v. Burkhart*, 371 S.C. 482, 488-89, 640 S.E.2d 450, 453 (2007)

v. Tennessee, 467 U.S. 1025 (1993) (permitting only a "brief glimpse" of the life of the victim); *Darden v. Wainwright*, 477 U.S. 168 (1985) (recognizing that inflammatory comments at the sentencing phase can deprive the defendant of fair sentencing proceeding).

6) Petitioner was denied his right to the effective assistance of counsel at the sentencing phase of the trial guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provision of the South Carolina Constitution when standby counsel, who were ordered to object to any inadmissible evidence or argument, failed to object to a) excessive and inflammatory victim impact evidence and b) improper and inflammatory closing argument. *See, e.g., Hall v. Catoe*, 601 S.E.2d 335 (S.C. 2004) (counsel found ineffective for failing to object to improper victim impact argument).

7) Petitioner was denied his right to the effective assistance of counsel on direct appeal, guaranteed by the Due Process Clause of the Fourteenth Amendment and the corresponding provision of the South Carolina Constitution, due to appellate counsel's failure to raise, *inter alia*, the following issues on direct appeal: a) the trial judge failed to conduct a competency hearing at sentencing; b) the trial judge failed to terminate petitioner's *pro se* status and appoint standby counsel; c) the prosecution exercised its peremptory strike in a racially discriminatory manner d) the trial judge erroneously excluded evidence of third party guilt; and, e) a statement made by

---

(holding the prosecution's "evidence regarding general prison conditions . . . . injected an arbitrary factor into the jury's sentencing considerations," and that the resulting death sentence could not be sustained under S.C. Code Ann. § 16-3-25(C)(1) (2003)).

petitioner was obtained in violation of *Miranda*.[11] *See Southerland v. State*, 524 S.E.2d 833 (S.C. 2002) (Appellate counsel found ineffective for failing to raise meritorious issues on appeal.

B. Petitioner's PCR Counsel Were Not Qualified To Represent Petitioner in a Capital Post-Conviction Proceeding Pursuant to the Requirements of S.C. Code §17-27-160(B).

The South Carolina legislature established standards for the appointment of counsel in capital post-conviction cases. The standards are codified in S.C. Code §17-27-160(B) and require that at least one of the two attorneys appointed must,

(1) Have previously represented a death sentenced inmate in state or federal post-conviction relief proceedings; OR

(2) meet the minimum qualifications set forth in S.C. Code §16-3-26(B)[12] & (F)[13] AND have successfully completed within the previous two years not less than twelve hours of approved CLE training "involving advocacy in the field of capital appellate and/or post-conviction defense."[14]

---

[11]These issues were raised substantively in the petitioner's *pro se* application for post-conviction relief, i.e., petitioner alleged that his conviction should be vacated due to the state's discriminatory use of its peremptory challenges and the exclusion of third party guilt evidence. The PCR court, however, found the claims to be procedurally barred because the issues could have been but were not raised on direct appeal. Order at 42, 48, 51

[12]Section 16-3-26(B) requires that counsel have been admitted to the bar for at least five years and have three years felony trial experience. Petitioner does not dispute that Mr. Walters and Mr. Grant had the requisite experience to meet the requirements of §16-3-26(B).

[13]Section 16-3-26(F) requires that counsel meet any other guidelines for the appointment of counsel promulgated by this Court.

[14]The statute provides:

If the applicant is indigent and desires representation by counsel, two

Neither of petitioner's court appointed counsel satisfied the statutory requirements for appointment in a capital post-conviction case. The statutory language is clear and unambiguous. It is also makes perfect sense. There are several reasons why the legislature would enact a different, and more stringent, standard for appointment of counsel in capital post-conviction cases than for appointment at the trial level. First, post-conviction litigation is an unusual combination of trial and appellate practice. Thus, persons competent to represent a death sentenced inmate at trial due to their extensive trial experience as reflected in §16-3-26(B), do not necessarily have the requisite skills to represent an individual in a capital post-conviction proceeding. *See* AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN CAPITAL CASES (2003) Guideline 1.1 (commentary) ("Post-conviction proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. . . . . For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers."). Second, at trial, the defendant has a Sixth Amendment right to counsel, and thus a Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). Thus, if trial counsel performs incompetently and the incompetence contributes to the conviction or death verdict,

---

> counsel shall be immediately appointed to represent the petitioner in this action. At least one of the attorneys appointed to represent the applicant must have previously represented a death sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

the defendant has a remedy. *See, e.g., Rosemond v. Catoe*, 680 S.E. 2d 6 (S.C. 2009) (finding counsel to have rendered ineffective assistance of counsel in a capital case for several different deficiences). However, in post-conviction proceedings, there is no currently recognized constitutional right to counsel, *see, e.g., Murray v. Giarratano*, 492 U.S. 1 (1989), and thus there is no clear remedy for substandard representation. *Cf. Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991) (finding second post-conviction petition barred as successive and appearing to reject ineffective assistance of post-conviction counsel as a "sufficient reason" for failing to raise issues in the first application); *Washington v. State*, 478 S.E. 2d 833, 835 (S.C. 1996) (allowing second post-conviction application to proceed due to "many procedural irregularities" in the first post-conviction proceedings). Therefore, because petitioner's court appointed counsel did not meet the standards for appointment of counsel contained in S.C. Code§17-27-160(B), petitioner's case should be remanded to the circuit court for the appointment of qualified counsel and for additional post-conviction proceedings. There is no other remedy that would not effectively render the statutory qualifications a nullity.

Furthermore, counsel's inexperience is evident from a review of the post-conviction record. As set forth above, undersigned counsel's review of the post-conviction file does not indicate that petitioner's post-conviction counsel conducted any investigation or secured any assistance from investigators or expert witnesses. While counsel did file an amended application for post-conviction relief, it raised only one claim. The bulk of the post-conviction relief hearing consisted of petitioner's testimony expressing his dissatisfaction with trial counsel. As petitioner has demonstrated, there were a number of other potentially viable claims evident from the record which could and should have been raised on petitioner's behalf. An adequate investigation will likely

almost certainly uncover other viable claims for post-conviction relief.

The American Bar Association Guidelines, referenced above, have been cited with approval by the Supreme Court of the United States on several different occasions, *see, e.g., Rompilla v. Beard*, 545 U.S. 374, (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003), as well as by this Court, *see Council v. State*, 670 S.E. 2d 356, 363 (S.C. 2008); *Ard v. Catoe*, 642 S.E.2d 590, 597 (S.C. 2007), and are applicable to trial, appellate and post-conviction counsel. Guidelines 10.15.1 (C) and (E), which outline the responsibilities of post-conviction counsel, explicitly state that:

> C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.
>
> E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:
>
> 1. maintain close contact with the client regarding litigation developments; and
> 2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;
> 3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and
> 4. continue an aggressive investigation of all aspects of the case.[15]

Thus, in petitioner's case, the appointment of counsel who did not meet the criteria established by the General Assembly worked to petitioner's clear detriment, and for this additional reason, the case should be remanded to the circuit court for the appointment of qualified counsel and additional post-conviction proceedings.

---

[15]The commentary to the guideline states that "collateral counsel cannot rely on the previously compiled record but must conduct a thorough independent investigation. . . .").

IV. CONCLUSION.

For the reasons stated above, petitioner's case should be remanded to the Beaufort Court of Common Pleas for additional post-conviction proceedings including: a) the appointment of counsel who meet the requirements set forth in S.C. Code §17-27-160(B); b) access to funds for investigative and access services to develop and present all viable claims for post-conviction relief; and, c) a new PCR hearing.

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

July 21, 2010

Appendix A

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

ABDIYYAH ALKEBULANYAHH A/K/A TYREE ROBERTS,
APPLICANT,
V.
STATE

TRANSCRIPT OF RECORD
07-CP-07-715

AUGUST 8, 2007
COLUMBIA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ROGER M. YOUNG, JUDGE.

A P P E A R A N C E S:

GLENN WALTERS, ESQUIRE
CARL B. GRANT, ESQUIRE
ATTORNEYS FOR THE APPLICANT

SAMUEL CREIGHTON WATERS, ASSIST. ATTORNEY GENERAL
ATTORNEY FOR THE STATE

STACY L. SHEPPARD, RPR
CIRCUIT COURT REPORTER

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS

(There were no witnesses.)

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.

(There were no exhibits.)

(The following proceedings were held on August 8, 2007.)

THE COURT: All right. This is the State of South Carolina -- it's actually Tyree Alphonso Roberts also known as Abdiyyah Alkebulanyahh versus State of South Carolina. It's a post-conviction relief matter.

Let the record reflect Mr. Alkebulanyahh is present in the courtroom. And I know I told you at the last hearing, Mr. Alkebulanyahh, I probably am going to mispronounce your name, but do I have it right this time?

MR. ALKEBULANYAHH: Yes, sir.

THE COURT: Okay. Thank you.

All right. The last hearing we had was to establish whether or not you wanted to represent yourself in your post-conviction relief hearing or whether or not you wished to have counsel appointed. And you indicated to me that you wished to have counsel appointed.

And, at that time, you had the opportunity to talk to Mr. Walters, who is sitting beside you, Glenn Walters. And I believe after discussion with him, you indicated to the Court that you would be glad to have him appointed to represent you.

And I told you in a death penalty post-conviction relief, you're entitled to two lawyers and that Mr. Walters was going to take the initiative to find somebody that he had worked with in the past on death penalty cases and see if that person would be willing to work with you on this as well and that's Mr. Carl Grant, who's also present and sitting with you.

Now, I wanted to then have this hearing today to again make sure that you are okay with the appointment of Mr. Grant as your lawyer as well. And then I have to conduct a hearing to make certain that they are, what we call, death penalty qualified. There's certain minimum qualifications. And both of these gentlemen are well more than minimally qualified to handle such a case, but we do have to just kind of do this as a formality.

And then we'll set a status conference where we'll actually, we have talked about this, what we will then do is set up a timeframe for when they will get the transcripts and when responsive pleadings will be required. And then, at some point in time, we will conduct a hearing.

So you have had the opportunity to meet with Mr. Grant as well?

MR. ALKEBULANYAHH: Yes, sir, I have.

THE COURT: And what are your desires with regards to Mr. Grant representing you?

MR. ALKEBULANYAHH: I would like to have Mr. Grant represent me along with Mr. Walters, yes, sir.

THE COURT: Very well. So you would like Mr. Walters and Mr. Grant to both be appointed as your counsel in this?

MR. ALKEBULANYAHH: I do, sir.

THE COURT: All right. Very well.

Okay. Mr. Walters and Mr. Grant -- Mr. Walters, give me a little bit of your background for the record, please.

MR. WALTERS: My full name is Glenn Walters. I'm a graduate of South Carolina State University, graduated from there in 1986. I graduated from the University of Virginia School of Law in 1989.

I've been practicing law in the State of South Carolina probably about 17 years. I started off as -- with the law firm of Johnson, Toal and Battiste. I later -- my law school had a loan forgiveness program if I worked for indigent people, so I became a public defender here in Richland County. I worked for the public defender's office here in Richland

County for a little over a year and a half.

I left this office, I then went to Orangeburg County, practiced as a public defender there for probably about a year and a half. I then went into private practice.

In the private practice, we continued to handle extensive criminal cases, as a general practice, handling criminal, bankruptcy, real estate, probate, personal injury and things of that nature. As far as the specifics with regards to criminal representation, we've represented from magistrate's court to federal court, all aspects of different types of cases.

With regards to death penalty cases, Mr. Grant and I tried Alfred Walker, the State versus Alfred Walker, and that was in Barnwell several years ago. And recently we were appointed as counsel to represent Mr. Mikal Mahdi and that case was tried in Calhoun County, both death penalty cases.

In this particular case, we'd be glad to represent the defendant. And as far as our criminal background, it's been 17 years of extensive criminal work, murder, armed robbery, death penalty, every aspect of criminal law and, of course, in every court in the State of South Carolina from the

federal courts to state courts and things of that nature.

THE COURT: You have been death penalty qualified in death penalty cases before?

MR. WALTERS: Yes, sir.

THE COURT: First chair, second chair or both?

MR. WALTERS: The first case, I was second chair. The second case, I was first chair.

THE COURT: That would certainly makes sense. All right, thank you.

Mr. Grant.

MR. GRANT: Good morning, Your Honor.

THE COURT: I want you to lay a little of your background on me for the record.

MR. GRANT: Yes, sir. Your Honor, my name is Carl B. Grant. I'm also a graduate of South Carolina State University, class of 1982. In 1985, I graduated from the Ohio State University College of Law.

I began my practice with the U.S. Army JAG Corps as a captain in the U.S. Army prosecuting soldiers as a trial counsel. And then as a trial defense attorney, defending soldiers at U.S. Army court-martials, all levels of court-martial from murder on down, general sessions type charges.

After leaving the JAG Corps, I joined a firm here in Columbia for about two years doing primarily criminal defense for the firm. And since then, I've started my own practice. And my practice has involved primarily criminal defense and personal injury.

I have tried or been appointed, I should say, to at least five death penalty cases in the capacity of lead counsel and second chair. I tried my first death penalty case in, I think, it was March of 1995. And I am indeed death penalty qualified.

I've tried cases in federal court. Every court that you can possibly imagine that I could think of from the Marine Corps to Fort Jackson to the Air Force type courts, all court-martial levels even as a civilian attorney and from death penalty cases on down in the State of South Carolina from the federal courts, I've tried those cases, Judge.

THE COURT: Very well.

Well, I find that both Mr. Walters and Mr. Grant are qualified to represent Mr. Alkebulanyahh in this matter and will appoint them as counsel for him during this post-conviction relief. So, at this point then, the State will then serve upon counsel a copy of the transcript and

provide them with a return to the application.

What I would like to do is I will then give the petitioner 180 days to review the transcripts and file an amended application, if they so desire. And at that point, once the -- well, then the State would have the right to file any responsive pleadings to that. We will then status the case in order to set a trial date at that time.

So let's see, this is August the 8th, so you'll have until February the 8th to file an amended application. And after that, the State will have the opportunity to file any responsive pleadings.

So let's set this for a -- tentatively, we'll set it for status some time around the first of March. I will have my office contact y'all in mid February so that we can set up a status conference then to set a trial date, see if we have any dispositive motions or anything that need to be heard.

As far as any application for expenses, what I would like to have the petitioner's lawyers do is file any application with the court and on the Attorney General's Office so if the Attorney General's Office wants to file an objection, they can do so.

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Beaufort County, South Carolina, on the 8th of August, 2007.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 29, 2010



Stacy L. Sheppard, RPR
Circuit Court Reporter

Appendix B

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

Dr. Rikki Lynn Halavonich, who appeared personally before me, affirms and states the following:

1. I am a physician licensed to practice medicine in the state of South Carolina. After medical school I completed a four-year residency in psychiatry and a one-year fellowship in forensic psychiatry, both at the Medical University of South Carolina (MUSC). My area of expertise is forensic psychiatry. I am board certified in both general psychiatry and forensic psychiatry.

2. After completing my forensic fellowship, I joined the faculty at MUSC as an assistant professor of psychiatry. My professional responsibilities focused on training forensic fellows and psychiatry residents, as well as evaluating clients in both criminal and civil legal settings. I was the Associate Fellowship Director of the forensic training program as well as the Director of the Department of Forensic Psychiatry. In 2008, I transitioned form MUSC to private practice and am currently practicing in Charleston, South Carolina, at Lowcountry Forensic Psychiatry.

3. I met with Abidiyyah ben Alkebulanyahh for 2 hours on March 31, 2010 and for 1.25 hours on May 24, 2010. I reviewed records related to Mr. Alkebulanyahh's case including the following transcripts: The portion of his pretrial hearing in which he made a motion to proceed pro se, his testimony during the guilt determination phase of the trial, the presentencing testimony in which he indicated his desire to not be present for the proceedings, the portion of the proceedings during sentencing in which he became unruly, and the PCR hearing. I reviewed the report of Donna Schwartz-Watts, MD dated July 29, 2003 and the deposition of Dr. Schwartz-Watts dated August 13, 2008. I reviewed writings of Mr. Alkebulanyahh including a voluminous narrative titled "Manuscript Part One".

4. It is my understanding that Mr. Alkebulanyahh was evaluated by multiple mental health professionals prior to his trial and subsequently found competent to stand trial, as well as competent to proceed pro se, by the Court. It is further my understanding that there was agreement that, although competent to stand trial and proceed pro se, Mr. Alkebulanyahh suffered from a serious mental illness.

5. It is my professional opinion, to a reasonable degree of medical certainty, that Mr.

Alkebulanyahh's symptoms of mental illness worsened as his trial progressed. The transcripts indicate he became increasingly disorganized, paranoid and delusional over the course of the trial. It is further my opinion that over the course of the trial, and specifically by the time of the penalty phase, Mr. Alkebulanyahh had decompensated to the point that his ability to understand the proceedings against him and assist in his defense were significantly impaired.

FURTHER AFFIANT SAYETH NAUGHT.

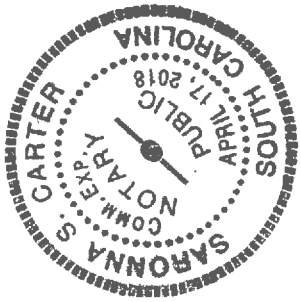
Rikki Lynn Halavonich MD

RIKKI LYNN HALAVONICH, M.D.

Sworn to and subscribed before me
this 15th day of July, 2010.

Saronna Carter

Notary Public for the State of South Carolina
My commission expires: April 17, 2018



THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Applicant's Motion to Remand for Additional Post-Conviction Proceedings was mailed today by first class United States mail, postage prepaid, this 21st day of July, 2010, upon the following:

S. Creighton Waters
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RESPONSE IN OPPOSITION TO MOTION TO REMAND FOR ADDITIONAL POST-CONVICTION RELIEF PROCEEDINGS

Respondent, above-named, hereby responds as follows to the Motion to Remand for Additional Post-Conviction Proceedings, filed by Petitioner Abidiyyah ben Alekbulanyahh. Respondent would assert the motion should be denied for the following reasons.

I. Petitioner's PCR counsel were qualified under the PCR statute; thus, there is no basis supporting a remand to allow Petitioner a second bite at the apple.

As an initial matter, Petitioner is incorrect that his PCR counsel were not qualified under the applicable statute. Petitioner asserts that under S.C. Code Ann. § 17-27-160 (2003), to be qualified in a capital PCR a lawyer either needs to have either previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate

at trial AND also have within the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief.

However, in her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 15th, 2003, the Chief Justice specifically rejected this interpretation, finding that it would lead to the absurd result that an attorney qualified to represent a capital inmate at trial would not be qualified to represent him in PCR. Thus, it was concluded that the "not less than twelve hours of CLE education" clause and the "or professional training primarily involving advocacy in capital appellate or PCR defense" clause of S.C. Code Ann. § 17-27-160(B) were independent means through which an otherwise death penalty-qualified attorney could qualify to represent a death row inmate in PCR. Accordingly, an otherwise death-qualified attorney's twelve hours of CLE within the previous two years did not necessarily have to be in the field of capital appellate or PCR defense.

Here, Judge Young specifically relied on the statute and this memorandum to conclude that PCR counsel were sufficiently qualified. **{Order Appointing Counsel August 8, 2007}**. Counsel Walters had been practicing for 17 years, including stints in the public defenders office and years in private practice handling felony criminal cases. He had previously represented a capital inmate at trial and was at the time of his appointment in this case representing another capital inmate in trial-level proceedings. **{Appendix A to Petitioner's Motion pp. 6-8}**. Similarly, counsel Grant had been practicing law for 22 years, including stints handling criminal law in the JAG Corps and private practice. He had tried some five capital cases, and tried his first one twelve years prior in 1995. **{Appendix**

A to Petitioner's Motion pp. 8-9}. Clearly these lawyers were well-versed in what it takes to try a capital case.

Thus, there was no violation of the capital PCR qualification statute, and accordingly no basis for remanding this case and treating the proceedings that have taken place as a nullity. Even if it is assumed that PCR trial counsel in this case were somehow ineffective, this would not matter, as there is simply no constitutional right to counsel in post-conviction proceedings. See generally Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Coleman v. Thompson, 501 U.S. 722 (1991); Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997). Accordingly, there can be no Sixth Amendment claim of ineffective assistance of PCR counsel, and this Court is clear that alleged ineffectiveness of PCR counsel is not a basis for having a second PCR. See Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (alleged ineffective assistance of first PCR counsel is not a sufficient reason to overcome the bar against successive applications).

In all, Petitioner's counsel were qualified under the statute, and his new counsel's complaints about PCR trial counsel are insufficient to justify a second bite at the apple.

II. Even if counsel was not qualified under the statute, there is no basis for giving Petitioner a second bite at the apple.

Even if somehow counsel was not qualified under the statute, and even assuming that lack of statutory qualification demanded a remedy on PCR appeal aside from the fact that there is no constitutional right of effective PCR counsel, that remedy is not a *per se* reversal. In the unpublished order issued by this Court denying the petition for habeas corpus of Kevin Dean Young, this Court pointed out that S.C. Code Ann. § 17-27-160(B) does not provide a remedy for its violation. It went on to cite cases for the proposition that

the failure to meet statutory standards for death qualification for *trial* counsel did not result in *per se* reversal but still needed to be assessed for prejudice. Kevin Dean Young v. State of South Carolina, Unpub. Order (S.C. Sup. Ct. November 1, 2000) (citing Aeschliman v. State, 973 P.2d 749 (Idaho Ct. App.1999); State v. Misch, 656 N.E.2d 381 (Ohio Ct. App. 1995); and State v. Maletta, 781 P.2d 350 (Or. Ct. App. 1989)).

Thus, even assuming a remedy for a violation of the statute, Petitioner would at a minimum have to show some sort of prejudice. He cannot do so in this case. Petitioner tried to fire his PCR counsel and handle the case on his own. But regardless, he had a full and fair hearing in which PCR counsel presented evidence on his decision to represent himself and the competency determination. At this hearing Petitioner was then able to, without limit, give testimony on the issues that were important to him.

Petitioner now raises a number of issues that he asserts PCR counsel should have raised; however, none of these are a basis for relief. At this stage, Respondent does not intend to fully brief each alleged issue Petitioner asserts his PCR counsel could have raised, since Petitioner did not brief them and to do so would require an extremely long document. Respondent submits it is sufficient to point out that the supposed issues Petitioner now raises are insufficient for relief. Thus, Petitioner has presented no evidence of prejudice from the supposed lack of qualification of PCR trial counsel.

A. Competence to stand trial

Petitioner first asserts that he was not competent to stand trial during his sentencing phase. He apparently relies on the fact that Petitioner told the judge before the jury returned its guilt phase verdict that if he was found guilty, he did not wish to remain for the sentencing phase, and would be disruptive if he had to stay. Once sentencing began, he

stood and calmly recited a religious phrase until the judge finally ordered him held in a back room where he could see and hear the proceedings. Petitioner ultimately relented and returned to the courtroom. Standby counsel and the solicitor also testified in PCR they saw no evidence of a break from reality or loss of faculties, but rather a deliberate and calm action which was the result of an intention decision that if the jury found him guilty he did not want any more part of the process. See **{Order of Judge Mullen pp. 14-20; 38-40}**.

The record in this case contains a very careful determination by the trial court of Petitioner's competence to stand trial and to represent oneself after very careful and repeated colloquies. Moreover, Judge Mullen determined that not only was it improper to go behind the trial court's ruling on PCR, but that in any event there was no evidence of incompetence from the trial or PCR record. Petitioner litigated pretrial motions and the whole guilt phase without any problems behaving inappropriately or with improper demeanor. His behavior in the sentencing phase only occurred after he calmly told the court he was going to do it and, more importantly, exactly why he was going to do it. **{Order of Judge Mullen pp. 5-40}**. There is no issue of competence.

B. Failure to make inquiry

Petitioner contends the trial judge erred in failing to make an inquiry into is competency at the end of the sentencing phase. Not only is this an issue for direct appeal, the record is clear Petitioner was not incompetent. He made a deliberate and goal-directed decision not to participate in the sentencing phase. His behavior over the course of many pre-trial and guilt phase proceedings belies any contention he was not competent. There is no evidence of incompetence, and Judge Mullen has already found as much.

C. Failure to terminate his pro se status

Again, not only is this an issue for direct appeal, the record is clear Petitioner was not incompetent. He made a calm, deliberate and goal-directed decision not to participate in the sentencing phase. Nothing about Petitioner's decision and demeanor *necessarily as a matter of law required* the judge to terminate his pro se status after he had already been granted it following a detailed procedure. Indeed, State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997) and Reed v. Ozmint, 374 S.C. 19, 647 S.E.2d 209 (2007) would counsel against terminating a competent *pro se* defendant's self-representation, and as Judge Mullen discussed in her order, nothing in Edwards requires the trial court override a competent defendant's wishes. **{Order of Judge Mullen pp. 35-40}**.

D. Shackling

Not only is this a direct appeal issue, but there is no evidence the jury saw Petitioner's feet shackled in the back room. Regardless, there is no reversible error or prejudice under Deck v. Missouri, 544 U.S. 622, 125 S.Ct. 2007 (2005), as argued in the Final Brief of Respondent from pages 32-33. Moreover, Petitioner's own intentional behavior led to any circumstances that existed, and he cannot now use his own misbehavior as a sword.

E. Admission of evidence

Petitioner makes a freestanding claim as to various evidence introduced in the sentencing phase which he asserts was inadmissible. This is clearly a freestanding claim that is only appropriate for direct appeal and not PCR. There was no objection to this evidence that would preserve it for direct appeal. Moreover, as noted in the next ground,

Petitioner cannot push the blame onto standby counsel when he chose to represent himself and he was never relieved of self-representation, even during the sentencing phase. Finally, there was no prejudice, given the horrible nature of this crime and Petitioner's long prior record and misbehavior in prison.

F. Failure to object

Petitioner contends standby counsel was ineffective for failing to object to evidence in the sentencing phase. While it is true that Petitioner agreed to allow standby counsel to make any objections and handle evidence while he was in the back room, he was back there by his choice and still retained ultimate authority for his own representation. Indeed, counsel specifically noted that if they were to do anything they would still remain standby counsel, because if they were made counsel of record and were "on the hook" they would then call mitigation witnesses which Petitioner did not want. **{R. 3526-29}**. Petitioner cannot put into motion this procedure and then complain of standby counsel's performance when Petitioner still retained the ultimate authority for the representation and was pro se. He was amply warned when he chose to go pro se that he would not be able to claim ineffectiveness on himself. **{R. 3900-45}**. Finally, there was no prejudice, given the horrible nature of this crime and Petitioner's long prior record and misbehavior in prison.

G. Ineffective assistance of appellate counsel

Petitioner finally asserts there was ineffective assistance of appellate counsel for failure to raise many of the issues set forth above. Aside from possibly the competence issues, these are all without merit as their either was no objection, or the issues as described in Judge Mullen's Order are simply insufficient for relief.

Thus, since even with a cursory view none of these issues has any merit, Petitioner cannot show prejudice even if it is assumed that PCR trial counsel were not qualified and there is a statutory remedy for the violation.

Indeed, if this Court is changing the interpretation of the qualification statute and also is at all concerned about the merits of any of these issues such that it might find prejudice, then the issues should be addressed with full briefing from both sides on the particular issue to which there is concern. All that has been done below already should not simply be thrown out based on a cursorily discussed laundry list of issues that Petitioner's current PCR counsel thinks he could have raised.

Accordingly, the motion should be denied.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Senior Assistant Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEYS FOR RESPONDENT.

BY: 
ATTORNEYS FOR RESPONDENT

August 2, 2010.

APPENDIX A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

07 AUG 13 PM 2:20
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

Abdiyyah ben Alkebulanyahh, #6012) C/A No. 2007-CP-07-0715

Applicant,)

v.) **ORDER APPOINTING COUNSEL**

The State of South Carolina,)

Respondent.)

Applicant, Abdiyyah ben Alkebulanyahh, is a death row inmate who has filed a *pro se* post-conviction relief application. On May 4th, 2007, the South Carolina Supreme Court issued an Order in which it assigned this Court jurisdiction over the case.

Accordingly, as provided in S.C. Code Ann. § 17-27-160, this Court held a hearing to determine Applicant's desires regarding appointed counsel on June 1st, 2007 at the Orangeburg County Courthouse, and on August 8th, 2007, at the Richland County Courthouse. Applicant was present at both hearings; the State was represented at both hearings by Assistant Attorney General S. Creighton Waters.

At the June hearing, Applicant stated that he is indigent and indicated his desire to have appointed counsel. This Court finds that appointed counsel is appropriate in this case.

At the June hearing, Glenn Walters, Esquire, of Orangeburg, South Carolina, was present. At this Court's direction, attorney Walters spoke to Applicant in private during a recess in the hearing, and Applicant subsequently indicated to the Court that attorney Walters was acceptable to him. Attorney Walters was then directed to see if he

could find a second attorney for this case.

At the August hearing, attorney Walters appeared along with attorney Carl B. Grant, Esquire, of Orangeburg, South Carolina. Prior to the hearing, attorneys Walters and Grant spoke to Applicant in private. At the August hearing, Applicant indicated that attorneys Walters and Grant were acceptable to him as his counsel in the PCR action.

At the August hearing, both Walters and Grant stated their qualifications to the Court. Although only one lawyer needs to be statutorily qualified, this Court finds that both attorneys Walters and Grant meet the statutory qualifications, in that they each have at least five years' experience as a lawyer and three years' experience in the trial of felony cases, as well as twelve hours of CLE training within the prior two years. S.C. Code Ann. §§ 16-3-26, 17-27-160 (2003). See also Memorandum of Chief Justice Jean H. Toal Regarding Appointment of Counsel in Capital Post-conviction Cases, dated August 15th, 2003 (opining that that the "not less than twelve hours of CLE education" clause and the "or professional training primarily involving advocacy in capital appellate or PCR defense" clause of S.C. Code Ann. § 17-27-160(B) were independent means through which an attorney could qualify to represent a death row inmate in PCR – thus, an attorney's twelve hours of CLE did not necessarily have to be in the field of capital appellate or PCR defense). Moreover, both attorneys have previously represented defendants in death penalty trials.

Therefore, this Court appoints Glenn Walters, Esquire, and Carl B. Grant, Esquire, as Applicant's attorneys in the capital PCR.

Mr. Waters of the Attorney General's Office has agreed to provide both of

Applicant's lawyers as well as this Court with copies of the trial transcript. This Court orders that Applicant shall have until February 8th, 2008, in which to file an Amended Application. The State shall then have thirty (30) days to file an Amended Return, and within thirty (30) days of that responsive filing the parties and this Court shall convene a status hearing to handle any dispositive motions or to set the case for a final evidentiary hearing on the merits, if necessary. See S.C. Code Ann. § 17-27-160(C) (2003).

Finally, the State has asserted that although funding requests for investigative, expert or other services can be made *ex parte* during a capital trial, such requests cannot be made *ex parte* in PCR proceedings. See generally Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996). While this Court declines to rule either way on the issue at this time, any party intending to approach this Court *ex parte* during the course of this litigation about funding requests for investigative, expert, or other services, shall first give notice of such intent to the opposing party as well as the Court, so that a hearing can be held before this Court with the participation of both parties as to the propriety of such an *ex parte* communication.

IT IS SO ORDERED.

Roger M. Young
Circuit Court Judge

Columbia, South Carolina

August 8, 2007.

APPENDIX B

177

The Supreme Court of South Carolina

Kevin Dean Young, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

In 1989, petitioner was convicted of murder and armed robbery and sentenced to death. On appeal, this Court reversed the death sentence. State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991). On remand, petitioner was again sentenced to death. This Court affirmed. State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995)(Young II). The United States Supreme Court denied certiorari. Young v. South Carolina, 516 U.S. 1051, 115 S.Ct. 718, 133 L.Ed.2d 671 (1996).

Thereafter, petitioner's application for post-conviction relief (PCR) was denied. On May 15, 1998, this Court denied petitioner's petition for a writ of certiorari. The federal district court denied petitioner's

subsequent petition for a writ of habeas corpus. The Fourth Circuit Court of Appeals affirmed. Young v. Catoe, 205 F.3d 750 (4th Cir. 2000). On October 2, 2000, the United States Supreme Court denied certiorari. Young v. Catoe, 2000 WL 875908, No. 99-10228 (Oct. 2, 2000).

Petitioner is scheduled to be executed on November 3, 2000. He has filed a motion for a stay of execution and a petition for a writ of habeas corpus.

A writ of habeas corpus will issue only if there is a constitutional violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998); Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S.Ct. 442, 112 L.Ed.2d 425 (1990). A request for a stay of execution pending the filing of a successive action for habeas corpus in the original jurisdiction of this Court must demonstrate that there are exceptional circumstances warranting the issuance of the stay. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996).

Petitioner maintains his execution should be stayed because the United States Supreme Court recently granted certiorari in Shafer v. South Carolina, 2000 WL 1057649, No. 00-5250 (Sept. 26, 2000) to review the following question:

Were petitioner's due process rights under Simmons

> v. South Carolina violated by trial court's refusal to instruct sentencing jury that "under South Carolina law, [petitioner] would be ineligible for parole if the jury were to vote for a life sentence." Ramdass v. Angelone, 120 S.Ct. 2113, 2119, 67 CrL 394 (2000)(plurality opinion), and by South Carolina Supreme Court's holding that Simmons no longer applies to South Carolina's capital sentencing scheme?

We disagree.

In Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the United States Supreme Court held that a capital defendant is entitled to a charge on parole ineligibility when future dangerousness is argued and the defendant is not eligible for parole. In Ramdass v. Angelone, ___ U.S. ___, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000), the United States Supreme Court reaffirmed its decision in Simmons, holding it applied only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison.

Shafer was tried under a version of S.C. Code Ann. § 16-3-20 which became effective on January 1, 1996. State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000). Under that version of the statute, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. Relying on Simmons, Shafer requested the trial court instruct the jury he would be ineligible for parole. The trial judge denied the request. This Court held on appeal that since one

of the alternatives to a death sentence was not life without the possibility of parole, Simmons was inapplicable. The United States Supreme Court has now granted certiorari to review that decision.

Petitioner, on the other hand, was tried and re-sentenced at a time when S.C. Code Ann. § 16-3-20(A) stated that a person who is convicted of murder must be punished by death or life imprisonment and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt, and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. Unlike the sentencing scheme in effect at the time of Shafer's trial, the only options available at the time of petitioner's trial and re-sentencing were death or a life sentence with parole eligibility. Indeed, petitioner did not ask the trial judge to charge the jury that he would be ineligible for parole if given a life sentence, but instead requested the judge charge the jury that if sentenced to life imprisonment he would not be eligible for parole until he had served thirty years.

Accordingly, because petitioner would have been parole eligible had he been given a life sentence and because future dangerousness was not an issue in his case, see Young II at 87, the decision of the United States Supreme Court to grant certiorari in Shafer has no bearing on this case.

Petitioner maintains in his petition for a writ of habeas corpus that because the two attorneys appointed to represent him in connection with his PCR application did not meet the qualifications set forth in S.C. Code Ann. § 17-27-160(B), he was denied his constitutional right to due process.[1] Petitioner contends it is reasonably likely that counsel experienced in capital cases would have raised the issue of racial disparity in the jury selected for petitioner's re-sentencing and the issue of a conflict of interest presented by the South Carolina Office of Appellate Defense's representation of petitioner on appeal.[2]

---

[1]Section 17-27-160(B) does not provide a remedy for its violation nor has this Court ever addressed the issue. Petitioner does not argue a violation of the section constitutes prejudice per se. Instead, petitioner essentially concedes that prejudice must be proven by arguing two instances in which he feels PCR counsel were ineffective. Courts that have addressed this issue have held that failure to meet statutory standards for death qualification does not render counsel's assistance ineffective per se, but instead the effectiveness of counsel must be judged under the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See Aeschliman v. State, 973 P.2d 749 (Idaho App. 1999); State v. Misch, 656 N.E.2d 381 (Ohio App. 3d 1995); State v. Maletta, 781 P.2d 350 (Or. App. 1989).

[2]Joseph Savitz of the South Carolina Office of Appellate Defense represented petitioner on his second direct appeal. Tara Dawn Shurling, also of the Office of Appellate Defense, had represented petitioner's co-defendant on direct appeal four years earlier. Ms. Shurling had left the Office of Appellate Defense by the time petitioner's appeal was heard. Mr. Savitz was again appointed to represent petitioner in connection with his petition for a writ of certiorari filed with this Court following the denial of his PCR application.

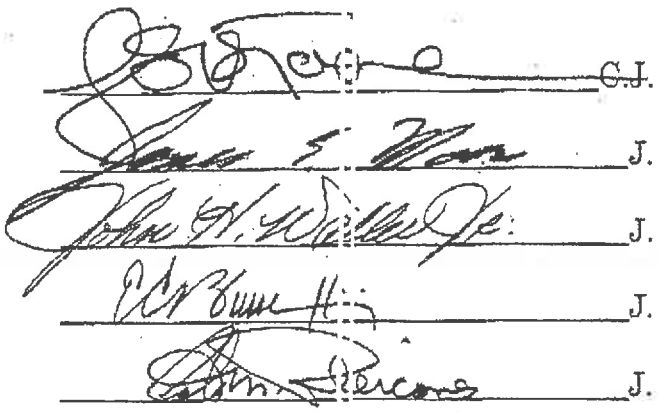
We find that because the jury venire was selected from lists of registered voters and licensed drivers, petitioner has failed to establish a systemic exclusion of blacks from the jury venire, which is required to establish a prima facie violation of the fair cross-section requirement. Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); United States v. Lewis, 10 F.3d 1086 (4th Cir. 1993); United States v. Cecil, 836 F.2d 1431 (4th Cir. 1988); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); S.C. Code Ann. § 14-7-130 (Supp. 1999). Accordingly, petitioner was not prejudiced by the failure of appellate counsel or PCR counsel to raise this issue.

We find further that petitioner failed to show that an actual conflict of interest resulted from Mr. Savitz's representation of him after Ms. Shurling's representation of his co-defendant. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Therefore, petitioner was not prejudiced by Mr. Savitz's representation of him or by PCR counsel's failure to raise the conflict of interest issue.

In conclusion, we find that petitioner has failed to demonstrate that there are exceptional circumstances which would warrant the issuance of a writ of habeas corpus or a stay of his execution. Accordingly, his motion for

a stay of execution and petition for a writ of habeas corpus are denied.

IT IS SO ORDERED.



C.J.

J.

J.

J.

J.

Columbia, South Carolina

November 1, 2000

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Response in Opposition to Motion to Remand for Additional Post-Conviction Relief Proceedings on Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, John Blume, III, Esq., Blume, Weyble & Norris, LLC, P.O. Box 11744, Columbia, SC 29211.

This 2nd day of August, 2010.

ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG - 9 2010
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

REPLY TO RESPONSE TO MOTION TO REMAND FOR ADDITIONAL POST-CONVICTION PROCEEDINGS

Petitioner, through undersigned counsel, files this reply to the Response in Opposition to Motion to Remand for Additional Post-Conviction Proceedings.

ARGUMENT IN REPLY

I. Petitioner's Post-Conviction Counsel Were Not Qualified Under the Plain Language of § 17-27-160(B).

In 1996, the South Carolina Legislature enacted S.C. Code Ann. § 17-27-160 ("Capital Case Post-Conviction Procedures") with the intention of "opting-in" to the expedited habeas corpus

procedures for capital cases contained in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Tucker v. Moore*, 56 F.Supp.2d 611, 613-14 (D.S.C. 1999) (State argued that S.C. Code Ann. § 17-27-160 was enacted to attempt to satisfy 28 U.S.C. §§ 2261(b)-(c) of AEDPA).[1] To qualify as an "opt-in" jurisdiction, a state is required to, *inter alia*: a) establish a mechanism to provide qualified and adequately compensated counsel in post-conviction proceedings; appoint counsel pursuant to that mechanism, 28 U.S.C. § 2261(b); and b) offer counsel to all state prisoners under capital sentence, 28 U.S.C. § 2261(c). The statute enacted by the South Carolina General Assembly in response to this federal incentive requires the appointment of two attorneys for indigent applicants, at least one of which:

> [M]ust have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) [five years practicing law with three years in the actual trial of felony cases] and Section 16-3-26(F) [any Supreme Court promulgated guidelines for attorneys handling death penalty cases] and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

S.C. Code Ann. § 17-27-160(B).

It is uncontested that neither of petitioner's post-conviction relief (PCR) attorneys had either (1) previously represented a death-sentenced inmate in state or federal post-conviction relief

---

[1]The United States District Court in *Tucker* construed § 17-27-160(B) as requiring one of the two appointed attorneys to have either: (1) previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings; or, (2) met the requirements of capital trial counsel in § 16-3-26(B) and § 16-3-26(F) *and* have completed at least twelve hours of continuing legal education in *capital appellate* and/or *post-conviction* defense. Report and Recommendation at 10-13, *Tucker v. Moore*, 56 F.Supp.2d 611 (D.S.C. 1999) (No. 0:98-681-8BD). Respondent conceded these statutory requirements and further conceded that Tucker's PCR counsel, who were admittedly qualified under §16-3-26(B), did not qualify for appointment as post-conviction counsel under the language of the statute at issue here. *Id.* Counsel in *Tucker* had the same experience as counsel appointed to represent petitioner.

proceedings; or, (2) completed twelve hours of continuing legal education or professional training in capital appellate and/or post-conviction defense within two years of their appointment to represent petitioner in this case.

Respondent does not attempt to offer a construction of the statute under which petitioner's PCR counsel were qualified, but instead relies entirely on an August 15, 2003 letter from the Chief Justice of the South Carolina Supreme Court to all Circuit Court Judges stating that the qualifications for capital post-conviction representation under § 17-27-160(B) are identical to those for capital trial representation under § 16-3-26(B). Response at 2. In her letter, the Chief Justice concluded that the use of "or" between "continuing legal education" and "professional training primarily involving advocacy" in § 17-27-160(B) gives courts the discretion to appoint attorneys in capital post-conviction relief proceedings that either: (1) have completed any twelve hours of South Carolina Bar approved continuing legal education, *regardless of the topic*, or (2) completed twelve hours of South Carolina Bar approved professional training s*pecific* to advocacy in the field of capital appellate and/or post conviction defense. The Chief Justice further opined that requiring more stringent qualifications for attorneys appointed in capital post-conviction relief than for attorneys appointed in capital trial proceedings would be an absurd result that the legislature could not have intended.

Respondent's reliance on the Chief Justice's letter is misplaced for two reasons: (1) It is outside the scope of her unilateral authority as Chief Justice of this Court as conferred upon her by the State Constitution and relevant statutes; and, (2) even if it were within the Chief Justice's authority to issue this unilateral change to the rules, it violates the separation of powers doctrine by contradicting clear and unambiguous statutory language that is not so *plainly absurd* that the legislature could not have intended it.

A. The South Carolina Constitution Does Not Give the Chief Justice Authority to Create Rules and Standards for the Appointment of Counsel in Capital Cases.

The South Carolina Constitution creates a Supreme Court consisting of a Chief Justice and four Associate Justices. S.C. Const. art. V, § 2. In addition to its original and appellate jurisdiction, the Supreme Court has the power to: (1) make rules governing the administration of the courts; and, (2) subject to statutory law, make rules governing the practice and procedure in all courts. S.C. Const. art. V, § 4; S.C. Code Ann. § 14-3-640 (1976).

New rules promulgated by the Supreme Court governing the administration of state courts "become effective upon publication of such rules in the Court Register." S.C. Code Ann. § 14-3-940(a) (1976). In contrast, new rules "governing the practice and procedure of all courts . . . shall become effective upon publication in the Court Register and review by the General Assembly pursuant to the provisions of § 14-3-950." *Id.* at (b).[2]

The Constitution appoints the Chief Justice of the Supreme Court as the administrative head of the state judicial system and assigns certain limited powers to the Chief. S.C. Const. art. V, § 4. As administrative head, the Chief Justice has the power to: (1) appoint an administrator of the courts and such assistants as deemed necessary; and, (2) set the terms of any court and assign any judge to sit in any court within the unified judicial system. *Id.*

---

[2]All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court shall be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly during a regular session, but not later than the first day of February during each session. Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting. S.C. Code Ann. § 14-3-950 (1976).

The Chief Justice's unilateral authority to issue orders is limited to these two enumerated powers and does not extend to issuing advisory opinions, changing court administrative rules, or changing the rules governing practice and procedure. This is further supported by the language in Article V, § 4 that specifically grants the power to make rules governing the administration of all state courts and the power to make rules governing the practice and procedure in all courts to the "Supreme Court." *Id.* In order for the "Supreme Court" to make rule changes, it necessarily must conform to Article V, § 2, which requires this Court to have a three-justice quorum for the "transaction of business." Further, if the Court makes changes to the rules governing practice and procedures in state court, these changes must be submitted to the respective Judiciary Committees of General Assembly per S.C. Const. art. V, § 4A, as codified in S.C. Code Ann. § 14-3-950. None of these requirements are met by a letter sent to Circuit Court judges from the Chief Justice setting forth her interpretation of a state statute.

By concluding that § 17-27-160(B) places no additional requirements on capital post-conviction relief representation, the Chief Justice effectively created a new and different standard for the appointment of counsel in capital cases. By any definition of the term, this is either rulemaking or legislating. No single justice of this Court is empowered to unilaterally change the law through statutory interpretation, especially in an area as significant as capital representation. It necessarily follows from a plain reading of the Constitution and related statutes that the Chief Justice's letter dated August 15, 2003 was outside the scope of her authority.

B. The Change to the Appointment of Counsel Standards in Capital Post-Conviction Cases Violates the Separation of Powers.

The Chief Justice's letter also violates basic separation of powers principles because it

changes the plain wording of the statute as enacted by the South Carolina Legislature. Additionally, even if the Chief Justice has unilateral authority to change the statutory rules governing capital post-conviction relief, her opinion must be rejected on well-established principles of statutory interpretation.

First, it is well established by this Court that "[a] basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject." *Berkebile v. Outen*, 311 S.C. 50, 53 426 S.E.2d 760, 762 (1993); *accord Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009); *City of Camden v. Fairfield Elec. Coop.*, 372 S.C. 543, 548, 643 S.E.2d 687, 690 (2007); *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003); *Scott v. State*, 334 S.C. 248, 253, 513 S.E.2d 100, 103 (1999).

The statutory qualifications for trial attorneys appointed to defend an indigent in a death eligible case are found in S.C. Code Ann. § 16-3-26. This statute, enacted in 1977, requires that at least one of the appointed attorneys have a minimum of five years' experience as an attorney and three years' experience in the actual trial of felony cases. S.C. Code Ann. § 16-3-26(B)(1) (1976). The statutory qualifications for capital post-conviction relief were codified in 1996 in S.C. Code Ann. § 17-27-160, well after § 16-3-26. Additionally, § 17-27-160(B) explicitly references the minimum qualifications in § 16-3-26(B)(1), and then adds an additional requirement of continuing legal education (CLE) or professional training involving capital appellate and/or post-conviction defense. Clearly, the legislature was aware of § 16-3-26(B)(1) when it explicitly incorporated it into § 17-27-160(B), and before adding the CLE requirement. If the legislative intent in § 17-27-160(B) were simply to mirror the requirements of § 16-3-26(B)(1), it would simply have referenced that statute and said no more. The additional language after the reference to § 16-3-26(B)(1) in § 17-27-

160(B) cannot be construed as being devoid of any meaning without totally torturing basic principles of statutory construction. *See, e.g.*, *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.") (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)); *Savannah Bank and Trust Co. of Savannah v. Shuman*, 250 S.C. 344, 348, 157 S.E.2d 864, 866-67 (1967) (Finding "[t]he construction urged by the appellant would disregard and treat as surplusage the quoted [section of the statute]. We are not at liberty to do so.").

Second, this Court has repeatedly held that it must interpret statutory language according to its plain meaning. *See, e.g.*, *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.") (citation omitted). The Court will only reject the plain reading of a statute "when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing *Stackhouse v. Rowland*, 86 S.C. 419, 68 S.E. 561, 562 (1910)); *see also Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009) ("One rule of statutory construction allows the Court to deviate from a statute's plain language when the result would be so patently absurd that it is clear that the Legislature could not have intended such a result.") (citation omitted); *Hodges*, at 87, 533 S.E.2d at 582 (2000) ("[A] court will reject the ordinary meaning of words used in a statute when, to accept the ordinary meaning, will lead to a result so plainly absurd that it can not possibly have been intended by the legislature.") (citations omitted).

As stated in Petitioner's Motion to Remand, there are several reasons why the legislature would enact a different, and more stringent, standard for appointment of counsel in capital post-conviction cases than for appointment at the trial level. First, post-conviction litigation is an unusual combination of trial and appellate practice. Thus, persons competent to represent a death sentenced inmate at trial due to their extensive trial experience as reflected in § 16-3-26(B)(1), do not necessarily have the requisite skills to represent an individual in a capital post-conviction proceeding.[3] Second, at trial, the defendant has a Sixth Amendment right to counsel, and thus a Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). If trial counsel performs incompetently and the incompetence contributes to the conviction or death verdict, the defendant has a remedy. *See, e.g., Hall v. Catoe*, 601 S.E.2d 335 (S.C. 2004) (counsel found ineffective for failing to object to improper victim impact argument). However, in post-conviction proceedings, there is no currently recognized constitutional right to counsel and thus there is no clear remedy for substandard representation. *See Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991) (finding second post-conviction petition barred as successive and appearing to reject ineffective assistance of post-conviction counsel as a "sufficient reason" for failing to raise issues in the first application); *Cf. Washington v. State*, 478 S.E.2d 833, 835 (S.C. 1996) (allowing second post-conviction application to proceed due to "many procedural irregularities" in the first post-conviction proceedings). Third, the legislature enacted standards for

---

[3]See AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN CAPITAL CASES (2003) Guideline 1.1 (commentary) ("Post-conviction proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. . . . For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers.").

capital post-conviction counsel for a specific purpose, i.e., to meet federal "opt-in" requirements. Thus, it makes perfect sense that the statutory standards would have specific requirements requiring either prior capital post-conviction experience or capital post-conviction CLE training.[4]

It easily follows, therefore, that when drafting the procedures for indigent "capital post-conviction representation," the legislature intended § 17-27-160(B) to require at least one of the appointed attorneys to have training that involves "advocacy in the field of capital appellate and/or post-conviction defense." Otherwise, it is impossible to explain what purpose the second clause "involving advocacy in the field of capital appellate or post-conviction defense" would serve since the minimum standard in the first clause of *any* South Carolina Bar approved training would inevitably be met by any duly licensed attorney in South Carolina. S.C. App. Ct. R. 408 (a) ("All persons admitted to the South Carolina Bar shall be required to attend at least fourteen (14) hours of approved continuing legal education (CLE) courses each year").[5]

The legislature was well aware of the qualifications for capital trial attorneys when it enacted the qualifications for post-conviction relief attorneys, and therefore the CLE requirement must be read as an additional qualification for capital post-conviction representation. There are also a number of plausible reasons for the legislature to have required different and more stringent qualifications for capital post-conviction relief, and in light of these reasons, the *plainly absurd*

---

[4]A number of other states have different requirements for capital trial and capital appellate or post-conviction counsel. *See, e.g.,* A.R.S. R. Crim. Pr. 16 (b) & (c) (requiring post-conviction counsel to have prior capital appellate or post-conviction experience or requiring a combination of felony trial and post-conviction experience); Oh, Sup. R.20(A) & (B) (setting forth different criteria for appointment as lead counsel for a capital trial v. a capital direct appeal).

[5]Not to belabor the point, but such an interpretation of the statute would mean that an attorney could meet the qualifications for appointment in a capital post-conviction case, but not have sufficient CLE hours to be licensed. Obviously, the legislature can not have intended such an illogical result.

threshold is not met. Therefore, even if the Chief Justice had the unilateral authority to interpret §17-27-160(B), her interpretation must be rejected.

II. Because Petitioner's Appointed PCR Counsel did not Have the Experience or Qualifications Required by §17-27-160, and Because Petitioner was Prejudiced by Their Lack of Experience, Petitioner's Case Should be Remanded to the Circuit Court for Additional Post-Conviction Proceedings.

Respondent additionally maintains that the case should not be remanded to the circuit court for additional post-conviction proceedings because: a) the statute does not provide a remedy for failing to appoint qualified counsel; and, b) petitioner can not demonstrate prejudice as a result of the failure to appoint counsel who satisfied the statutory criteria. Both arguments must fail.

While it is true that the statute does not specifically state what relief is available in the event a court appoints unqualified counsel, the same can be said of many (if not most) statutes. The capital trial statute does not specifically state what the remedy would be if a circuit court judge appointed trial counsel who did not meet the statutory criteria. But, if a court were to appoint counsel who did not meet those criteria and a defendant was convicted and sentenced to death, this Court would certainly reverse the conviction and sentence and remand for the appointment of qualified counsel and a new trial. *See State v. Diddlemeyer*, 371 S.E.2d 793 (S.C. 1988) (holding that "the trial court's failure to follow the mandates of Section 16-3-26(B) denied appellant a fair trial"). There is no other appropriate remedy which would satisfy the statute's purposes. Similarly, in petitioner's case, there is no remedy other than remanding the case to the circuit court for additional post-conviction proceedings that will satisfy the statute's purposes. No showing of prejudice should be required.[6]

[6]Respondent cites and attaches an order of this Court denying a petition for writ of habeas corpus in *Young v. State*. Respondent's Exhibit B. Young sought a petition for writ of habeas corpus and alleged that he was denied due process because his post-conviction counsel did not meet

However, even if this Court were to require a showing of potential or actual prejudice, such a showing is easily made. First, as set forth in detail in the Motion to Remand, petitioner's PCR counsel: a) obtained no funds for investigative and/or expert services and retained no investigators (neither fact nor social history/mitigation investigators); b) conducted no extra-record investigation to determine if there were viable claims for post-conviction relief not apparent from the trial record; and, c) failed to pursue or raise a number of claims which were apparent from the record. The PCR hearing, for the most part, consisted of counsel calling petitioner as a witness to "air his grievances" against his trial counsel. Undersigned counsel, who was appointed by this Court on appeal, does not, given the procedural posture of the case, have access to funds for investigative and expert services and thus has not (and can not reasonably be expected to have) conducted a necessary and competent post-conviction investigation.[7] The failure to conduct any investigation or retain any experts of any

---

the requirements of § 17-27-160(B), and further alleged that qualified counsel would have raised two additional issues, which this Court ultimately determined to have no merit. There are a number of factors which distinguish *Young* from petitioner's case. The first distinction is the very different procedural posture of the cases. Young had already completed state post-conviction and federal habeas corpus proceedings (in which he was represented by different counsel) before he raised any objection to the qualifications of his original post-conviction counsel. Petitioner, on the other hand, has raised the issue of the qualifications of his PCR counsel at the earliest possible opportunity. Second, Young was seeking a writ of habeas corpus. Pursuant to this Court's jurisprudence, a writ of habeas corpus will only issue if there is a constitutional violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. *See Butler v. State*, 397 S.E.2d 87, 92 (S.C. 1990). Given that petitioner has not completed his initial post-conviction proceedings, and thus has not had a "full bite" at the post-conviction apple, he should not be required to satisfy the habeas corpus standard. However, even given the differences, it is important to note that this Court did address the merits of the issues raised by Young which his unqualified counsel did not present in his initial post-conviction proceedings. Appendix B at 5. Given the greater equities in petitioner's favor in his case, he is clearly entitled to a remand for additional post-conviction proceedings.

[7]At a minimum, petitioner should be afforded: a) the services of a forensic psychiatrist and other mental health professionals (e.g., a neuropsychologist) to further inquire into petitioner's competency at the sentencing phase of his trial as well as his current competency; and b) the services of an investigator to interview the jurors.

kind should, in and of itself, satisfy any prejudice requirement.[8]

Second, in the Motion to Remand previously filed, petitioner set forth a number of potentially viable post-conviction issues which were not included in the amended application for post-conviction relief. In support of one of the potentially viable issues, i.e., whether petitioner became incompetent during the sentencing phase of the trial, petitioner provided a supporting affidavit from a highly qualified forensic psychiatrist. This was evidence which could have, and should have, been presented at petitioner's post-conviction relief hearing.[9]

Additionally, petitioner also noted a number of issues apparent from the record which could and should have been raised below, not only as substantive allegations for post-conviction relief but also, depending on the issue, as ineffective assistance of trial or appellate counsel. Motion to Remand at 7-11. In response to these issues, respondent makes a number of easily refutable points. First, as for petitioner's claim that he was deprived of his constitutional right to fair sentencing trial because he was shackled without any showing of necessity, respondent contends that there is no evidence the jury saw petitioner's feet shackled. Response at 6. It would be remarkable if the jurors did not see the shackles, as petitioner was placed in a glass room and there is no indication in the record any attempt was made to prevent the jurors from seeing the shackles. Furthermore, this is precisely the type of investigation which could have, and should have, been done prior to petitioner's post-conviction relief hearing. Second, in response to petitioner's claim that trial counsel was

---

[8]Undersigned counsel, who has represented indigent death sentenced inmates in South Carolina since 1985, is aware of no other capital post-conviction case where no funds for investigative and expert services were obtained nor any investigation conducted.

[9]Respondent points out that a claim of competence (although a different claim than the claims raised by undersigned counsel) was raised during the PCR proceedings but no evidence was presented in support of the claim. Response at 5. That, of course, only proves the point. No evidence was sought and no evidence was presented.

ineffective for failing to object to the erroneous admission of evidence and improper argument by the solicitor during the penalty phase of the trial (Motion to Remand at 9-10), respondent maintains that there was no objection to the evidence to preserve the issues for direct appeal (which is correct), but then asserts that petitioner can not "push the blame" onto standby counsel when petitioner chose to represent himself. Response at 7. This is simply wrong. The trial judge, after removing petitioner from the courtroom, specifically charged standby counsel with the responsibility of objecting to any inadmissible evidence or argument. Tr. 3541-42, 3556-57. Thus, petitioner does have a viable claim of ineffective assistance of trial counsel. Third, as for petitioner's potentially meritorious claims of ineffective assistance of appellate counsel (Motion to Remand at 10), respondent asserts that the issues are without merit either because there was no objection or the issues were discussed in the PCR order. Response at 7. Again, that is not correct. Several of the issues, e.g., failure to terminate petitioner's *pro se* status and the failure to conduct a competency hearing could have, and petitioner submits should have, been raised on direct appeal. As for the other issues, the PCR order did not address the merits of the issues because they were raised only as free-standing claims of error and were rejected by the lower court on procedural grounds as issues which could or should have been raised on direct appeal. PCR Order at 42, 48 & 51[10]. Again, the proof is in the pudding; given the procedural posture of the case, the only way to present the merits of these issues was to raise them

[10]Respondent refers a number of times to the PCR order of Judge Mullen. Response at 5,6,7. Another unique feature of this case is that the case was originally assigned to Judge Roger Young. Judge Young appointed counsel and presided over the PCR hearing. For reasons which are not stated in the order transferring the case, it was reassigned at this very late state of the proceedings to Judge Mullen on 17, 2008. It does not appear from the record that any post-hearing briefs were submitted to Judge Mullen, or that the court heard arguments before signing verbatim the state's proposed order.

as issues of ineffective assistance of appellate counsel, which petitioner's PCR counsel failed to do.[11]

CONCLUSION.

For the reasons stated above, as well as those set forth in the Motion to Remand, petitioner's case should be remanded to the Beaufort Court of Common Pleas for additional post-conviction proceedings. Petitioner should also have counsel appointed to represent him who meet the requirements set forth in S.C. Code §17-27-160(B), and who are sufficiently familiar with capital post-conviction representation to provide adequate representation in a capital post-conviction case.

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
112 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

August 9, 2010

[11]Petitioner does not concede that the issues set forth in the Motion to Remand at 7-11 are the only potentially meritorious issues in the case. Without conducting the appropriate investigation, counsel can make no such representation.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

RECEIVED
AUG - 9 2010
S.C. SUPREME COURT

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Applicant's Reply to Response to Motion to Remand for Additional Post-Conviction Proceedings was mailed today by first class United States mail, postage prepaid, this 9th day of August, 2010, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

Jill A. Rider

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 20, 2010

John H. Blume, III, Esquire
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211

Re: Roberts, Tyree, a/k/a Alkebulanyahh v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Remand for Additional Post-Conviction Proceedings in the above entitled case on appeal.

> "Motion to remand for additional post-conviction proceedings is denied.
>
> s/ Jean H. Toal C.J.
> For the Court
>
> October 20, 2010."

Please be advised the Petition for a Writ of Certiorari and Appendix should be served and filed within thirty (30) days of the date of this letter.

Very truly yours,

CLERK

DES/dmh

cc: Chief Appellate Defender Robert M. Dudek
Assistant Attorney General Alphonso Simon, Jr.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

TYREE ROBERTS AKA,
ABDIYYAH BEN ALKEBULANYAHH, #6012, *PETITIONER*,

V.

STATE OF SOUTH CAROLINA, *RESPONDENT*.

PETITION FOR A WRIT OF HABEAS CORPUS

JOHN H. BLUME
Cornell Law School
110 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

Counsel for Petitioner

I. INTRODUCTION.

Petitioner, through undersigned counsel, hereby files this petition for writ of habeas corpus in this Court's original jurisdiction. As will be demonstrated below, there are a number of violations of petitioner's rights guaranteed by both state and federal law which, in the setting, "'constitute[] a denial of fundamental fairness shocking to the universal sense of justice.'" *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (S.C. 1990) (quoting *State v. Miller*, 84 A.2d 459 (N.J. Super. Ct. App. Div. 1951)). Mr. Alkebulanyahh, therefore, respectfully requests that this Court grant a writ of habeas corpus setting aside his convictions and death sentence. Alternatively, because petitioner was denied basic procedural due process throughout the post-conviction proceedings in such a manner that is also a "denial of fundamental fairness shocking to the universal sense of justice," *id.*, petitioner requests that this Court order a new post-conviction relief hearing and grant him discovery and access to funds sufficient to present additional evidence in support of his claims.

II. PROCEDURAL HISTORY.

A. Pre-trial and Trial Proceedings.

Petitioner was charged with two counts of murder and other offenses arising from the death of two Beaufort County Sheriff's deputies. Prior to trial, petitioner filed a motion to proceed *pro se*. Petitioner's stated reason for wanting to dismiss his counsel was his belief that both of his court appointed attorneys, Gerald Kelly and Sean Thornton, were actively involved in a conspiracy with the prosecution to insure that he was found guilty and sentenced to death. App. 3986.[1] Despite

[1]*See also* App. 3889 (Petitioner objected to counsel speaking at a pre-trial hearing saying "I am without representation. They are sabotaging my case"). At another pretrial hearing, petitioner stated: "And this late in the stage where I have made openings to the court that the attorneys was sabotaging my case and doing things that were detriment to my defense; that they still continue on to exercise the powers attorney in filing motions and speaking with the prosecutor and speaking with this court under the impression of being in my defense when actually they are not." App. 3910.

testimony from a respected forensic psychiatrist—Dr. Donna Schwartz Watts—that petitioner suffered from bi-polar disorder with psychosis and paranoia and thus was not competent to stand trial, the trial judge, the Honorable Daniel Pieper, relying on the Department of Mental Health (DMH) examiner's conclusion that petitioner was competent, granted petitioner's motion to dismiss his counsel and permitted petitioner to discharge counsel and proceed *pro se.* App. 4077.[2]

Petitioner's defense at the guilt-or-innocence phase of the trial was based largely on his own rambling, tangential and paranoid testimony. The "gist" of the defense was that law enforcement and the solicitor's office conspired to obtain his conviction based upon false testimony and planted evidence. Not surprisingly, petitioner was found guilty of the charged offenses on October 21, 2003.

Prior to the commencement of the sentencing phase of his capital trial, petitioner informed the trial judge that he did not wish to participate in or attend the sentencing hearing. Petitioner offered no coherent explanation for wishing to absent himself from the proceedings other than he did not think the sentencing phase would "do anything for me to no extent" and that he was not concerned with the outcome. App. 3450. Petitioner stated he did not wish to attend:

> Because I – at this – there is nothing that – it has nothing to do with me. It has nothing that – you know, I'm not concerned about it. I don't care about it. It has nothing to do with me. It don't – it won't move me or shake me no matter which way it goes, one way or the other, what is said or done, so.

App. 3486.

The trial judge tried to reason with petitioner to no avail. Then, weighing and rejecting various options including terminating petitioner's *pro se* status and re-appointing standby counsel

---

[2]The trial court designated Mr. Kelly and Mr. Thornton "standby counsel." App. 4077.

to take over the penalty phase (App.. 3488-508), the judge concluded that petitioner would: a) remain as his own counsel; and, b) remain in the courtroom for sentencing. App. 3504. The trial judge did not, however, seek or obtain any expert opinion or insight into whether petitioner was—at that point in the proceedings—competent to stand trial or to completely waive the presentation of mitigation.

Petitioner informed the court that he would be disruptive if he was required to remain in the courtroom. The trial judge took a "wait and see" approach. When the prosecution called its first witness, petitioner stood up and, in the presence of the jury, said: "Blessed be the Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." App. 3550. The trial judge briefly attempted to "plow ahead," but petitioner repeated the above refrain when the next question was asked. The trial judge removed petitioner from the courtroom, sent the jury to the jury room, and brought the defendant back into the courtroom where petitioner informed the court that he would continue to be disruptive because he "did not wish to engage in the proceedings." App. 3552. The court told petitioner that he had to attend the sentencing proceeding, and warned him that if he continued to be disruptive he would put petitioner in a room in the back of the courtroom where he could see and hear the proceedings.

When proceedings commenced, both petitioner and the trial judge were true to their word. The prosecution again sought to elicit testimony from its first witness and petitioner again stood up and said: "Blessed by Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." App. 3556. The trial judge ordered that petitioner be placed in the "room at the back of the courtroom that has a glass partition to allow him to hear all the proceedings . . . and see the proceedings as he desires." Id. The court also ordered that petitioner be shackled and threatened to gag petitioner if he made another outburst. App. 3557. Standby counsel were

ordered to resume representation to a limited extent, and were affirmatively given the responsibility to lodge any objections to inadmissible evidence. Petitioner, however, was allowed to control the defense presentation, or non-presentation as it turned out, of evidence.

The penalty phase proceeded and no mitigating or other evidence was presented by the defense. After closing arguments, the jury sentenced petitioner to death.

B. Appellate and Post-Conviction Proceedings.

On direct appeal, petitioner was represented by Joseph Savitz and Robert Dudek of the Office of Appellate Defense. Petitioner moved to represent himself on direct appeal, alleging that the Warden of Leiber Correctional Institution and his appellate counsel were conspiring to deny him access to the courts. *State v. Roberts*, 614 S.E.2d 626, 126 (S.C. 2005). This Court denied the motion. *Id.* at 629. Appellate counsel raised a single issue on appeal, i.e., whether it was error for the trial judge to require petitioner to be present at the penalty phase of the proceedings. This Court affirmed on July 24, 2006. *State v. Roberts*, 632 S.E.2d 871 (S.C. 2006)

Petitioner filed a *pro se* application for post-conviction relief which contained a number of search and seizure and speedy trial issues. His persistant belief that his arrest, trial, conviction, death sentence, continued incarceration and the present conditions of his confinement were (and are) part of a vast and growing conspiracy is evident in the PCR application and in documents he has continued to file.[3] Glenn Waters and Carl Grant were appointed by Judge Roger Young to represent petitioner in connection with his post-conviction proceedings. The transcript of the appointment hearing does not indicate that either attorney had ever been involved in a capital post-conviction

---

[3]On April 7, 2010, this Court entered an order that clerks of court in South Carolina should no longer accept filings by petitioner unless submitted by an attorney and the filing fee was paid. The Court found the order was necessary due to the "frivolous, repetitive and abusive nature of petitioner's filings."

case in state or federal court, or that they had attended any appropriate CLE programs as defined in S.C. Code § 17-27-160(B) of the South Carolina Code. S.C. Code Ann. § 17-27-160(B) (2010).[4] Counsel filed an amended application raising a single claim for relief. The issue asserted in the amended application was that the "trial judge failed to make the proper findings to determine if the applicant knowingly and intelligently understood the implications of proceeding *pro se*." *See* Amended Application for Post-Conviction Relief (filed Feb., 2008).

The post-conviction relief hearing, conducted before Judge Young on October 13-14, 2008, consisted primarily of counsel calling petitioner to the stand to state (in detail) his grievances with trial and appellate counsel. Undersigned counsel's review of the files and investigation reveals that petitioner's court appointed post-conviction counsel: a) conducted no independent investigation;[5] b) secured no investigative or any expert assistance; and, c) failed to have petitioner evaluated by a psychiatrist or psychologist to determine: i) whether he was competent to proceed in post-conviction relief proceedings; or, ii) to do a retrospective assessment of petitioner's competency at the sentencing phase of the proceedings. On September 17, 2009, Judge Carmen Mullen[6] signed

---

[4]Furthermore, undersigned counsel subsequently contacted both attorneys and confirmed that they, in fact, did not have the experience set forth by the statute. Respondent does not contest that Mr. Grant and Mr. Walters do not satisfy the criteria set forth in §17-27-160(B). § 17-27-160(B).

[5]Based upon petitioner's initial investigation post-conviction counsel did not even obtain trial counsel's file or interview trial counsel prior to the PCR hearing.

[6]For reasons which are not clear from the record, this Court reassigned the case to Judge Mullen on December 17, 2008 after the PCR hearing. Based on undersigned counsel's review of the court file, no post-hearing briefs were submitted to Judge Mullen and she did not entertain any post-hearing argument. Judge Mullen did, however, sign without a single modification the state's proposed order. Furthermore, despite the fact that Judge Mullen did not preside over the post-conviction relief hearing, the order contains a number of credibility findings. Undersigned counsel is not aware of any other capital post-conviction cases in South Carolina where a case has been reassigned after the PCR hearing.

verbatim the state's order denying post-conviction relief.[7]

A timely notice of appeal was filed. On January 8, 2010, this Court appointed Glenn Walters to represent petitioner on appeal from the denial of post-conviction relief, finding that the Office of Appellate Defense had a conflict of interest. Mr. Walters subsequently moved to be relieved, alleging that petitioner made a verbal threat to harm Mr. Walters and his family. Petitioner also requested that this Court appoint Emily Paavola or John Blume to represent him. On March 5, 2010, this Court relieved Mr. Walters and appointed undersigned counsel to represent petitioner in connection with this appeal.[8]

On July 21, 2010, undersigned counsel filed a motion to remand the case to the circuit court for additional proceedings. The primary basis of the motion was that petitioner's court appointed counsel were not qualified to represent him under the plain language of §17-27-160(B). After respondent filed a responsive pleading, which relied in the main on an August 15, 2003 letter from the Chief Justice of the South Carolina Supreme Court to All Circuit Court Judges stating that the qualifications for capital post-conviction representation under § 17-27-160(B) are identical to those for capital trial representation under § 16-3-26(B), counsel also filed a motion to recuse Chief Justice Toal. S.C. Code Ann. §§ 17-27-160(B), 16-3-26(B) (2010). The Chief Justice denied the motion for recusal in an order filed August 30, 2010. On October 20, 2010, this Court summarily denied the motion to remand.

---

[7]The order noted on a number of occasions that no new evidence of incompetency was presented in the post-conviction proceedings. *See, e.g.,* Order at 37.

[8]Undersigned counsel was not aware that petitioner had filed a motion requesting that new counsel be appointed or that petitioner had requested that undersigned counsel in particular be appointed. Undersigned counsel did not talk to or correspond with petitioner at any point during the direct appeal or during the post-conviction proceedings.

III. THIS CASE IS APPROPRIATE FOR HABEAS CORPUS REVIEW IN THIS COURT'S ORIGINAL JURISDICTION.

This Court has specifically reserved the writ of habeas corpus as a remedy which remains available even after a prisoner has exhausted all other avenues of direct and collateral review. *See, e.g.*, *Tucker v. Catoe*, 552 S.E.2d 712, 718 (S.C. 2001) (per curiam); *Pennington v. State*, 441 S.E.2d 315, 316 (S.C. 1994); *Drayton v. Evatt*, 2, 430 S.E.2d 315 (S.C. 1993). In *Butler v. State*, 397 S.E.2d 87, (S.C.1990) (rev'd on other grounds), this Court made clear that habeas corpus permits a prisoner to "take advantage of constitutional principles recognized after his trial, appeal, and exhaustion of state post-conviction relief proceedings." ID. At 88 While "not every intervening decision, nor every constitutional error at trial will justify issuance of the writ," relief is required "where there has been a 'violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'" *Id.* (quoting *State v. Miller*, 84 A.2d 459 (N.J. Super. Ct. App. Div. 1951)) (emphasis by this Court).

This Court has made the elevation of substance over technical procedural rules a cornerstone of its habeas jurisprudence. Where fundamental fairness and equity demand a remedy, this Court has shown no hesitation to set aside procedural obstacles that may have prevented earlier review and proceed directly to the merits. In *Butler*, the Court noted that it did "not condone" the petitioner's "delay in calling this grave constitutional error to our attention," but nevertheless granted relief because of the "unique and compelling circumstances" presented by the case. *Butler*, 302 S.C. at 468, 397 S.E.2d at 88. And in *State v. Torrence*, 406 S.E.2d 315 (S.C. 1991), the Court concluded its landmark opinion abrogating the 200-year-old doctrine of *in favorem vitae* review in capital cases by emphasizing that, even after the establishment of a rigorous contemporaneous objection requirement, habeas relief would remain available under *Butler* for "those who have, for whatever

reason, been utterly failed by our criminal justice system." Id. at 328. The Court later made good on this promise in *Tucker v. Catoe*, 552 S.E.2d 712 (S.C. 2001) (*per curiam*), where relief was granted on a petition asserting a statutory claim which had never been previously presented, and a constitutional claim which had been found procedurally defaulted on direct appeal and was later the subject of an unsuccessful claim of ineffective assistance of appellate counsel. This case is an especially appropriate case for the Court's habeas corpus remedy. Petitioner received virtually no representation, certainly no adequate or competent representation, during the post-conviction proceedings. In the entire history of the modern death penalty in South Carolina, undersigned counsel is not aware of any case in which no investigation was conducted, trial counsel's files were not obtained, no expert or investigative assistance was secured and effectively no witnesses of substance were called to testify at the PCR hearing. Given the lack of due process and competent representation, and the numerous meritorious constitutional claims discussed in detail below, the writ of habeas corpus should issue.

IV. REASONS THE WRIT SHOULD BE GRANTED

GROUND I: PETITIONER WAS DEPRIVED OF A FAIR AND RELIABLE DETERMINATION OF THE APPROPRIATE SENTENCE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONAL AND SOUTH CAROLINA LAW BECAUSE A) THE TRIAL JUDGE FAILED TO INQUIRE INTO PETITIONER'S COMPETENCY, B) PETITIONER WAS INCOMPETENT IN FACT, C) THE TRIAL JUDGE FAILED TO SECURE A KNOWING AND INTELLIGENT WAIVER OF PETITIONER'S RIGHT TO PRESENT MITIGATING EVIDENCE AND D) THE TRIAL JUDGE FAILED TO TERMINATE PETITIONER'S *PRO SE* STATUS.

A. Facts Relevant to the Ground for Habeas Corpus.

Petitioner was charged with two counts of murder arising from the January 8, 2002 deaths of two Sheriff's Deputies in Beaufort County, South Carolina. App. 3986. The officers were killed after responding to a possible domestic disturbance at petitioner's home. Initially, petitioner was

represented by Gene Hood and Sam Bauer, but they were dismissed six months later at petitioner's request. App. 3920. Petitioner asked that they be dismissed because "they have conspired to deny me a fair trial, they have conspired to deny me proper representation." App. 4140. On November 12, 2002, petitioner requested that he be permitted to fire his new attorneys, Gerald Kelly and Randolph Thornton, and represent himself claiming that he felt his attorneys were also conspiring with the prosecution to insure that he be sentenced to death. Petitioner informed the court, "I am without representation. They are sabotaging my case." App. 3989. The trial judge delayed ruling on the motion to proceed *pro se* until a competency evaluation could be conducted. App. 3891.

On July 25, 2003, Judge Daniel F. Pieper held a new hearing on petitioner's motion to proceed *pro se*. App. 3894. During this proceedings the trial judge asked Mr. Kelly "are there any indications that there is a problem with competency?" Mr. Kelly responded "Yes, sir." App. 3896. The trial judge proceeded to question petitioner on his experience with the criminal justice system, petitioner replied, "I Shepardize, research pretty much how to, you know, pull cases and so forth to that extent." App. 3901. Despite being informed by trial counsel that there were concerns related to petitioner's competence, the trial judge was reluctant to hold a competency hearing, stating "do we need to have a further hearing? Mr. Alkebulanyahh says he's competent." App. 3926.

On August 1, 2003, a competency hearing was held. Dr. Donna-Schwartz-Watts, a forensic psychiatrist retained by the defense, testified that, in her opinion, petitioner was not competent. App. 3979. Dr. Watts stated that during their first interview petitioner was "incredibly pleasant . . . as the interview progressed he became very comfortable, he was extremely cooperative." App. 3977. When discussing the second interview, she described him to be "somewhat paranoid during that interview in terms with just his relationships with his [defense] team." App. 3978. She believed that petitioner was "demonstrating psychotic thought processes."

App. 3980. According to Dr. Watts, during the third interview petitioner was "very paranoid, very angry, spoke very rapidly and was very tangential in how he expressed his thought." App. 3979. To better assess petitioner, Dr. Watts spoke to his mother who stated, "Ben was always 'off' even as a child . . . he would cook animals . . . he would take them and cook them and eat them, things like turtles, squirrels, that sort of thing." App. 3982. Dr. Watts testified that petitioner suffered from bi-polar disorder, depression, and paranoia. App. 3983-84. Furthermore, she believed petitioner did not have the capacity to adequately assist his attorneys with his defense let alone represent himself. App. 3986. Many of the reasons expressed by petitioner for wanting to represent himself supported Dr. Watts' conclusion that petitioner was not competent, such as his belief that his lawyers were "Masons colluding against him with law enforcement in Beaufort County to make sure he receives the death penalty because of his religious beliefs." App. 4015-16.

Dr. Richard L. Frierson, who evaluated petitioner on behalf of the Department of Mental Health, opined that petitioner suffered form "a personality disorder with narcissistic and antisocial traits." App. 4037. Dr. Frierson acknowledged petitioner's beliefs about Masons, but dismissed their significance on the basis that "if a whole part of our society believes in it . . . I'm saying that would not qualify as an actual delusion." App. 4035. Alongside Dr. Frierson, Dr. Jeffrey E. Musick examined petitioner and testified petitioner was "unwilling to admit to common shortcomings that most people will admit to." App. 4047. Dr. Musick determined that petitioner was competent to assist his counsel or to represent himself. App. 4044 However, Dr. Musick stated that "if they're not willing to admit to that [common shortcomings], maybe they are not willing to admit to more serious problems...at that point you need to investigate if there might be any more going on in terms of mental health problems." App. 4049-50.

Despite concerns over the stability of petitioner's mental state, the trial judge allowed

petitioner to proceed *pro se*. App. 4078-79. For example, the trial judge informed petitioner "if the jury returns a guilty verdict, I assure you the shock is going to set in very quickly with you and perhaps disorientation and confusion...I can just tell you out of experience." App. 3935. Immediately before granting the motion to proceed *pro se*, the trial judge again stated, "the most confident of people, the strongest of people, the people that you would never expect to act otherwise when they realize that they are looking me in the eye before sentencing break down in tears." App. 4066.

During the beginning of the *voir dire*, petitioner asked relevant questions such as potential jurors' views on the death penalty. While cross examining Jeffrey Barbic, petitioner asked "Could you describe your views on the death penalty?" App. 755. As the *voir dire* progressed, however, petitioner began to appear confused and disoriented, repeatedly asking the same questions despite sustained objections. Several times the court had to instruct petitioner not to ask questions about religion.[9] Petitioner was unable to clearly articulate his questions in many instances, such as asking: "So you wouldn't want to harbor any un-biasness or any impartial in reference to the death penalty itself?" App. 886. On a number of occasions the potential juror was unable to understand the question, such as "Are you the type of person who would make a distinction between different types of murder or between people who were charged, and you would feel that each case should be treated exactly the same?," forcing the juror to request that the question be repeated or rephrased. App. 812. Petitioner immediately forgot the question he had asked multiple times forcing him to admit "I don't know what the question was. I don't recall it." App. 1073.

---

[9]After petitioner asked a potential juror to describe the guidance his religion provides on the death penalty the court admonished petitioner stating, "That's what I just instructed you on." App. 806.

Attempting to oppose one of the prosecution's peremptory challenges, petitioner was asked to pinpoint another juror that shared similar characteristics. His response was rambling and nearly unintelligible: "Well, the characteristics that she had that was similar was pretty much to the extent that she seemed like she was more – I wouldn't want to use the characteristic—afraid in similarity as far as she would not be – would feel intimidated by the prosecution – authority of the prosecution." App. 1341.

Petitioner's opening statement at the guilt-or-innocence phase focused on the conspiracy theory he would present as a defense. Petitioner stated:

> Now, I want you ladies and gentlemen to look at the evidence – plenty evidence. You're going to see officers doing things that there will be no doubt about that they planted evidence. They put things down. They moved things, because they want to solidify their case, their position. They want to quell the interest of the people about they're going to solve this case. This is going to be handled. It was a wrong-doing. There was something wrong about this. And they wanted to gain the confidence of the community, that they was on top of things, and they was doing the right things, everything legally. But they was not doing everything legally. And the evidence is going to show that they was not doing anything legal—doing everything legally as they supposed to have been doing, because if they was doing everything legally, we would not even be here today.

App. 1389-90. Petitioner also expressed a belief that the State was trying to assassinate him stating, "There's two officers that shot Mr. Alkebulanyahh twice . . . Is Mr. Alkebulanyahh is to call the police? He don't know what going on. He don't know someone try to assassinate him, kill him." App. 1402.

During the prosecution's case-in-chief, petitioner's examination of witnesses and legal arguments was often unintelligible. When his points were comprehensible, they referred continually to the conspiracy accusations against the Beaufort County Sheriff's Department. For example, while cross examining Bob Bromage, the chief investigator for the Beaufort County Sheriff's Department, petitioner attempted to show it was impossible to take the facts and conclude he had shot anyone.

To illustrate the point, petitioner asked Bromage, "[s]o if I said, an elephant's behind that door and showed you some elephant manure, and you put the facts together, you would say, an elephant behind that door; is that correct?" App. 1578. As the trial progressed, he referred more and more to his conspiracy theory accusing Bob Bromage;[10] Dave Brown,[11] Matt Averill,[12] Scott Johnson,[13] and Diane Bodie[14] of planting evidence in order to frame him for the deaths of the officers.

Petitioner's questioning of Dan Defreese, the SLED agent responsible for determining the trajectories of the bullets, focused on Defreese's use of a protractor, which petitioner appeared not to comprehend. For example, petitioner asked, "You wouldn't have to have a protractor – that type of subtractor --- protractor available, would you?," App. 2411-12; "Do you think you can draw you can draw a diagram of a protractor?," App. 2412; and "Your honor, may I examine the weapon?" App. 2413.

Petitioner elected to testify on his own behalf. His testimony was, at best, very difficult to follow. He began by explaining where he was in the house when the officers arrived, "I left and I went to this rest – to the rest room back here to defecate. I had not done anything else, been in the

---

[10] Petitioner suggested that the gun was unlatched and a deputy latched it back into the holster, "[B]ut it is possible that the gun could have been out and then the deputy replaced the gun back into his holster?" App. 1587.

[11] While questioning Mr. Brown, petitioner asks, "Is it possible – would you—will you agree that the reason the weapon type is not there and you listed – as you say—Mr. Alkebulanyahh is arm because it was your intention to plant a weapon?" App. 2016.

[12] "Isn't it true that you added or planted evidence with that report that you submitted to the SLED forensic service laboratory?" App. 2036.

[13] "Mr. Johnson—Lieutenant Johnson, isn't it true that you wanted them shoes so that you can make foot impressions— plant foot impressions of the suspect to solidify the prosecutor case?" App. 2088.

[14] "Is it possible that—that either some evidence could be planted or added if you allege something was there and it was not there?" App. 2335.

house no more than maybe 5 to 10 minutes from my arrival in the house. I went in this area and sat here to defecate." App. 3191. He continued to pursue conspiracy theories, stating "But to me, I didn't know that – that the circumstances and the facts that surrounded them [police officers] being there. I'm only thinking they tried to kill me or assassinate me." App. 3233. When cross examined by Solicitor Murdaugh, petitioner became increasingly difficult to understand. When Solicitor Murdaugh asked petitioner whether he believed the fanny pack that was found on him was planted by the Beaufort County Sheriff's Department, petitioner responded,

> I know – I know that the Beaufort County Sheriff Department, them, brought that fanny pack out to where I was at because Kimberly Blate and no one else has ever stated I had that fanny pack. I did not have that fanny pack. And you would not found nail, fingerprint nothing, no item in that fanny pack that belongs to me or no other item in there on that fanny pack. I have not touched not one single item. Not one fingerprint of mine is on any of them items in that fanny pack.

App. 3218. When questioned about whether or not he believed all law enforcement officers were corrupt, petitioner responded,

> I know that you [Mr. Murdaugh] have lied. I know that some officer have went out of their way to villainize me and to put this case on me because you – because you didn't do your – you didn't – the law enforcement allow the people possible to know exactly who did this shooting leave that residence or had them detained and they didn't do a thorough investigation.

App. 3223. Prior to closing statements, the trial judge offered to instruct the jury on manslaughter. App. 3272. Petitioner refused stating, "I do not wish for it to be charged that – that I committed an act, any type of act." App. 3273. Despite explaining to petitioner that manslaughter was a lesser included offense of murder, petitioner refused to allow manslaughter to be submitted.

During his closing argument, petitioner continued to press the sprawling conspiracy theory involving the Beaufort County Sheriff's Department and now the prosecutor stating, "The prosecutor, when he opened up his – opened his statements to you all, he came and he stood before

you all in opening statement, he started out with telling you a lie." App. 3222. Petitioner argued evidence was planted because "they was from the beginning starting to try to construct a case, concoct a case, because he didn't bring nothing up with that to try make sure that he tell you all that." App. 3323. Despite several in-court identifications, petitioner insisted that not a single person has properly identified him,

> There's no mistake about identification. There's no mistake that Mr. Alkebulanyahh didn't had no gun and wasn't with no Ms. Kimberly Blate. That's evidence. That's not something that's abstract. That's going to be – that's right there in them exhibits right before you. That's concrete. There's no mistake about that.

App. 3346. Later in his argument, petitioner began to ramble, turning to topics unrelated to the trial, such as his mental health:

> "[I]t had – it hurt me to realize that the--- the – that the—that the system could take any individual they want to and force them into examination by a mental health psychologist and psychiatrist, and then that person can say whether you mental health or not.

App. 3367.

While the jury deliberated, petitioner informed the court that he did not intend to participate in the proceedings if the jury returned a guilty verdict. App. 3448. After determining that petitioner not only did not wish to be present but also had no desire to put on any mitigating evidence, the trial court said, "[b]ut, obviously, you understand that the second phase of the trial focuses solely on penalty. And essential to that process of a fair decision is the fact that not just aggravating information is introduced, but mitigating information." App. 3449. The trial court asked why, "knowing that [mitigating information] can have a major impact on the determination of the jury," petitioner refused to present any evidence. Petitioner responded, " it wouldn't make no difference to me." App. 3449. When the trial judge asked whether petitioner believed that "the jury would want to hear information about your background or any of the circumstances that might have been

involved or anything like that," petitioner replied, "I don't see where it would be helpful to me in any type of manner. I don't see where it would be helpful— helpful to me. I don't see where it would, you know, do anything for me to no extent." App. 3450. The trial judge made no further inquiry.

The trial judge then attempted to ascertain why petitioner wished to absent himself during the sentencing phase. App. 3450. Petitioner asserted that he "wouldn't be able to sit there and attend that proceeding." App. 3451. If objectionable information was presented, "[i]t would be for the court and for the . . . whatever has to be done, has to be done. I mean, it doesn't matter now. I don't need no objection to me." App. 3451. Petitioner said he would "waive all rights to any objections to anything" if found guilty. App. 3451. The judge asked for everyone to leave the courtroom so that he could talk to petitioner alone. App. 3451.

After the courtroom was cleared, the trial judge asked petitioner whether he planned on testifying to the jury or presenting mitigating evidence, and petitioner said no. App. 3453. The trial judge told petitioner that "the jury could go either way. If it gets to [the sentencing] phase . . . life or death, and death is a final thing . . . usually this phase is important enough to want . . . have that presented to a jury. The jury doesn't weigh those things. They just consider everything." App. 3455. Without defining aggravating circumstances, mitigating circumstances, non-statutory mitigating circumstances, or how the jury weighs evidence at the penalty phase to arrive at a determination of the appropriate sentence, the trial judge then asked whether petitioner understood what was just said "as far as the aggravating circumstances," to which petitioner answered "yes." *Id.* The court inquired whether petitioner preferred death to life, and petitioner responded:

> [N]o. What I'm saying— I would not be speaking as a juror, I'm just speaking in general . . . that's a form of death itself . . . so I don't see it as any— in my position, I don't see it as anything that— that— that could concern me to that . . . extent. But

> I understand the nature part as far as reference you speaking to me about and your position."

App. 3456. The court then asked, "so you're telling me, you don't— you're not asking that counsel be appointed to represent you on this proceeding?" App. 3457. Petitioner responded, "[N]o. Any decision they make in that proceeding is acceptable to me . . . I don't see advantage to anything." *Id.* He also said, " . . . I'm not asking you to grant anyone to represent me at that particular proceeding, at the mitigating— mitigating, aggravating circumstances." App. 3457.

The trial judge determined that petitioner "voluntarily, knowingly, and intelligently" waived his right to counsel, and brought everyone back in. App. 3458. Petitioner answered more questions about his intentions regarding the sentencing phase, saying that the jury "should continue in sequestration if it came to a second phase" and should determine his sentence, and that he wished to have 24 hours between the close of the guilt-or-innocence phase and the sentencing phase. App. 3459. Petitioner was advised that he had the right to testify, and to make a statement to the jury. App. 3460. The issue of petitioner's presence at the sentence proceeding was raised again, App. 3461, and petitioner said he would be "unruly" if present during sentencing. App. 3461.

> I would probably have to be restrained, probably really restrained physically; and that's for sure. There's no doubt about it. I would not— I would not sit there . . . not voluntarily . . . no matter what the circumstances or what the law say or anybody say, that would not be voluntary . . . when I speak, I do speak firmly.

App. 3462. However, petitioner also said that he would not resist being restrained "unless they plan to physically assault me and use whatever necessary force, take me in their bathroom, beat it up." App. 3463. Petitioner proceeded to waive objections during sentencing, App. 3450, making a statement to the jury, App. 3452, and having counsel appointed to represent him for the sentencing phase. App. 3457.

The jury returned a guilty verdict. App. 3473. Petitioner changed course and waived his statutory right to a 24 hour "cooling off" period before sentencing commenced, App. 3481, a right which he had intended to invoke before he was found guilty. App. 3460. He also reiterated that he did not "intend to offer anything at this proceeding, other than sentencing." App. 3482. He said he had no intention "to be sitting up in the courtroom, listening to the material." App. 3483. If required, he would end up being "unruly" but not violent towards others. App. 3483. The court explained that "a capital case requires the defendant's presence," App. 3483, and attempted to persuade petitioner to attend the penalty phase, App. 3484-85, asking why petitioner was "now after this point indicating" a refusal to comply with the court's instructions. App. 3486. Petitioner said, "because . . . it has nothing to do with . . . I'm not concerned about it. I don't care about it. It has nothing to do with me . . . it won't move me or shake me no matter which way it goes . . . " App. 3486. The court replied that "this proceeding is all about you." App. 3486. However, petitioner said he did not want the jury "to know nothing about me." App. 3487. "I'm not concerned about their verdict. I'm not concerned whether they're going to say death . . . or life sentence. That has no relevance in my mind." App. 3487. Petitioner also said, "I'm not considering or thought about mitigating circumstances. I don't care about the word, the terminology, and the purpose of it." App. 3485. Petitioner informed the court that he had no intention of presenting mitigating evidence during the penalty phase of his trial, he did not wish to be present at the penalty phase, and he also did not intend to relinquish his *pro se* status. App. 3492 ("[T]he defendant . . . . says that he doesn't agree to any changes in his status as attorney of record, and that if the court makes any change, they'll have to do it on their own motion without his input."). The trial judge recognized that this was potentially problematic, and attempted to cajole petitioner into changing his mind informing petitioner it had "honored" his "request" to represent himself, and reminded him that "when you

made your representation that you were going to see this through, [] I took your word." App. 3490. The trial court also expressed concern about petitioner's assertion that he did not wish to be present during the penalty phase, with the exception of "at sentencing." The court stated that "[a] capital case requires the defendant's presence. And while there have been some situations where . . . the defendant has been taken out of the courtroom, the only situations where that has occurred is where the defendant actually had counsel representing him." App. 3483.

Unsure how to proceed under these circumstances, the trial court asked Mr. Murdaugh, the assistant solicitor, for guidance: "What's the state's position? You know, the court is in a peculiar position, also in figuring out what to do about stand-by counsel." App. 3487. Mr. Murdaugh acknowledged the uniqueness of the situation and said that he wished he "had the wisdom to tell [the court] what to do." App. 3487. Both agreed that it was their "general understanding that in a capital trial, the defendant's presence is required." App. 3487. The court informed petitioner that it might "be forced to ask counsel to step in." App. 3490. Petitioner reaffirmed his desire to take no part in the penalty phase "except the sentencing." App. 3492.

After failing to persuade petitioner to participate in the penalty phase, the court proposed the possibility of appointing standby counsel to represent him, but limiting their duties to objecting "to the presentation of anything improper from the state," while not presenting "any mitigating evidence." App. 3494. Anticipating a potential ethical conflict, the court asked Mr. Kelly whether he would "be professionally and ethically capable of proceeding tomorrow, if those are your instructions from the client?" App. 3496. Mr. Kelly said that he and Mr. Thornton would be able to proceed, although if petitioner agreed to terminate his *pro se* status, he and Mr. Thornton intended "to call witnesses . . . because . . . that's [in petitioner's] best interest . . . [we] would do everything in [our] power to represent him. But if it's limited by him, [we] have no choice." App. 3496. Mr.

Thornton, however, urged the court to respect petitioner's wishes: "I think in a case as serious as this one is, where the defendant has demonstrated his willingness all the way, really into over two weeks of trial, I think the smart course would be for his lawyers—stand-by counsel, if the court orders us to make objections, I think the smartest course would be to honor his wishes." App. 3499-50.

The court was not convinced. Referencing *United States v. Davis*, 180 F. Supp. 2d 797 (E.D.La. 2001),[15] and characterizing the case as holding "appointment of independent counsel is the most appropriate course of action where a capital defendant consistently stated his intention to present no evidence in mitigation of the death penalty," App. 3500, the court stated that it had "two courses of action, either appoint [Mr. Kelly and Mr. Thornton] to represent" petitioner "in accordance with his wishes, or to let [Mr. Kelly and Mr. Thornton] as stand-by counsel object to the presentation of anything that might be improper from the state's position and to argue." App. 3502-03. Mr. Kelly characterized petitioner's actions as resulting in a "hybrid" where the defendant refused "to deal with the court" and simultaneously refused "to give up any of his *pro se* status." App. 3509.

Before making a final determination, the trial judge requested that Mr. Murdaugh, Mr. Kelly, and Mr. Thornton research the applicable case law during the "lunch hour" and report back. App. 3506 ("I still think that perhaps I should let you all see what research you can find during, maybe the lunch hour, before we make that type of decision."). After returning from the break, the court

---

[15] *Davis* held that the appointment of independent counsel is the most appropriate action where a capital defendant consistently stated his intention to present no evidence in mitigation of the death penalty and invited the death penalty to be imposed. The court reasoned "Society has a strong and compelling interest in a full and fair capital sentencing proceeding, regardless of the individual circumstances of a particular case. This interest requires the presentation of both aggravating and mitigating factors to the jury that will be deciding life or death. Without that information, the jury cannot perform its statutory function and make an informed, reliable decision." 180 F. Supp. 2d at 807. The court went on to state that the "safeguards are intended to protect an individual defendant from an arbitrary and capricious execution," but they "also serve an equally, if not more, important purpose in protecting society from participating in an execution that is not warranted." *Id.*

acknowledged that *Davis* had been criticized by other courts and observed that it was necessary to "be very careful about trumping the right to representation." App. 3507. The court then questioned Mr. Murdaugh regarding what he had discovered. Mr. Murdaugh reported that he had found two cases relevant to the defendant's situation: *United States v. Lawrence* and a case from South Carolina called *State v. Reed*.[16] Mr. Thornton stated that he had discovered only the *Reed* case.

After a brief discussion of the cases (with virtually no analysis of either), the trial judge opined that petitioner had the right not to present any evidence and the right not to testify, but recognized that a potential "dilemma" might occur "in the event that petitioner [was] removed" from the court room during the trial. Worried about this possibility, the court asked petitioner how he intended to behave during the trial, to which petitioner stated that "there will be a disruption." App. 3514. Mr. Thornton, recognizing the likelihood that he and Mr. Kelly would be called to represent

---

[16] While neither Mr. Murdaugh nor the court provided the citation for the cases nor elaborated on their holdings, Mr. Murdaugh was almost certainly referring to *State v. Reed*, 503 S.E.2d 747, (S.C. 1998), and *United States v. Lawrence*, 161 F.3d 250 (4th Cir. 1998). *Reed* held that a trial court did not abuse its discretion in refusing to allow standby counsel to take over the representation on the eve of sentencing 503 S.E.2dat 751. The trial court "concluded that it would be a hybrid form of representation placing standby counsel in the position of not being fully prepared to cross-examine witness without delaying the trial" and that it would not delay the proceedings. *Id.* at 751 The trial court declined to appoint counsel, but allowed standby counsel to aid the defendant throughout the sentencing proceedings. On appeal, this Court held that the "trial judge did not err in denying appellant's request to have standby counsel represent him on the eve of sentencing." *Id.*

Lawrence held that a *pro se* defendant, on trial for attempted bank robbery, could be permitted to absent himself voluntarily during trial. Lawrence appealed his guilty verdict in the trial court arguing that the court erred in "restricting his standby counsel's advice to procedural matters" thereby violating his Sixth Amendment right and by "allowing him to remain outside of the courtroom during trial." 161 F.3d at 253. The Fourth Circuit held that "[t]he limits placed by the court on Lawrence's use of his standby counsel in this instance were reasonable. . .When circumstances changed due to Lawrence's request to leave the courtroom, the court demonstrated its responsiveness . . . by extending the scope of standby counsel's representation to include a substantive discussion of the implications of waiving his right to be present at his own trial. Placing reasonable limits on the advice to be given by standby counsel that the court was under no obligation to provide in the first instance does not constitute an abuse of discretion." *Id.*

petitioner in the penalty phase, then asked the court to clarify the role of stand-by counsel if the defendant's current status should change. App. 3515. The court responded stating:

> As I indicated earlier . . . because he's representing himself *pro se*, he has the right to use stand-by counsel as I've previously granted. At the same time, I have a hard time balancing the fact that he has the right to make . . . an informed decisions about not presenting anything during mitigation. He doesn't have the right to be disruptive in the court, but at the same time he has the right not to present anything in mitigation, no matter how un-wise that decision may be. My dilemma is if he is not able to control himself, then I feel compelled that I should consider the option of appointing counsel to represent him.

App. 3516. The court again tried to convince petitioner to agree to stay in the courtroom without being disruptive and to question witnesses. *See* App. 3517. Petitioner answered "I don't want to be at the proceeding. I don't want to see any of the proceedings. I definitely don't want to hear the proceedings. And I have no interest in the proceeding. I'm only interested in the sentence." App. 3516. The court then asked "do you have any objection to letting stand-by counsel at least handle the evidence and the objections that's appropriate, and honor your wish to not present any witnesses?" App. 3518. After receiving more clarification, Mr. Alkebulanyahh responded, "No, sir, I sure don't. That seems feasible." App. 3519.

The court was still concerned about "whether or not [it could] at this point order that [petitioner] be removed from the courtroom." App. 3523. Mr. Kelly replied, "[f]or what it's worth, I believe he can waive his right to be present, just as anybody can in any portion at any time. And, your honor, I think he can waive his right to be present and still remain *pro se*." App. 3523. Mr. Kelly assured the court that "in this case [the petitioner] is present, he wants to waive his presence; there's a difference. . . It's not a defendant being blind sided by the prosecution because he's not shown up for trial." App. 3524. Mr. Kelly then explained that if he as standby counsel was re-appointed to represent the petitioner, he would not honor petitioner's wishes. App. 3525.

> I don't have any problem if we're stand-by counsel following the direction of the court if it's in agreement with the defendant or not. But if we are not stand-by counsel but actually counsel of record, then if it has to do with presentation of evidence, I'm not going to be limited to that just because my client doesn't want his mother or his sister or his brother or an expert on the witness stand. I'm going to call them, and he will just have to remove me to stop me from doing it, because that's my duty. If I'm not counsel of record and he remains *pro se*, that's a different matter.

App. 3526–27. Solicitor Stone added that petitioner "has to do one or the other, either represent himself or they represent him. I don't think there's a hybrid there." App. 3528. The court once again acknowledged that it was faced with a difficult decision, but stated "my gut reaction is I have to—I may need to appoint counsel; that's my gut reaction." App. 3529. Mr. Thornton then cautioned the court that he was very "concerned about" the possibility that "if the court does then appoint us, you know, we're literally talking about less than twenty-four hours . . . then we're going to be judged as [to] whether or not we did our job as counsel with . . . no real way to get any witnesses . . . sometimes there are situations . . . where you could do more harm than good." App. 3529-30.

After the various inquiries and much wavering, the trial judge decided to proceed with petitioner sitting at the table with counsel,[17] and counsel performing the limited role of objecting to evidence. Mr. Kelly informed the court that there were several investigators he was interested in contacting for the purpose of testifying on behalf of the petitioner were counsel to be re-appointed, however he was worried about who would pay the travel expenses. The trial judge instructed Mr. Kelly not to "do that now." App. 3537. The court once again warned petitioner of the dangers of proceeding *pro se*, and verified that petitioner still wished to represent himself. The court also

---

[17] The court acknowledged that petitioner might follow through with his threats to disrupt the trial. The court characterized this as a "timing" issue and indicated that, if necessary, it would respond to any outbursts by Mr. Alkebulanyahh by appointing standby counsel to represent Mr. Alkebulanyahh with the restrictions they had previously discussed.

verified that petitioner agreed to allow standby counsel to perform the limited role of objecting to evidence and making the closing argument.

With that, the jury was called back into the courtroom and the penalty phase of the trial began. As soon as the first witness was called by the prosecution, petitioner rose and began chanting: "Blessed by Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." App. 3550. Petitioner would repeat this chant on several more occasions before the court ordered that he be placed "in a room at the back of the courtroom that has a glass partition to allow him to hear all the proceedings." App. 3556. When the trial resumed, Mr. Kelly and Mr. Thornton acted in the limited "hybrid" role predetermined by the court.

Of the twenty-eight witnesses called by the prosecution during the penalty phase, Mr. Kelly and Mr. Thornton cross-examined seven in their role as "hybrid counsel." Neither Mr. Thornton or Mr. Kelly objected to any of the questions presented or testimony offered by the eleven witnesses called by the prosecution to testify about victim impact, or to any of the numerous pictures of the victims, including photos of the funeral attended by massive numbers of police officers, offered during their testimony. Mr. Thornton and Mr. Kelly objected to one question posed to Cheryle Cosson, who was asked for her opinion about how petitioner adjusted to prison. App. 3588. They also objected to a question posed to Jeff Lights on the grounds that it was hearsay, but later withdrew the objection. App. 3628. Mr. Kelly and Mr. Thornton did not present any mitigating evidence during the defendant's case, nor did they object at all during the prosecutor's closing argument.

B. Argument in Support of Habeas Corpus.

1. The Trial Judge's Failure to Inquire into Petitioner's Competency to Stand Trial When the Circumstances Raised a Bona Fide Doubt Regarding Competency Violated the Due Process Clause.

Given petitioner's increasingly irrational and bizarre behavior prior to trial, during the guilt-or-innocence phase of the proceedings and during the sentencing phase of trial, the trial judge was required by the Due Process Clause to inquire further into petitioner's competency to stand trial. The Supreme Court has specifically held that a trial judge has an affirmative duty to delve into a defendant's competency to stand trial when the circumstances raise doubts about whether the defendant has the rational and factual capacity to understand the proceedings and to communicate with counsel. *Drope v. Missouri*, 420 U.S. 162, 182 (1975) (holding that trial judge's failure to suspend the proceedings and have the defendant evaluated for competency violated due process when there was evidence suggesting the defendant's mental condition had deteriorated during the trial). This is true even if the defendant has previously been determined to be competent to stand trial. The Court explicitly recognized that a defendant's mental state can fluctuate as a trial progresses, and "a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Id.* at 181. The standard for determining whether or not the duty to inquire has been triggered, is whether the totality of the circumstances, objectively considered, "raised a doubt about the defendant's competency and alerted [the court] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir.1980).

In this case, a fair assessment of the relevant evidence clearly raised doubts regarding petitioner's competency. First, petitioner's competency was disputed prior to trial by Dr. Schwartz-

Watts, who informed the trial judge that in her opinion petitioner was bi-polar, psychotic, and paranoid. Petitioner's trial counsel also told the judge that, in their opinion, petitioner was not competent. While the trial judge found petitioner competent prior to the commencement of the proceedings, Dr. Watts' testimony is certainly a relevant consideration. Second, the trial judge himself acknowledged the effect that the stress of a capital trial could have on a capital defendant's mental informing him, "if the jury returns a guilty verdict, I assure you the shock is going to set in very quickly with you and perhaps disorientation and confusion...I can just tell you out of experience." App. 3935. Third, during the trial, from *voir dire* forward petitioner's ability to coherently question witnesses and make relevant points diminished substantially. His decision-making also became increasingly erratic and irrational, i.e. his decision not to allow manslaughter be presented to the jury, and his decision not to present mitigating evidence at sentencing. Petitioner's increasingly strange and self defeating behavior should have given the trial judge sufficient reason to question his competency. When petitioner began loudly chanting "Blessed be Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus," prompting the judge to remove petitioner from the courtroom and restrain him the trial judge was at that point constitutionally required to initiate an inquiry into petitioner's competence. App. 3550. The totality of evidence triggered the duty to inquire into petitioner's competency. A *bona fide* doubt was raised at that point in the proceedings and the trial judge's failure to have petitioner's competency evaluated was a violation of due process. *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

2. Petitioner was Incompetent in Fact throughout the Guilt-or-Innocence Phase of Trial Violating the Due Process Clause.

Furthermore, petitioner was incompetent in fact throughout the trial proceeding. To be competent a defendant must have "sufficient present ability to consult with his lawyer with a

reasonable degree of rational understanding; and a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). Undersigned counsel has retained the services of a forensic psychiatrist, Dr. Rikki Lynn Halavonich. Dr. Halavonich has reviewed the trial transcripts, some collateral documents, the post-conviction relief transcript, and she also has interviewed petitioner several occasions. Based on her review of the relevant materials and her interviews with petitioner, Dr. Halavonich has concluded that petitioner was incompetent in fact during the penalty phase of the proceedings. Dr. Halavonich holds this opinion to a reasonable degree of medical certainty and is prepared to testify to that effect at an evidentiary hearing.[18]

3. Petitioner's Death Sentence Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Corresponding Provisions of the South Carolina Constitution as a Result of the Trial Judge's Failure to Secure a Knowing, Voluntary, and Intelligent Waiver of the Right to Present Mitigating Evidence.

Mitigating evidence is central to sentencing and may not be inadvertently waived. Mitigation plays an indispensable role in capital sentencing proceedings. *See e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (holding unconstitutional a statute that prohibited consideration of mitigating circumstances); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (prohibiting limitations on sentencer's ability to consider non-statutory mitigating evidence). Because of the qualitative difference between a death sentence and any other punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* at 305. As a result, "[i]n capital cases the fundamental respect for humanity

---

[18]A copy of Dr. Halavonich's report is attached to this petition as Attachment A. In addition to being periodically psychotic, Dr. Halavonich also believes that petitioner suffers from temporal lobe epilepsy and that much of his behavior is best understood as a by-product of his neurological abnormalities.

underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304. Concurring in *California v. Brown*, 479 U.S. 538 (1987), Justice O'Connor wrote:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence . . . *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.

Id at 545. *See also State v. Bell*, 360 S.C.2d 706, 712 (S.C. 1987) (stating that the jury must carry out its function in capital cases by focusing "on the defendant as a 'uniquely individual human being'") (quoting *Booth v. Maryland*, 482 U.S. 496, 504 (1987)); *State v. Mercer*, 672 S.E.2d 556, 562 n.7 (S.C. 2009) (reminding " the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence . . . The trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant's right to present mitigation evidence.").

A capital sentencing jury's consideration of mitigating evidence ensures that a defendant receives individualized consideration guaranteed by the Eighth and Fourteenth Amendments. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (emphasizing that consideration of mitigating facts about the defendant and the circumstances of his

crime ensures an individualized assessment) (citations omitted). As the Supreme Court has recognized, "[t]he nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." *Lockett* 438 U.S. at 605.

Like other constitutional rights, the right to present mitigating evidence may be waived, but the waiver of this fundamental right must be knowing and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (waiver of the right to a jury trial); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (waiver of the right to confront adverse witnesses); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (waiver of counsel at trial); *Boyd v. Dutton*, 405 U.S. 1, 2 (1972) (waiver of guilty plea). A "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege," and its validity is determined by a fact-specific inquiry which includes "the background, experience, and conduct of the accused." *Zerbst* at 464. From guilty pleas to the right to counsel, a known right or privilege may not be abandoned without clear evidence that the defendant understood the right that he or she allegedly relinquished. *See Van Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (noting that waivers of the right to counsel are valid only if defendants understand the nature of their charges, the possible punishments, defenses and mitigating circumstances, and "all other facts essential to a broad understanding of the whole matter"); *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (requiring defendants who plead guilty to possess "an understanding of the law in relation to the facts"). The right to present mitigating evidence is similarly indispensable to a fair outcome in a capital case, and may be waived only with full knowledge of what is being relinquished.

a. States Increasingly Require Inquiry into a Defendant's Refusal to Present Mitigating Evidence

While an issue of first impression in South Carolina, petitioner's is not the first case in which a capital defendant sought to waive the presentation of mitigating evidence. State courts facing the identical issue presented in petitioner's case have recognized that due to the fundamental nature of the right to present mitigating evidence and the critical role mitigation plays in the capital sentencing phase, the right cannot be validly waived with a probing inquiry into the defendant's understanding of the concept of mitigation. These courts require trial judges to inform the defendant about the nature of mitigating evidence and the role it plays in capital sentencing.[19] *See e.g.*, *Wallace v. State*, 893 P.2d 504, 512-13 (Okla. Crim. App. 1995) (issuing standards that sentencing courts must use to evaluate whether defendants understand the right to present mitigating evidence); *State v. Ashworth*, 706 N.E.2d 1231, 1237 (Oh. 1999) (holding that when defendants wish to waive "all" mitigating evidence, trial courts "must conduct an inquiry on the record to determine whether the waiver is knowing and voluntary"); *St. Clair v. Com.*, 140 S.W.3d 510, 560-61 (Ky. 2004)

---

[19]No jurisdiction has ruled that waivers need not be knowing or intelligent. Recognizing the fundamental importance of presenting mitigating evidence, trial judges routinely conduct colloquies and make on the record determinations, even where there is no express command to do so by the state supreme court. *See e.g.*, *State v. Bordelon*, 33 So. 3d 842, 864 (La. 2009) (upholding waiver based on trial court's "extensive colloquy with defendant, in which it explained his right to present mitigating evidence and stressed the importance of that right in view of the potential consequences of the sentencing hearing"); *Commonwealth v. Randolph*, 873 A.2d 1277, 1282 (Pa. 2005) (holding that the defendant's waiver was effective where the trial judge's colloquy explained who had the burden of proving aggravating and mitigating circumstances, "the significance of mitigating evidence, and his right to present mitigating evidence"); *State v. Bearup*, 211 P.3d 684, 694 n.3 (Az. 2009) (noting trial court's colloquy with defendant before rejecting his claim for relief); *Jackson v. State*, 18 So.3d 1016, 1024 (Fl. 2009) (upholding validity of defendant's waiver where trial court conducted colloquy with defendant, and defendant was "well informed" by his counsel of the consequences of waiver); *Shore v. State*, No. Ap-75049, 2007 WL4375939, at * 10 (Tex. Crim. App. 2007). (Tex. Crim. App. 2007) (finding knowing and intelligent waiver based on defendant's conduct and the record as a whole); *State v. Woods*, 23 P.3d 1046, 1084 (Wash. 2001) (requiring that waiver of mitigating evidence "like other constitutional rights . . . [be] made 'knowingly, voluntarily, and intelligently'").

(importing Oklahoma's standard for determining whether a defendants waiver was knowing and intelligent); *State v. Kiser*, 284 S.W.3d 227, 252 (Tenn. 2009); *State v. Shafer*, 969 S.W.2d 719, 738 (Mo. 1998) (holding that record reflected defendant's waiver was knowing, voluntary and intelligent). Failure to ensure that a capital defendant knowingly and intelligently waives his right to present mitigating evidence can result in reversal of a death sentence. *See Fitzgerald v. State*, 972 P.2d 1157, 1173 (Okla. Crim. App. 1998).

At least two capital cases have been remanded for resentencing because the defendant failed to understand the purpose of mitigating evidence. In *Tilly v. State*, 963 P.2d 607, 617 (Okla. Crim. App. 1998) (*rev'd on other grounds*), the court vacated the defendant's sentence because the trial court failed to make an on the record determination that he waived his rights "expressly, knowingly, intelligently, and voluntarily." Id. At 616. The court rejected the State's argument that because a witness testified on the defendant's behalf during mitigation, the trial court did not need to follow stringent safeguards to protect the defendant's right to present mitigating evidence. *Id.* at 617. In *Fitzgerald v. State*, 972 P.2d 1157, 1173 (Okla. Crim. App. 1998), the court affirmed the importance of ensuring that defendants understand the right that they are attempting to relinquish. Although the defendant could distinguish between life and death, and was aware he could call witnesses, the record failed to clearly indicate whether he understood the effect of personal information on the jury's determinations, and whether the trial judge advised or questioned the defendant about the purpose or importance of mitigating evidence. *Id.* The court noted that the defendant's failure to call family members, and admission to the jury that he "didn't know" why he did not open up about his personal information, sufficiently suggested that he did not understand his rights. *Id.*

A number of states have developed standards to determine the sufficiency of the trial court's explanation of mitigation in order to ensure that any purported waiver is truly knowing and

intelligent. Recognizing that "the Constitution requires individualized sentencing, and mitigating evidence is an important factor in ensuring this right," Oklahoma's state Supreme Court requires "stringent procedures before a defendant may waive his right to present evidence in mitigation." *Fitzgerald v. State*, 972 P.2d 1157, 1173 (Okla. Crim. App. 1998). Oklahoma requires that capital defendants understand the difference between life imprisonment and the death penalty, as well as the importance of mitigating evidence. *Id.* Additionally, because an on the record colloquy will "provide valuable information and help preserve the record for the mandatory sentence review," trial judges must define mitigation, explain that it can offset aggravating circumstances, inform the defendant of the consequences of failing to present mitigating evidence, and make an on the record determination that the defendant understands the importance of mitigation in capital proceedings. *Wallace v. State*, 893 P.2d 504, 513 (Okla. Crim. App. 1995); *see also State v. Ashley No. 9605003410,* 1999 WL 463708 at *2 (Del. Super. Ct. 1999) (analyzing the trial court's application of Oklahoma's *Wallace* standard in evaluating waiver).

Likewise, Tennessee trial courts must engage in a colloquy with the defendant and make an on the record determination of the defendant's understanding of mitigation "to protect the defendant's interests and to preserve the record." *State v. Kiser* 284 S.W.3d 227, 252 (Tenn. 2009). Ohio and Kentucky additionally require trial courts to conduct inquiries on the record where they explain mitigation, ensure that defendants understand its importance, its use in offsetting aggravating circumstances, the effect of failing to present mitigating evidence, and to make findings of fact as to the defendant's understanding and waiver of rights. *State v. Ashworth*, 706 N.E.2d 1231, 1237 (Oh. 1999); *St. Clair v. Com.*, 140 S.W. 3d 510, 560 (Ky. 2004) (holding that these requirements are "incumbent" upon trial judges); *see also Com v. Wilson*, 861 A.2d 919, n. 20 (Pa. 2004) (noting in a footnote that trial courts must follow similar requirements).

b. Petitioner's Waiver Was Not Knowing and Intelligent.

In this case, the court never determined that petitioner knowingly and voluntarily waived his right to present mitigating evidence. The evidence is clear that trial counsel never discussed with petitioner the nature and function of mitigation. They admitted as much. An on the record determination is particularly important given that petitioner expressed a general intention to absent himself from the sentencing proceedings. However, the record lacks any indication that petitioner intended to specifically relinquish his right to present information that could have served as a basis for a sentence less than death. Additionally, petitioner at one point, expressed an interest in the sentence. *See* App. 3516 (saying he was "only interested in the sentence" and not the "proceeding"). Considering petitioner's repetitive and broad refusal to participate in the sentencing proceedings if found guilty, petitioner's purported refusal to present mitigating evidence cannot substitute for a determination by the trial court that he specifically waived his right to present mitigation.

Second, the trial court failed to explain or inquire into petitioner's understanding of the nature, purpose and function of mitigation. As *Tilly* and *Fitzgerald* establish, a capital defendant's waiver of his right to present mitigating evidence requires that he understand what he is giving up. Without such an understanding, the right is meaningless. Here, the court never attempted to ascertain whether petitioner understood the concept of mitigation. The failure is especially egregious given that the trial court knew that petitioner's stand-by counsel did not explain these concepts to him. App. 3488. The record reflects that neither stand-by counsel, nor the court, explained to petitioner that the failure to present mitigating evidence would increase the likelihood, if not guarantee that he would be sentenced to death.[20] It is important to bear in mind that waiver

[20] Throughout the guilt-or-innocence phase, the trial court was witness to petitioner's confusion, self-destructive behavior, and paranoia, all of which established his incompetence, or at a minimum

in this context is a subjective test which takes into account the particular characteristics of the defendant. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Petitioner's lack of understanding was evident from his responses. The court asked petitioner, "you don't think that the jury would want to hear information about your background or any of the circumstances that might have been involved or anything like that?" Petitioner responded, "I don't see where it would be helpful to me in any type of manner. I don't see where it would be helpful— helpful to me. I don't see where it would, you know, do anything for me to no extent." App. 3449. The trial judge took this non-response at face-value and did not inquire into petitioner's understanding of mitigating evidence or the penalty phase, nor did the court apprise him of the consequences of failing to present mitigating evidence at that time.

The trial court's failure to inquire into a defendant's understanding is particularly troubling where, as here, the defendant is proceeding *pro se*, and the scant record evidence demonstrates the defendant's belief that mitigating evidence was categorically unhelpful. Unlike the trial judge in *State v. Shafer*, 969 S.W.2d 719, 737 (Mo. 1998), who explained to a pro se capital defendant that mitigation makes a defendant sympathetic to the jury, and gives reasons for sentencers to impose a life sentence rather than death, the trial court here did not explain the purpose of mitigating evidence in guiding the jury's decision to sentence the defendant, nor explained that it offsets the prosecution's presentation of aggravating circumstances.

Third, the record reflects that petitioner did not rationally differentiate between life and death. As recognized in *Fitzgerald v. State,* supra, a capital defendant's inability to appreciate this difference should render a waiver invalid because he is unable to act in his own rational self-interest.

---

raised a *bona fide* doubt as to his competence. Given petitioner's mental impairments, he was particularly susceptible to unintelligently relinquishing his rights.

972 P.2d 1157, 1173 (Okla. Crim. App. 1998). At a minimum, petitioner's apparent confusion regarding the distinction between life and death further indicates that petitioner's reluctance to present mitigating evidence lacked the requisite knowledge or intelligence. Petitioner told the court, "I can't differentiate between life and death if it [came] to a guilty verdict." App. 3456. *See also* App. 3489 (saying that he was "not concerned about [the jury's] verdict. I'm not concerned whether they're going to say death, you know, or life sentence. That has no relevance in my mind"). As a *pro se* capital defendant, petitioner was in an unusually stressful position, particularly considering that he had just been convicted of capital murder. The trial judge took inadequate steps to ascertain petitioner's competence, let alone whether he understood mitigation, and conducted no meaningful inquiry into petitioner's inability to appreciate the choice between life and death. Petitioner's indifference towards death reflected an inability to act in his own rational self-interest, without which he could not knowingly and intelligently waive his right to present mitigating evidence.

4. The Trial judge Erred in Failing to Terminate Petitioner's Pro-Se Status

Petitioner was denied due process when the trial judge refused to terminate his *pro se* status during the penalty phase and instead allowed stand-by counsel to perform only in a limited hybrid role. In capital cases, the penalty phase serves an important role in ensuring that only those whom are truly the most culpable are sentenced to death. A *pro se* defendant who is not present during this portion of his trial, and whose stand-by counsel is restricted from presenting mitigating evidence, is denied due process and a fair trial. This is especially true where, as here, the defendant has been removed from the courtroom due to his disruptive behavior.

Due process not only protects the defendant, but also safeguards society's interest in promoting just and accurate results in criminal cases. Due process requires that when faced with *pro se* defendants who seek to waive the right to be present during the penalty phase of their trials

and to substantially limit the role of stand-by counsel, trial courts should terminate *pro se* status and reinstate counsel.

a. Due Process Requires a Fair Trial and Just and Accurate Results.

The Due Process Clause of the Fourteenth Amendment entitles criminal defendants to a fair trial. U.S. CONST. amend. XIV; *see also Massey v. Moore*, 348 U.S. 105, 108 (1954) ("The requirement of the Fourteenth Amendment is for a fair trial."). " [D]ue process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "[D]enial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Due process requires that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part). In *Gardner v. Florida*, 430 U.S. 349 (1977), the Court stated that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358. In all criminal proceedings, justice demands that sentencing be based on an accurate and reliable determination. "Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). "The public has a substantial independent interest in being assured of a full and fair sentencing proceeding, in compliance with constitutional and statutory requirements." *United States v. Davis*, 180 F. Supp. 2d 797, 798 (E.D.La. 2001). When a trial court acts in a way that denies a capital defendant a fair trial, it also

deprives society of impartiality, fairness, and justice in the most important decision society must make—whether a citizen should live or die.

i. Representation By Counsel Helps Ensure a Fair Trial.

Counsel serves an essential role in ensuring a fair trial. The Sixth Amendment provides that "a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Faretta v. California*, 422 U.S. 806, 807 (1975). In *Gideon v. Wainright*, 372 U.S. 335 (1963), the Court emphasized the crucial role of legal counsel in promoting a fair and even-handed criminal trial by quoting Justice Sutherland's opinion in *Powell v. Alabama*, 287 U.S. 45 (1932), which stated "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Gideon*, 372 U.S. at 344–45 (quoting *Powell*, 287 U.S. at 68–69). The Court has stated that "'[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'" *U.S. v. Cronic*, 466 U.S. 648, 654 (1984) (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1965).

ii. Limitations on the Right of Self-Representation.

While *Faretta* holds that a defendant has the right to proceed *pro se* at trial, the self-representation right is not absolute. In *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), holding that there is no *pro se* right on appeal, the Supreme Court acknowledged that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* at 162. In *Godinez v. Moran*, 509 U.S. 389 (1993), for example, the Court held that before a defendant can proceed *pro se* the defendant must

make a knowing, intelligent, and voluntary waiver of the right. *Id.* at 400-02 Moreover, in *Indiana v. Edwards*, 1554 U.S. 164 (2008), the Court recently held that trial courts faced with mentally ill defendants who wish to proceed *pro se* have the right to deny "gray-area defendant[s]" the right to represent themselves. *Id.* at 173, 178. The Court reasoned "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id.* at 176-77. Thus, in *Edwards,* the Court recognized that in certain circumstances self-representation may be limited so as to prevent an "improper conviction or sentence." *Id.* at 176.[21]

Faretta itself qualified the *pro se* right acknowledging that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Id.* 422 U.S. at 834 n.46. The Court further stated, "[o]f course, a State may—even over objection by the accused—appoint a 'standby counsel' . . . to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.* (citing U.S. v Dougherty, 154 U.S. App. D.C. 76, 87-89 (1972)). Thus when faced with a *pro se* defendant who is disruptive, a trial judge is empowered to and should terminate a defendant's *pro se* status.

---

[21] *See also State v. Farhad*, 190 F.3d 1097, 1108 (9th Cir. 1999) (Reinhardt, J., concurring) (stating that "[t]he right to self- representation must be *balanced*, like the right to waive conflict free counsel in *Wheat*, or the right to a public trial in *Estes*, against the Due Process Clause's fundamental guarantee that trials will be reliable, just, and fair. Surely if the right to a fair trial is compelling enough to justify the Court's previous limitations on the Sixth Amendment rights, it is compelling enough to limit, in appropriate cases, the Sixth Amendment right at issue here.") (citing *Wheat v. U.S.*, 486 U.S. 153 (1988); *Estes v. Texas*, 381 U.S. 532 (1965)).

In *Illinois v. Allen*, 397 U.S. 337 (1970), for example, the Court reaffirmed, as it had previously stated in *Faretta* that a judge could terminate a defendant's *pro se* status if the defendant repeatedly disrupted the trial proceedings. *Id.* at 339, 342. The Court reasoned that:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.

Id. at 343. *Allen* makes it clear that when faced with a "stubbornly defiant" *pro se* defendant who disregards the proper procedures and conduct necessary to maintain the dignity and order of the proceeding, the trial judge "should not, and cannot" tolerate such behavior and is entitled to remove the defendant from the courtroom and terminate his *pro se* status.[22]

---

[22] In *Davis v. Grant*, 532 F.3d 132 (2d Cir. 2008), Judge Wesley of the Second Circuit noted that although a "trial-court judge confronted with a defendant who both continues to engage in serious misconduct and insists upon his right to represent himself" faces a difficult dilemma, "a number of concerns favor requiring counsel to be appointed to represent a *pro se* defendant who is involuntarily removed from the courtroom." *Id.* at 143. First, the court noted that the "defendant's Constitutional rights, including his Fifth Amendment right to `due process' "and his Sixth Amendment rights to an 'impartial jury' and 'to be confronted with the witnesses against him' . . . support the appointment of standby counsel." *Id.* Second, the court recognized that the government possessed an `independent interest' in ensuring that criminal trials are fair and accurate." *Id.* at 143. The Court noted that "[t]he Supreme Court has recognized that 'the government's interest in ensuring the integrity and efficiency of [a] trial at times outweighs [a] defendant's interest in acting as his own lawyer." *Id.* at 144 (quoting *Martinez v. Ct. of California Appeal*, 528 U.S. 152, 162). Judge Wesley warned that "[i]f no counsel is appointed to represent an absented *pro se* defendant, there is a real danger that the ensuing lack of 'rigorous adversarial testing that is the norm of Anglo-American criminal proceedings[,'] will undermine the 'the accuracy of the truth-determining process' by eliminating 'the trier of fact['s] . . . basis for evaluating the truth of the [testimony].'" *Id.* at 143 (quoting *Maryland v. Craig*, 497 U.S. 836, 846 (1990); *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

In no other context is the role of counsel more important than in a capital case, because "the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) (citing Herrera v. Collins, 506 U.S. 390, 399 (1993); Beck v. Alabama, 447 U.S. 625 (1980)). "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia,* 536 U.S. 304, 319 (2002)). In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Stewart, writing for the majority, stated that a jury needed "accurate sentencing information" because it "is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Id.* at 190.[23]

The penalty phase of a capital case should include a thorough and detailed examination of the mitigating as well as the aggravating factors to ensure a just and fair result. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court stated that:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of

---

[23] ABA Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases,10.7(A), p. 17 (2003), states that "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." ABA Guideline 10.7(A)(2) provide further that "[t]he investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." In the commentary, the ABA expands in this rule stating that "[b]ecause the sentencer in a capital case must consider in mitigation, 'anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,' 'penalty phase preparations require extensive and generally unparalleled investigation into personal and family history.' ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 10.7(A), p. 17 (2003). In the case of the client, this begins with the moment of conception."

> compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 304. The Court went on to state that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* (Citing trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)). [24] Furthermore, "[b]ecause of the qualitative difference [in a sentence of death and a sentence of imprisonment], there is corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 305.

In addition to the rights of the defendant, society also has a paramount interest in ensuring that whatever decision the jury makes is the result of an individualized consideration of the defendant's culpability. A jury that hears only one side of a defendant's story cannot make the "reasoned determination of whether a defendant shall live or die." *Gregg*, 428 U.S. at 190.[25]

---

[24] *See also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional mental problems, may be less culpable than defendants who have no such excuse. Moreover . . . it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a uniquely individual human being [] and has made a reliable determination that death is the appropriate sentence. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.") (internal citations and quotations omitted)

[25] In addition to requiring a penalty phase in capital cases, the ABA's section on Criminal Justice Standards indicates that "[s]tandby counsel should always be appointed in capital cases and in cases when the maximum penalty is life without the possibility of parole." *ABA Criminal Justice Section, Standard 6-3.7 Standby Counsel for Pro Se Defendant (1999).* Because a defendant who elects to proceed *pro se* cannot raise an ineffective assistance of counsel claim on appeal, it is imperative to

b. The Trial Court Should Have Terminated Petitioner's Pro-Se Status and Appointed Counsel.

The trial court erred in allowing petitioner to maintain his *pro se* status while simultaneously removing petitioner from the courtroom for his obstreperous behavior and restricting the ability of stand-by counsel to present evidence. When the petitioner informed the court that he did not wish to be present and that he would act out if required to be present, the trial judge should have revoked his *pro se* status. *Faretta* clearly states that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Id.* 422 U.S. at 834 n.46. The petitioner's outbursts,[26] as well as his unwillingness to continue to participate in the penalty phase of his trial, provided the trial court with ample reason and justification to revoke petitioner's *pro se* status.

In *People v. Anderson*, 518 N.Y.S.2d 658 (N.Y. App. Div. 1987), the Supreme Court, Appellate Division, of New York held that "the court should not have allowed the defendant to continue to proceed *pro se* once the defendant demonstrated by his conduct that his intent was not to pursue his self-representation in good faith, but was rather to disrupt the trial proceedings." *Id.* at 121. The Court recognized that while a "defendant has a constitutional right to proceed *pro se* . . .[the defendant] may forfeit that right by engaging in disruptive or obstreperous conduct 'calculated to undermine, upset or unreasonably delay the progress of the trial.'" *Id.* (quoting *People v.*

---

provide some guidance about the basic rules of law to such defendants throughout the proceedings. In capital cases, where the defendant's ignorance of the law and lack of prowess throughout the trial may result in a guilty verdict during the guilt-or-innocence phase, it is import to provide the defendant with the guidance and tools necessary to present a competent defense during the penalty phase.

[26] Mr. Alkebulanyahh repeatedly rose and chanted "Blessed by Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." *See* App. 3550. While not violent, he was definitely disruptive.

McIntyre, 36 N.Y.2d 10, 18 (1974); citing Faretta, 422 U.S. 806). The court noted that the purpose of appointing stand-by counsel "is to have an attorney available to represent the accused in the event that termination of he defendant's self-representation becomes necessary." *Id.* Similarly, in *United States v. Taylor*, 569 F.2d 448 (7th Cir. 1978), the Seventh Circuit was faced with a record in which the trial court allowed standby counsel to participate in the trial alongside a *pro se* defendant in order to ensure that "all of the facts favorable to the defendant would be brought out at trial." *Id.* at 451. The Seventh Circuit found that although *Faretta* holds that an accused can represent himself at trial, "[i]t does not inevitably follow . . . that this right of self-representation comprehends any correlative right to preclude the trial court from appointing counsel and authorizing him to participate in the trial over the accused's objection in order to protect the public interest in the fairness and integrity of the proceedings." *Id.* at 452 (citing Mayberry v. Pennsylvania, 400 U.S. 455, 467-68 (1971) (Burger J., concurring). In this case, despite the presence of stand-by counsel, and the obstreperous conduct on the part of the petitioner, the trial court failed to terminate the petitioner's pro se status. The resulting penalty proceedings failed to ensure "the public interest in [] fairness and integrity." *Id.*

Faretta made clear that the purpose of appointing standby counsel, is to "aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." 422 U.S. at 834 n.46. In this case, however, when the "termination of the defendant's self-representation" became necessary, the trial court refused to fully appoint standby counsel to represent petitioner. As the Court stated in *Allen*, "[t]he flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated." 397 U.S. at 343. Instead of terminating his *pro se* status, however, the trial court opted to craft what Mr. Kelly referred to as "hybrid" counsel. App. 3509. This resulted in severe limitations on the ability of Mr. Kelly and Mr. Thorton to act as counsel in the penalty phase,

as they were permitted only to object to improper questions and evidence. They were not permitted to present an affirmative case for life, thus ensuring that the jury would hear only the prosecution's case for death. The trial court failed to properly apply *Allen* and *Faretta*, both of which make clear that the correct course of action was to terminate petitioner's *pro se* status. The trial court's neither fish nor fowl approach destroyed whatever fairness and integrity remained in the already tarnished proceedings.

In appointing Mr. Kelly and Mr. Thornton as standby counsel, while simultaneously restricting their role, the trial court ensured that petitioner would receive less protection than the law afforded him and guaranteed a sentence of death. Because petitioner and society were denied the "rigorous adversarial testing" necessary for evaluating "the accuracy of the truth-determining process," *see Craig*, 497 U.S. at 846; *Dutton*, 400 U.S. at 84 (plurality opinion), petitioner is entitled to a new sentencing trial.

GROUND II: PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE WAS VISIBLY SHACKLED WITHOUT JUSTIFICATION AND WITHOUT AN INDIVIDUALIZED DETERMINATION BY THE TRIAL JUDGE.

A. Statement of Relevant Facts.

While the jury deliberated during the guilt-or-innocence phase, petitioner informed the court of his desire not to be present during the penalty phase. *See e.g.*, App. 3449 (discussing petitioner's comment that he allegedly "did not intend to be here."); App. 3483 (instructing petitioner that capital cases require the defendant's presence). Petitioner also informed the trial judge that if forced to be present, he may become "unruly." App. 3461. The trial judge responded, "I'm not going to allow you to be unruly," App. 3461, but made no determination as to the need for restraints at that time, instead deciding to wait and see how the defendant would behave. App. 3463.

After the jury returned the verdict, and prior to the beginning of the penalty phase, petitioner again informed the trial judge that he may "end up being unruly and [vociferous]." App. 3483. Petitioner also stated that he had no intention to "display any type of violence or anything to that extent, towards anyone." *Id.* The trial judge clarified:

> The Court: You're not planning to do that?
> Petitioner: Yes sir, I definitely will not. I will not.
> The Court: All right.
> Petitioner: I will not do that.

App. 3483. The trial judge made no determination of the need to restrain petitioner, but instructed, "if you get out of line, then I will have to deal with it. I would caution you not to do that." App. 3492.

The trial judge discussed the possibility of appointing Mr. Thorton and Mr.Kelly as standby counsel, and again inquired whether petitioner intended to be disruptive at trial. App. 3494. Counsel indicated that petitioner was not going to be disruptive, App. 3505, and would sit quietly at the table. App. 3513. Likewise, petitioner stated he would express himself "just verbally" rather than physically, and did not plan to use "any profanity or anything like that." App. 3516. Characterizing the possible disruption as "blurt[ing] out things instead of questioning the witness," App. 3517, the trial judge therefore understood that petitioner had no intention of being violent, let alone disrespectful. App. 3517 ("You don't wish to show any disrespect.").

When the prosecution began to examine its first witness in the penalty phase, petitioner stated "Blessed be Yahweh" and continued to speak over the court's instruction, saying "El Shaddai . . . Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, and Jacob, and Jesus." App 3551. The jury was removed. App. 3551. The trial judge gave petitioner "one last warning" not to speak, and informed him he would be placed in a separate room, App. 3552, or even "shackled or gagged." App.

3553. When the prosecution resumed its direct examination, petitioner again recited the same religious names. App. 3556. The jury was removed, and the trial judge placed petitioner in a back room with a glass partition where he could see all of the proceedings, and was visible from the courtroom. App. 3557, 3563. Petitioner could hear through a system that fed sound into the room, App. 3557, but petitioner could not be heard for the most part. App. 3559 (telling petitioner to "bang on the window" and "turn and face the court" to indicate he could hear the proceedings). After petitioner again expressed a desire to be absented from the proceedings, the trial judge stated "I personally don't have a problem . . . if someone doesn't want to be here, so be it. They don't have to be here . . . But the rule says what it says. So I'm going to have to confine you to that back room." App. 3560.

Without making any findings regarding the need for restraints, the trial judge then ordered that petitioner's hands and legs be shackled. App. 3561. He subsequently allowed petitioner's hands to be unrestrained so that he could cover his ears if he did not wish to listen to the testimony. App. 3562. After petitioner was placed in the back room, he caused no disruption to the proceedings. Multiple times, the trial judge offered petitioner the opportunity to re-join the courtroom, *see e.g.*, App. 3796, but did not offer to remove petitioner's shackles. Petitioner remained visibly shackled throughout the remainder of the trial.

B. Relevant Legal Principles.

"The right to a fair trial is a fundamental liberty interest secured by the Fourteenth Amendment." *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing Drope v. Missoui, 420 U.S. 162, 172 (1975)). Accordingly, "courts must be alert to factors that may undermine the fairness of the fact-finding process." *Id.* It is because of the prejudicial effect on the right to a fair trial that "no person should be tried while shackled . . . except as a last resort." *Allen*, 397 U.S. at 344 (1970);

McKaskle v. Wiggins, 465 U.S. 168, 178 (1984) (a defendant "may not normally be forced to appear in court in shackles"). Shackles are "an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Allen*, 397 U.S. at 344. The Constitution thus forbids visibly shackling a defendant during the penalty phase of trial, as in the guilt-or-innocence phase, unless the restraints are "justified by an essential state interest." *Deck v. Missouri*, 544 U.S. 622, 624 (2005).

The unwarranted use of visible restraints creates a presumption that the defendant is dangerous, and places "a 'thumb [on] death's side of the scale.'" *Deck*, 544 U.S. at 633, (quoting *Sochor v. Florida*, 504 U.S. 527, 532 (1992).)[27] The Court in Deck v. Missouri, 544 U.S. 622 (2005), stated that:

> The appearance of the offender during the penalty phase in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community— often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point . . . It also almost inevitably affects

[27] As a juror, the sight of a visibly shackled defendant can produce a "visual, psychological, and emotional response to seeing a defendant so physically restrained and differentiated from everyone else and the natural tendency to wonder whether the defendant is a violent and dangerous person, and worry about safety." *People v. McDaniel*, 71 Cal. Rptr.3d 845, 851 (Cal. Ct. App. 2008). The need for reliable fact-finding at the penalty phase, where jurors decide matters of life and death, compelled the Court in *Deck* to prohibit the routine use of visible shackles. 544 U.S. at, 633. In other cases, the Supreme Court has warned of the dangers of visibly shackling defendants. *See Holbrook v. Flynn*, 475 U.S. 560, 568 (1986) (describing visible shackles as one of the "inherently prejudicial practices" that warrants "close judicial scrutiny"); *Allen*, 397 U.S. at 344 (1970) (explaining that "the sight of shackles and gags might have a significant effect on the jurys' feelings about the defendant"). Similarly, the Fourth Circuit has compared visible shackles to marking [the defendant] "as an obviously mad man or to suggest that the fact of his guilt is a foregone conclusion." *Brewster v. Bordenkircher*, 745 F.2d 913, 915 (4th Cir. 1984). *See also State v. Finch*, 975 P.2d 967, 1008 (Wash. 1999) (emphasizing that "[i]t is undisputed that placing the [D]efendant in restraints indicates to the jury that the Defendant is viewed as a 'dangerous' and 'unmanageable' person, in the opinion of the court, who cannot be controlled, even in the presence of courtroom security").

> adversely the jury's perception of the character of the defendant. And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations— considerations that are often unquantifiable and elusive— when it determines whether a defendant deserves death.

Id. at 633. In addition to unfairly prejudicing the jury's perception of the defendant, visible shackles demean defendants, offend the dignity of the judicial process, and can interfere with defendants' ability to consult with counsel. *Id.* at 630-31.

Accordingly, visible shackles are prohibited in all but exceptional circumstances. *Id.* at 633. Only a "state interest specific to a particular trial" may justify a trial judge's decision to shackle a defendant. *Id.* at 629. Even if exceptional circumstances may warrant the use of restraints, however, trial judges must make an on the record determination of their need before ordering restraints, and make formal findings as to the exigent circumstances that compel the use of visible physical restraints. *See id.* at 633 (emphasizing that the determination "should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial"). Defendants need not prove prejudice in order to establish a due process violation, because shackling is "'inherently prejudicial'." *Deck*, 544 U.S. at 635 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)). Rather, the burden is upon the State to prove beyond a reasonable doubt that unjustified shackling made no contribution the jury's death sentence. *Deck,* at 544 U.S. at 635.

C. Petitioner was Impermissibly and Prejudicially Shackled.

Petitioner's due process rights were violated when he was visibly restrained in the presence of the jury without specific findings by the trial judge. Petitioner's legs were indisputably shackled during the penalty phase of his trial. *See* App. 3563 (removing petitioner's hand shackles to allow him to cover his ears). The trial judge's failure to make any determination as to the need for restraints is evident from the record. Furthermore, the record lacks a sufficient basis to permit a

finding by the trial court or this Court that shackles were necessary. *See e.g.*, *Lakin v. Stine*, 431 F.3d 959, 961 (6th Cir. 2005) (finding shackles to be unjustified where the determination was based on underlying escape charge and a corrections officer's opinion that petitioner needed to be shackled, but finding error was harmless for purposes of federal habeas review).

In *Cox v. Ayers*, 613 F.3d 883 (9th Cir. 2010), shackling the petitioner because counsel reported that he might escape was deemed to be an insufficient justification. *Id.* at 890-891(noting that shackling is necessary only if there is a compelling security reason); *see also State v. Gomez*, 123 P.3d 1131, 1141-42 (Ariz. 2005) (en banc) (vacating and remanding for new proceedings because neither a capital conviction nor the general jail policy of shackling all defendants were determinative of the need to shackle petitioner). An on the record determination is necessary to ensure that the need for visible shackles justified the prejudice it inevitably caused.

Contrary to the requirements set forth in *Deck*, the trial judge made no determination that the defendant posed a risk of escape or threat to courtroom security, and the record lacks any "formal or informal findings" that necessitated the use of shackles. *Id.*, 544 U.S. at 634. Lacking an individualized basis for shackling, petitioner's case is indistinguishable from those where trial courts shackled defendants as a matter of "routine." *Id.* at 633. *See United States v. Banegas*, 600 F.3d 342, 345 (5th Cir. 2010) (vacating the defendant's conviction because the trial judge ordered restraints on the *pro se* defendant "the same as everyone in this court who has tried a case *pro se* that's incarcerated"); *Lakin v. Stine*, 431 F.3d 959, 963 (6th Cir. 2005) (concluding that "the principle that shackling a defendant at trial without the individualized determination as to its necessity violates the due process clause was clearly established long before *Deck* was decided").

Moreover, the case did not involve circumstances that would warrant the use of visible shackles. Petitioner's situation is not the "exceptional case where the record itself makes clear that

there are indisputably good reasons for shackling." *Deck* , 544 U.S. at 635. *See e.g.*, *Morgan v. Bunnell*, 24 F.3d 49 (9th Cir. 1994) (upholding the use of visible restraints where defendant had demonstrated a pattern of violent behavior). Rather, the record clearly indicates that the shackles were unwarranted. Petitioner stated he would not be violent, or even use profanity. App. 3516, 3517. His lawyers informed the court that petitioner would not be violent and the trial court gave no indication of any belief to the contrary. App. 3505, 3513. Petitioner subsequently behaved according to his word, and interrupted the State's examination by saying "Blessed by Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus" on two occasions. App. 3550-56. As promised, the trial judge placed petitioner in a back room with a large window, separated from the jury and the courtroom, and accompanied by at least one officer. App. 3556-57. Although petitioner was largely unable to interrupt the proceedings from the back room, and had remained true to his word that he would not act violently or aggressively towards anyone, the trial judge additionally ordered that petitioner's legs be restrained by shackles. App. 3561. In short, petitioner was shackled despite the fact that he presented no danger to anyone.

Petitioner's visible shackles inevitably implied to the jury that he was a dangerous person, and affected the jury's ability to evaluate whether his character warranted a life sentence. The trial judge's unnecessary use of shackles unfairly prejudiced petitioner before the jury, and placed "a 'thumb' [on] death's side of the scale." *Deck*, 544 U.S. at 633 (quoting Sochor, 504 U.S. at 532). For the foregoing reasons, petitioner was unjustifiably shackled without specific findings, and in violation of his due process rights. Accordingly, he is entitled to have writ issue on his behalf.

GROUND III: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF THE PROCEEDINGS.

At the close of the guilt-or-innocence phase, petitioner informed the trial judge that he had

no intention of presenting mitigating evidence during the penalty phase, that he did not wish to be present at the penalty phase, and that he also did not intend to relinquish his *pro se* status. App. 3492. After failing to persuade petitioner to change his mind, the court eventually settled on appointing Mr. Thorton and Mr. Kelly to represent petitioner, but limiting their duties to objecting "to the presentation of anything improper from the state," while not presenting "any mitigating evidence." App. 3494. Petitioner "agreed" to this arrangement.[28] App. 3519. When the penalty phase commenced, petitioner was removed from the courtroom for his verbally disruptive behavior. App. 3556. Mr. Thorton and Mr. Kelly then assumed responsibility for petitioner's representation. As will be set forth in detail below, trial counsel's performance was both deficient and prejudicial.

A. Applicable Legal Principles.

"[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (citing Reese v. Georgia, 350 U.S. 85 (1995); Glasser v. U.S., 315 U.S. 60 (1992), Avery v Alabama, 308 U.S. 444 (1940), Powell v. Alabama, 287 U.S. 451 (1932)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trail cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A capital sentencing proceeding, like a trial, must "ensure that the adversarial testing process works to produce a just result." *Strickland*, 466 U.S. at 686–87. Thus, trial counsel is held to the same requirements of effective assistance during the penalty phase as in the guilt-or-innocence phase. *Id.*

In order to establish a claim of ineffective assistance of counsel, a convicted defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*,

[28]As is set forth elsewhere in this petition, the trial judge erred in allowing petitioner to maintain his *pro se* status while simultaneously removing petitioner from the court room for his obstructive behavior and restricting the ability of stand-by counsel to present evidence.

466 U.S. at 687–88. There are two components to an ineffective assistance of counsel claim. "First, the defendant must show that counsel's performance was deficient." *Id.* at 687. "To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms." *Leon v. State*, 666 S.E.2d 260, 261 (S.C. Ct. App. 2008) (S.C.App. 2008) (citing *Strickland*, 466 U.S. at 687; *Cherry v. State*, 386 S.E.2d 624, 625 (S.C. 1989)). A defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Second, a defendant must show that counsel's "deficient performance prejudiced the defense." *Id.* This requires a showing that counsel's performance deprived "the defendant of a fair trial, a trial whose result [was] reliable." *Id.*

B. Counsel were Deficient in Failing to Object to Evidence Regarding General Prison Conditions.

Mr. Kelly and Mr. Thorton provided petitioner with ineffective assistance of counsel when they failed to object to statements made by Solicitor Stone during his closing argument and the testimony offered by James Sligh regarding the living conditions of prisoners within the general population of the South Carolina Department of Corrections. This Court has held that evidence regarding general prison conditions is beyond the scope of what the jury should consider when determining whether the defendant should be sentenced to death or life without parole. In failing to object to the introduction of this evidence, Mr. Thorton and Mr. Kelly's "representation fell below an objective standard of reasonableness" and was prejudicial to the defendant. *Strickland*, 466 U.S. at 687–88.

In *State v. Bowman*, 623 S.E.2d 378 (S.C. 2005), the defendant challenged the admission of evidence about prison conditions. While the Court found that the issue was not preserved for review

on appeal, it stated in *dicta*,

> We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant."

Id. at 385. Relying on the reasoning articulated in *Bowman*, this Court, in *State v. Burkhart*, 640 S.E.2d 450 (S.C. 2007), reversed the appellant's death sentence and remanded the case for resentencing. *Id.* at 489. Although the trial in *Burkhart* occurred before *Bowman* was decided, the court applied *Bowman* recognizing that "it is consistent with [our] long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime." *Burkhart*, 640 S.E.2d at 453 (citing *Bowman*, 623 S.E.2d 378). This rule was well settled long before petitioner's trial.[29]

The evidence at issue in *Burkhart* was testimony by the "State's witness James Sligh, Director of Inmate Classification for the Department of Corrections, regarding the privileges available to an inmate who receives a sentence of life without parole." *Id.* at 452-53. Sligh testified that the privileges available included "access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors." *Id.* at 453 The Court held that determinations as

[29] *Bowman* and *Burkhart* restate a long established legal principle first articulated in *State v. Plath*, 313 S.E.2d 619 (S.C. 1984). In *Plath* this Court held that "[s]uch determinations as the time, place, manner, and conditions of execution or incarceration . . . are reserved . . . to agencies other than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and characteristics of the individual defendant." *Id.* at 627.

to "'the time, place, manner, and conditions of an execution *or incarceration* . . . are reserved . . . to agencies other than the jury'." *Id.* 453 (quoting *State v. Plath*, 313 S.E.2d 619, 627 (S.C. 1984). The Court acknowledged the "long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime," resulting in restrictions "on the admission of evidence regarding prison life *in general*." *Burkhart*, 640 S.E.2d at 453. Admitting such evidence into the record, this Court held "inject[s] an arbitrary factor into the jury's sentencing considerations." *Id.* "A capital jury may not impose a death sentence under the influence of any arbitrary factor," and when it is "invited to speculate about irrelevant matters upon which a death sentence may be based," Section 16-3-25(C)(1) of the South Carolina Code is violated. *Id.* (citing S.C.Code Ann. § 16-3-25(C)(1) (2003); *State v. Sloan*, 298 S.E.2d 92 (S.C. 1982). According to the Court, what distinguished *Burkhart* from *Bowman*, was that in *Burkhart* the defendant's counsel "objected to the State's evidence regarding general prison conditions." *Id.*

When petitioner's trial counsel failed to object to the testimony offered by James Sligh and the statements within the closing argument made by Mr. Stone, their representation was unreasonable and prejudicial. In *Burkhart*, Sligh's testimony about "access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors" was held to be irrelevant and its introduction was held to be irreversible error. *Burkhart*, 640 S.E.2d at 453. James Sligh offered the same testimony about the same privileges in petitioner's case, however, trial counsel failed to object. The prosecution asked Sligh about a "typical day in general population" for inmates sentenced "to any sentence other than death." App. 3636. Sligh answered:

> Generally 5:30 A.M., we have a standing formal count. We have counts throughout the day. Once the count is cleared, we feed the population breakfast by living unit. . . Once breakfast is completed, the inmates then—if the have job assignment or an education program or vocational program, they're released for those programs. We have movement on the hour called control movement, so they go out in a very

> controlled environment. We bring them back to their living unit at lunch and then feed them in the same manner, unit by unit. They're again released to work or school in the afternoon, come back into their unit, are fed supper, and then are pretty much confined to their living unit for the rest of the evening unless they're involved in some type of evening program.

App. 3636–37. Next, Solicitor Stone asked Sligh whether the inmates were "locked into their individual cells on a regular basis during" the day. App. 3637. Sligh answered "generally from, say, 10:00 P.M. until the count is clear in the morning they're released for breakfast." After a follow-up question by Solicitor Stone, Sligh clarified that the inmates could enter their cells during the day generally through the use of "their own key to their cells." App. 3638. Solicitor Stone also asked Sligh about the visitation policy at the prison to which Sligh responded that defendants were entitled to contact visitation. He stated that "[t]hat means that you're not separated by barrier in any way, that you're – we basically have tables and the families can sit at the tables." App. 3638. Sligh stated that inmates, "[d]epending upon [their] custody level," could have visitors "up to eight times a month." App. 3639. Sligh also testified in response to a question from Solicitor Stone about any other general characteristics of general population that:

> There are recreation services. Each [] living unit has a small recreation area attached to it. And then we have some centralized recreation issues with the –no weight rooms or anything like that, but basically multi-purpose buildings and that type of thing. We try to provide services in the institution that minimize[] having to take an inmate out of the confines of the institution, so we have medical services. We have educational services. The inmates have access to a canteen once a week to buy hygiene items and snacks and things like that. And then we have a number of volunteers who come in and conduct religious programs and some education programs and some pre-release type programming.

App. 3639.

During this lengthy testimony about the living conditions for the general population, neither Mr. Thorton nor Mr. Kelly objected. Throughout his cross-examination of Sligh, Mr. Kelly failed

to address any of the evidence presented by the witness pertaining to the conditions for general population and focused his short cross on an incident report from October 2, 1998. App. 3646.

Based on Sligh's testimony, Solicitor Stone's closing argument offered an irrelevant and inappropriate characterization of living conditions for the general population housed in the South Carolina Department of Corrections. This also reminded the jury of Sligh's testimony and increased the likelihood they'd consider it—and that it would affect their sentencing decision. Solicitor Stone stated,

> They get up in the morning; they're fed. They get recreation time. They're contained. They have to stay inside, but they have keys to their own cells. They get to visit with family [seven] and [eight] times a month. . . General population. Sounds an awful lot like military school. It sounds an awful lot like military school.

App. 3794. Trial counsel once again failed to object to this statement despite the applicable authority apparent in the *Bowman* and *Burkhart* decisions.

Because these decisions make clear that such evidence and argument is inadmissible and improper, and that objecting to the introduction of such evidence is essential to preserve the issue on appeal, counsel's representation was deficient and unreasonable "under prevailing professional norms." *Leon*, 666 S.E.2d at 261 (citing *Strickland*, 466 U.S. at 687; *Cherry*, 386 S.E.2d at 625). Moreover, *Burkhart* indicates that admitting such evidence into the record "inject[s] an arbitrary factor into the jury's sentencing considerations" and constitutes reversible error. *Burkhart*, 640 S.E.2d at 453. The effect of the prosecution's inaccurate portrayal of life behind bars was to mislead the jury into believing it had only one genuine sentencing option: death. In so doing, the prosecution violated petitioner's Eighth Amendment right to be free from arbitrary imposition of the death penalty by impermissibly expanding the scope of the jury's sentencing determination to include factors totally unrelated to "any arguably valid sentencing consideration." *Caldwell v. Mississippi*,

472 U.S. 320, 336 (1985); *see State v. Plath*, 313 S.E.2d at 627) ("[T]he sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and the characteristics of the individual defendant."). The conditions that petitioner would be subject to if he were given a life sentence have no relation either to the circumstances of the crime, or to petitioner's personal characteristics, and as such, they have no place in the jury's capital sentencing determination. *See Plath*, 313 S.E.2d at 627.

Furthermore, because the conditions petitioner would live under if sentenced to life in prison are wholly beyond his control, the solicitor's argument heightened the risk of arbitrariness by encouraging the jury to sentence petitioner to death based on their dissatisfaction with the South Carolina penitentiary system. In *State v. Atkinson*, 172 S.E.2d 111 (S.C. 1970), the court stated that

> The Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs.

Id. at 112 (quoting State v. White, 142 A.2d 65, 76 N.J. 1958).

The solicitor's denigration life in prison as punishment violated petitioner's right to due process and fundamental fairness by suggesting to the jury that anything less than a sentence of death would allow applicant to escape punishment even though he had been convicted of a serious crime. The effect of this suggestion was to impermissibly diminish the reliability of the jury's sentencing determination, since that determination is at least as likely to rest on the assumption that death was the only genuinely punitive option, as it is on a determination that death was the more appropriate of two legitimate forms of punishment. *See Beck v. Alabama*, 447 U.S. 625, 638 (1980) (stating that "[t]o ensure that the death penalty is indeed imposed on the basis of 'reason rather than caprice and emotion,' we have invalidated procedural rules that tended to diminish the reliability of the

sentencing determination. . . .Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case").

In sum, trial counsel's failure to object to the introduction of James Sligh's testimony and Solicitor Stone's statements during his closing argument was both unreasonable and prejudicial and constituted ineffective assistance of counsel. *See Strickland*, 466 U.S. 668.

C. Counsel were Deficient for Failing to Object to the Extensive Amount of Victim-Impact Evidence Introduced by the Prosecution.

The prosecution introduced a substantial amount of inflammatory victim-impact evidence during its case-in-chief at the penalty phase of petitioner's trial. The admission of this evidence violated the petitioner's due process rights and ensured that petitioner's death sentence would be "imposed under the influence of passion." *See* S.C. Code Ann. § 16-3-25(c)(1) (2003) 16-3-25(C)(1). It was unreasonable and prejudicial for trial counsel to fail to object to any of this evidence. *Strickland*, 466 U.S. at 668.

The jury's discretion to impose a death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court held "that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Id.* at 825. The Court held that "the Eighth Amendment erects no *per se* bar" to the admission of victim impact evidence. *Id.* at 827. However, it also suggested that the state should present only "'a quick glimpse of the life'" of the victim. *Id.* at 822 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). It indicated that "[i]n the event

that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825. (Citing Darden v. Wainwright, 477 U.S. 168, 179-183 (1986)). Moreover, the Court stated in a footnote that its decision did not affect *Booth v. Maryland's*, 482 U.S. 496 (1987), holding that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Payne,* at 501 U.S. at 830n.2.[30]

In *Booth* the Court stated that victim impact statements regarding the victim's characterizations of the crime and/or opinions about the proper punishment "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id.* 482 U.S. at 508. The Court reasoned that "any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion,'" and admitting "emotionally charged opinions as to what conclusions the jury should draw from the evidence is clearly inconsistent with the reasoned decisionmaking" required in capital cases. *Id.* 508–509 (citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

This Court has long recognized that a capital trial witness cannot express an opinion as to the appropriate punishment to be imposed. In *State v. Wise*, 596 S.E.2d 475 (S.C. 2004), this Court held that the defendant in the case was "prohibited from directly eliciting the opinion of family members or other penalty-phase witnesses about the appropriate penalty" because "[s]uch questions go to the ultimate issue to be decided by the jury—life in prison versus the death penalty—and are properly reserved for determination by the jury." *Id.* at 481; *see also State v. Matthews*, 373 S.E.2d 587, 595

[30] *See also* S. C. Code Ann § 16-3-25(C)(1) (authorizing the Supreme Court of South Carolina to review "whether a sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor").

(S.C. 1988) (excluding admission of family members' opinions about the appropriate penalty and how a death sentence would affect them); *State v. Adams*, 283 S.E.2d 582 (S.C. 1981) (holding that the issue of whether the death penalty should be imposed is reserved for the jury's determination). These cases stand for the proposition that at trial, it is the jury, and the jury alone, who must weigh the evidence and select the appropriate sentence. *See Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005) ("Of note, the *Payne* Court did not alter *Booth's* holding that admitting evidence of the victim's opinions of the crime and of the appropriate sentence for the defendant violates the Eighth Amendment; rather *Payne* only allows evidence of the victim's personal characteristics and the harm inflicted upon the victim's family and community.")

The prosecution's presentation in this case far exceeded the strict parameters established in *Booth* and *Payne*. Of the twenty-eight witnesses called by the prosecution during the penalty phase, eleven testified regarding victim-impact. The prosecution's case in aggravation occupies 175 pages of trial transcript and of these 175 pages, 65 pages are dedicated to victim-impact evidence. In contrast, petitioner's trial counsel offered no mitigating evidence, failed to object to any testimony or evidence presented by the eleven witnesses called to testify on matters relating to victim-impact, and their cross-examination of the other seventeen witnesses called by the prosecution constituted a total of 21 pages.

Furthermore, multiple witnesses called by the prosecution to give victim-impact testimony also testified concerning their opinions about the crime and their opinions about the appropriate sentences for petitioner in direct violation of *Payne* and *Booth.* See Payne, 501 U.S. 830 n.2. When asked if she had anything else to tell the jury, Mrs. Coursen, the mother of victim Dyke Coursen, told the jury that "they have the hardest job ever to work on this case. I'm so very proud

of all of you." App. 3708. When Mrs. Deborah Coursen, the wife of victim Dyke Coursen, was asked the same question, she answered "I want to thank you guys for making the choice that you made. I know it was so hard, and I'm proud of you. And I know A.J. is very, very proud of you. You did the right thing. I just want to thank you." App. 3714. When Monique Ruiz, the stepdaughter of Dyke Coursen, was asked if there was anything she'd like to tell the jury, she stated

> I hope that when you went to sleep last night, you all knew you did the right thing because you did. And I know this next step is going to be hard. But I just hope you get from this that this was the life of a man that was unbelievable, that that man over there took away two wonderful fathers and husbands and sons. . . So I—I just hope that whatever comes about, that you all can sleep."

App. 3723–24. Thelma Tate, the mother of Dana Tate, testified that "I prayed and I knew that God's will would be done. And I'm certain it will still be done. . . I'm trusting Him, not my will, but what God's will when you go into that room and you think of what [] my son gave his life. And I—I know it won't be in vain." App. 3749–50.

Each statement made by these witnesses indicated the witness' gratitude and affirmation of the jury's verdict in the guilt-or-innocence phase. More importantly, several of these statements also included appeals to the jury regarding their choice of punishment. This testimony stressed that the jurors' consciences would only by unburdened if they selected the right punishment—a death sentence—in accordance with "God's will." App. 3749–50; *see also* App. 723–24 ("I just hope that whatever comes about, that you all can sleep."). These statements effectively constituted "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence" in violation of the Eighth Amendment and petitioner's Due Process rights. *Payne*, 501 U.S. at 830, n.2. The statements were emotional pleas to the jury and served "no other purpose than to inflame the jury and divert it from deciding the case on the relevant

evidence concerning the crime and the defendant." *Booth*, 482 U.S. at 508. Such emotionally charged testimony persuaded the jury that only a death sentence could heal the pain and suffering incurred by the victims' families. These pleas served to detract the jury's attention from the defendant and the crime, and instead focused the jury's decision on the desires of mourning family members. Trial counsel's failure to object to this testimony rendered their representation ineffective.

Through the victim-impact testimony, numerous photos were also introduced of the defendants with their families and friends, as well as photos from the defendant's funerals.[31] There was no objection from defense counsel to the introduction of any of these photos—many of which were highly prejudicial. Photos of the defendants with their children, family, and even at their funerals played on the emotions of the jury and robbed the defendant of a reliable determination based on the relevant factors. These photos, the passionate pleas made by family members, and the numerous witnesses called by the State to testify about the loss of the victims, were excessive, prejudicial, and extremely influential in compelling the jury to sentence the petitioner to death.[32] The Supreme Court has stated that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319). A death verdict handed down by a jury swayed by the passions of the victim's family results in a legal determination rooted in vengeance rather than justice. Due Process requires that a death sentence be the result of "reason rather than caprice or emotion." *Gardner*, 430 U.S.

[31] During Kenya Tate's, Dana Tate's daughter, testimony, the State introduced a photo of Ms. Tate, her brother and her younger sister at their father's funeral holding a dove as a representation of their father." App. 3746.

[32] Moreover, these statements violated petitioner's due process by failing "to observe the fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219 (1941).

at 358. Likewise, S.C. Code § 16-3-25(C)(1) prohibits these trial conditions for they result in death sentences "imposed under the influence of passion," and other "arbitrary factor[s]." S.C. Code Ann § 16-3-25(c)(1) (2003). A death sentence that is the result of a jury's sympathy for the victim's family is not based on the defendant's culpability, but rather the victim's popularity.

The victim impact evidence, exhibits, and opinions dominated the prosecutor's penalty phase presentation, distracting the jury from the reasoned moral assessment of punishment which they were charged with making under the Eighth Amendment. The excessive number and the scope of these statements created an impermissible risk that the jury's decision was based on emotion, sympathy, and a desire to comply with the wishes of the victim's family. Trial counsel's failure to object to the evidence was both unreasonable and prejudicial.

D. Counsel were Ineffective for Failing to Object to Inflammatory and Improper Statements Made During the Prosecution's Closing Argument that Rendered the Sentencing Phase Fundamentally Unfair.

Comments made by a prosecutor during the guilt-or-innocence or penalty phase of a trial can render a "conviction fundamentally unfair and deprive[] the sentencing determination of the reliability that the Eighth Amendment requires." *Darden v. Wainwright*, 477 U.S. 168, 178–79 (1986). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). According to the American Bar Association standards, "[t]he prosecutor should not express his or her personal belief or opinion as to the truth or the falsity of any testimony or evidence or the guilt of the defendant" and "[t]he prosecutor should refrain from argument which could divert the jury from its duty to decide the case on the evidence." ABA, Criminal Justice Section Standards, 3-5.8(b) & (d), *Argument to the Jury* (1999); *see also State v.*

Reese, 633 S.E.2d 898, 901 (S.C. 2006) ("A solicitor's closing argument must be carefully tailored not to appeal to the personal biases of the jury. . . . The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.") (citing *Von Dohlen v. State*, 602 S.E.2d 738 (S.C.2004)).

In *Viereck v. United States*, 318 U.S. 236 (1943), the prosecuting attorney in his closing remarks stated:

> In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with the their ideas of persecution and concentration camps. This is war. It is fight to the death.

Id. at 247 n.3. On appeal the Supreme Court stated that these statements by the prosecuting attorney "prejudiced petitioner's right to a fair trial" and might "have placed the judgment of conviction in jeopardy." *Id.* at 247. The Court reasoned that in making these statements the prosecutor "indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice." *Id.*

Similar to the statements made in *Viereck*, during his closing argument, Mr. Stone compared the killings of officers Tate and Coursen to war stating "Alkebulanyah went to war on January [eighth]. He didn't tell Dan Tate and he didn't tell Dyke Coursen. Couldn't call it an ambush. It was more than that." App. 3791–92. Mr. Stone further stated, "He's at war with civilization. He's at war with authority. No one will tell him what to do or how to do it. . . He's at war. He's been at war his entire adult life, not with Dana Tate and Dyke Coursen, but with police, correctional officers, and anybody else that stands for authority; that's what he is at war with, authority. . . Alkebulanyahh has been at war all his adult life. Is this case bad enough? Could it get any worse? Is the criminal bad enough? Does it get any worse? He is at war now. He will always be at war." App. 3801 –02.

The statements were extremely prejudicial and "infected the trial with unfairness," thereby denying the petitioner due process. *Donnelly*, 416 U.S. at 643. The improper comments suggested to that the jury that it could and should apply a lower standard in making its sentencing determination—namely, that applied to enemy combatants. By comparing petitioner's crimes to acts of war the solicitor suggested to the jury that they had a moral and patriotic duty to protect society from the "enemy." These inflammatory statements by the solicitor unfairly influenced the jury to view the defendant as a hostile enemy—a "member of a faceless, undifferentiated mass"—rather than as an individual defendant. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The statements were not relevant to the defendant nor to his specific crime, "the purpose and effect of" the war comparisons "could only have been to arouse passion and prejudice." *Viereck*, 318 U.S. at 247. In failing to object to these statements by the solicitor in his closing argument, trial counsel enabled the solicitor to ensure defendant did not receive a fair trial.

GROUND IV: THE PROSECUTION EXERCISED ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER IN VIOLATION OF PETITIONER'S RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Statement of Relevant Facts.

Following *voir dire*, the State struck a number of potential African-American jurors including Edith Owens, Matthew Young, Antwoine Crosson and Kerry Brown. After petitioner objected, the prosecution gave the following reasons for the peremptory challenges.

♦**Edith Owens** - She (a) was afraid of the defendant; (b) was weak on the death penalty; and (c) did not know anything about the case. App. 11340

♦**Matthew Young** – He (a) knew a witness; (b) was weak on the death penalty; and (c) knew too much about the case. App. 1342.

♦**Antwoine Crosson** – He (a) had a brother who had been in trouble before; and (b) was just not a "good" juror. App. 1349-50.

♦**Kerry Brown** – She (a) had a pending domestic violence proceeding (she was the victim); and (b) had not heard about the case. App. 1351.

As will be set forth in detail below, the prosecution's alleged race neutral reasons for the challenges are self-contradictory, not supported by the record and thus pretextual.

B. Relevant Legal Principles.

"[T]he State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause," which "forbids the prosecutor to challenge potential jurors solely on account of their race." *Batson v. Kentucky*, 476 U.S. at 79, 89 (1986). This mandate is violated where even a single juror is removed on the basis of his or her race. See *Id.* at 95. A defendant has standing to raise an equal protection challenge under *Batson v. Kentucky*, 476 U.S. 79 (2000), even when he and the excluded jurors are not members of the same race. *Powers v. Ohio*, 499 U.S. 400 (1991).

Analysis of an asserted *Batson* violation proceeds in three steps. *See Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*). First, the opponent of a peremptory strike must make a "*prima facie* case of purposeful discrimination . . . ." *Batson*, 476 U.S. at 93-94. Second, "[o]nce the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging [the] jurors [in question]." *Id.*, 476 U.S. at 97. Third, if the prosecutor succeeds in articulating a facially race-neutral reason for exercising a particular strike, the "trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98. "[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory

strike. At this stage, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.'" *Miller-El v. Cockrell*, 537 U.S. 322, 338- 339 (2003) ("*Miller-El I*") (quoting *Purkett v. Elem,* 514 U.S. 765, 768 (1995) (*per curiam*)). Ultimately, "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991).

"More than a century ago, the Court decided that a State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson, 476 U.S. at* 85 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)). Furthermore, the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id.* at 85-86. The competence of a person to serve as a juror is unrelated to race and depends only on their "ability impartially to consider evidence presented at trial." *Id.* at 87 (citing Thiel v. Southern Pacific CO., 328 U.S. 217 (1946)). Allowing jurors to be selected in a discriminatory manner harms the defendant and undermines the confidence of the public. *Boston, 476 U.S.* at 87. The Equal Protection clause forbids the prosecutor to exercise peremptory challenges in a discriminatory manner. *Id.* at 89.

C. The Prosecution's Purported Race Neutral Reasons were Clearly Pretextual.

Petitioner, who is African-American, maintained at trial that the prosecution unlawfully used its peremptory challenges to exclude Edith Owens, Matthew Young, Antwoine Croson, and Kerrie Brown, who were also African-American as well. App. 1340-1353. In fact, the state challenged four of the five African-American jurors that were presented. Given the number of challenges against black jurors, who were ultimately excluded, and the percentage thy constituted of the overall jury pool, petitioner clearly made out a *prima facie* case.

Assuming, *arguendo*, that the prosecution set forth a "race neutral" reason for the challenges,

which in the case of Mr. Crosson (who the prosecution rejected on grounds that he was simply not a "good" juror) is highly doubtful, the prosecution's explanation was pretextual. The evidence of pretext is clear from the fact that the prosecution did not challenge a significant number of similarly situated white members. Moreover, the race-neutral reasons provided by the prosecutor were conflicting and unsupported by the voir dire.

The prosecutor premised the dismissal of Edith Owens on the fact that she was afraid of the defendant, that she was weak on the death penalty, and that she did not know anything about the case. App. 1340. However, one can search the *voir dire* in vain for any indication whatsoever that Ms. Owens was afraid of petitioner, and the prosecution offered no evidence to support its assertion. However, after being questioned by petitioner during voir dire, Joy Smith, a white juror, stated that "[her] heart was about to jump out of [her] chest." App. 671. The prosecution found Ms. Smith to be completely satisfactory. Furthermore, other white jurors were seated with substantially weaker views on the death penalty and who had the same knowledge of the case as Ms. Owens. Without elaborating or hesitating, Ms. Owens categorized herself as the type of person who would have to listen to all the evidence before determining whether the death penalty would be warranted. App. 279. Bruce Batastini, a white male, however, gave virtually identical answers about the death penalty and also stated he had heard nothing about the case. *See e.g.*, App. 571-73. Jannie Glover, also white, stated that she had not heard or read anything about the case. App. 987. Yet the prosecution did not challenge either Mr. Batastini or Ms. Glover. Because there is nothing to support the assertion that Ms. Owens was afraid of the defendant, and because other jurors who knew nothing about the case and who had similar views on the death penalty were seated, Ms. Owens exclusion

rises to the lever of purposeful discrimination.[33]

The prosecution's reasons for striking Matthew Young were that he knew a defense witness, knew about the case, and was weak on the death penalty. *See e.g.*, App. 1342. However, the record is clear that the prosecution was mistaken in its belief that Mr. Young knew a defense witness. The trial judge, erroneously dismissed the state's factual error as irrelevant. *See e.g.*, App. 1345. Even if the mistake is irrelevant, because it is wrong, the prosecution's other reasons fail on their own terms. First, as noted above, the prosecution challenged Ms. Owens because she did not know enough about the case. Then, it switched positions and challenged Mr. Young because he allegedly knew too much. This "shell game" of conflicting reasons for the challenges is sufficient in and of itself to find pretext. But, setting aside the contradictory positions, Michelle Wilson, for example, was able to provide more information about the case than Mr. Young, stating "I just know that two cops were killed, that the [men] that were killed had families and children." App. 543.[34] Like Mr. Young, Ms. Murray indicated she was a category three individual, and that she would have to listen to all the evidence before imposing the death penalty. App. 545. As the above discussion reveals other similarly situated white jurors were not challenged by the prosecution. Therefore, it was purposeful discrimination to strike Mr. Young.

Antwoine Crosson was struck because the prosecutor knew his brother, and the prosecutor stated that he was "just not a good juror." App. 1349-50. However, Mr. Crosson assured the trial judge he would not harbor any bias against the State based on his brother's prior arrest. App. 538.

---

[33]It is also relevant that the prosecution asked Ms. Owens about the O.J. Simpson case. App. 261. No similar questions were posed to white jurors.

[34]When asked about what he had heard or read about the case, Mr. Young only knew that the case was about "[a] struggle situation, like a bust or something," but he was unable to provide any specific details. App. 441

Furthermore, several white jurors had family members that had been arrested and prosecuted. Cynthia Milanesi's fiancé had been arrested for a DUI. App. 583. Michelle Wilson's husband had been arrested for a DUI. App. 549. Neither Ms. Milenesi nor Ms. Wilson were peremptorily challenged by the prosecution. Because other white jurors were seated who had the same characteristics as Mr. Crosson, petitioner has established that the alleged race neutral reason was pretextual.

Finally, the prosecution struck Kerri Brown allegedly because she had not heard about the case and because she was the victim in a pending criminal domestic violence proceeding. *See e.g.*, App. 1351. In regards to the domestic violence proceeding, it is difficult – if not impossible – to imagine how being a victim of domestic violence would in all cases make Ms. Brown a poor juror. If anything, it would have made her more likely to favor the prosecution.in petitioner's particular case. As noted above, the prosecution seated Jannie Glover who also had not heard or read anything about the case. Tdhus, the prosecution's assertion that Ms. Brown culd not serve b/c she knew too little about the case was pretextual. Furthermore, during the *voir dire* examination, the prosecution explicitly asked Ms. Brown "[w]ould the fact that he is African-American have any effect on your ability to issue a fair, and impartial trial?" App. 1009. No similar questions were asked of white jurors. Because the prosecution dismissed Ms. Glover for her limited knowledge of the facts in this case after dismissing others for knowing too much, seating other jurors who also had not heard or read about the case, and in light of the disparate questioning of Ms. Glover, the relevant circumstances rise to the necessary inference of purposeful discrimination.

The prosecution exercised its peremptory strikes in a discriminatory manner to exclude African-American members from the jury. The trial judge's determination that the prosecution's stated reasons were race neutral and not pretextual was erroneous and therefore the writ of habeas

corpus should issue on his behalf.

GROUND V: PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BEFORE TWELVE FAIR AND IMPARTIAL JURORS AS A RESULT OF MULTIPLE PREJUDICIAL EXTRANEOUS INFLUENCES.

A. Facts Relevant to this Ground for Habeas Corpus.

At the penalty phase of petitioner's trial, following the presentation of the prosecution's case in aggravation, counsel's closing arguments (there was no defense case in mitigation), and the trial court's instructions, the jury retired to deliberate to determine whether petitioner should be sentenced to death or to life imprisonment without the possibility of parole. Petitioner's investigation has revealed that during the penalty deliberations, several jurors held hands and prayed. Noel Aff. 2.[35] Additionally, some jurors brought Bibles and/or copies of scripture they had reproduced into the jury room. Noel Aff. 2. In assessing petitioner's fate, jurors relied on specific Biblical passages to help them make their decision; especially passages advocating *lex talionis* or, "an eye for an eye." Noel Aff. 2. In addition to praying, one juror reported asking a minister for guidance as to how to make the sentencing phase life or death decision. Noel Aff. 2. In addition to the injection of religion into the juror's deliberative process, the jurors were exposed to other prejudicial non-record information. Some of the jurors in this case were led to believe that the jury was sequestered because of threats made by petitioner's "followers." Noel Aff. 3. During trial, several jurors entered the jury box and discovered a pile of dog manure. Noel Aff. 3. The jurors were then told by court personnel that there had been threats from "associates" of Mr. Roberts, and that the manure came from a bomb sniffing dog that was being used daily to inspect the courtroom for bombs. Noel Aff. 3. The jurors, quite naturally, found this was frightening. Noel Aff. 3. In fact, based on this extraneous

[35]The affidavit of Kara Noel, as well as the supporting affidavits of Caroline Colangelo, Margaret O'Leary, and Sonali Shahi are included in Attachment B to this petition.

information, several jurors continue to be afraid of retaliation from Mr. Roberts, his "followers," friends, and family. Noel Aff. 3.

B. The Consideration of External and Extraneous Sources of Information Violates the Sixth and Fourteenth Amendment Right to a Fair Trial.

The Sixth Amendment right to jury trial, and the Fourteenth Amendment right to due process of law, guarantee every criminal defendant the right to a fair trial before a fair tribunal. *See Jordan v. Massachusetts*, 225 U.S. 167 (1912) ("Due process implies a tribunal both impartial and mentally competent to afford a hearing"). No right is more fundamental to our Anglo-American criminal justice system. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). A critical component of the right to a fair trial is "a panel of impartial, indifferent jurors [whose] verdict [is] based upon the evidence developed at trial." *Irwin v. Dowd,* 366 U.S. 717, 722 (1961)(citations omitted). The Supreme Court has repeatedly proclaimed that "[o]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. *Taylor v. Kentucky*, 436 U.S. 478 485 (1978); *see also Holbrook v. Flynn*, 475 U.S. 560, 567 (1986).

Furthermore, the Eighth Amendment's ban on cruel and unusual punishment recognizes that "death is different." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). The qualitative difference of capital punishment requires that the procedures used in capital cases have a special indicia of reliability. *Zant v. Stephens*, 462 U.S. 862, 884 (1983). The Court has also recognized that due to the unique nature of the jury's sentencing deliberations in a capital case, there is an especially high risk that any bias or prejudicial information will result in constitutional error. See *Turner v. Murray*, 476 U.S. 28 (1986). Thus, "it is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise free of deliberate an unbiased judgment." *Mattox*

v. United States, 146 U.S. 140, 149 (1892).

A jury that has been exposed to prejudicial, extraneous information is clearly not fair and impartial. *See Rushen v. Spain*, 464 U.S. 114 (1983) (improper communications with trial judge); *Turner . Louisiana*, 379 U.S. 466 (1965) (improper communications with bailiffs). For this reason, the Supreme Court has clearly forbidden juries from being exposed to any external influences because such exposure "subvert[s] the[ ] basic guarantees of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). In particular, the Court stated that "[t]he requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Id.* at 472, 85 S.Ct. 546; *see also Irvin v. Dowd*, 366 U.S. at 722.

There are three—and only three—permissible ways in which information may reach the jury: it can come from the witness stand, it can come via the instructions of the court, or it can be part of the "common knowledge" of jurors. *See Fullwood v. Lee*, 290 F.3d 663, 682 (4th Cir. 2002). Extraneous and impermissible information includes phone calls from, or conversations with, comments from state officials, or information obtained in non-admitted sources of evidence, such as dictionaries or Bibles. *See, e.g., Parker v. Gladden*, 385 U.S. 363 (1966) (due process violated when a bailiff expressed opinions to the jury regarding facts or law); *Jones v. Kemp*, 706 F.Supp. 1534 (N.D.Ga.1989) (granting relief in capital habeas case analogizing the jurors use of the Bible in deliberations with the use of a dictionary by a jury).[2]

1. The Information Regarding Bomb Threats is Extraneous Information.

Petitioner was deprived of his right to a fair trial before a fair and impartial jury when court personnel notified jurors of the use of bomb dogs in petitioner's case. First, there is no evidence whatsoever in the record that any such threats were actually made. Second, although the threats

were allegedly made by petitioner's friends and family rather than the Petitioner himself, the jury believed that the petitioner had numerous "followers" akin to a Church congregation, making it impossible for the jury to distinguish between alleged threats made at the petitioner's behest and those done independent of his wishes. The threat of danger, then, was inseparable from petitioner, casting him in a prejudicial and dangerous light. The spectre of petitioner's possible dangerousness was particularly salient during sentencing, because several jurors relied on the alleged threats when choosing the death penalty rather than life imprisonment.

Regardless of juror's assessment of the threats, comments from court personnel regarding the occurrence of daily searches of the court room by bomb dogs constituted an impermissible third party communication. "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States,* 146 U.S. 140, 142 (1892). For example, in *Parker v. Gladden,* 385 U.S. 363 (1966) , the Court held that the new statements of the bailiff to certain jurors that the defendant was a "wicked fellow," was guilty, and that if there was anything wrong with the verdict the state appellate court would correct it, violated the Sixth and Fourteenth Amendment right to an impartial jury. The Court found actual prejudice, but also held that the bailiff's conduct "involved such a probability that prejudice will result that it is deemed inherently lacking in due process." *Parker*, 385 U.S. at 365-66. The same result is required in petitioner's case.

2. The Use of the Bible by the Jury During the Deliberations and the Consultation with a Minister Constituted Extraneous Prejudicial Information.

The Bible and Biblical passages used by the jurors during the penalty phase deliberations were not evidence or law that the jury was permitted to consider. Yet jurors each brought in their

own Bible (or copies of scripture) and relied on passages referring to punishment while deliberating during sentencing. Noel Aff. 2. The jurors specifically relied on verses regarding "an eye of an eye," or *lex talionis*. Noel Aff. 2. This extra-legal principle is inconsistent with the law governing the sentencing phase of a capital trial. The retributive principle of *lex talionis* mandates the death penalty in capital cases. Yet the Supreme Court has made clear that there can never be a mandatory death penalty. *See Woodson v. North Carolina,* 428 US 280 (1976); *Sumer v. Shuman*, 484 U.S. 992 (1987). Furthermore, jurors who believe in a mandatory death penalty are not eligible to serve because he they cannot conscientiously fulfill the oath to follow the law and the instructions to the jury. *Morgan v. Illinois* 504 U.S. 719 (1992). (Noting that jurors who believe the death penalty is mandatory could not, "in good faith ... consider evidence of aggravating and mitigating circumstances" as may be required by law and included in jury instructions.)

While the Bibles and scripture relied upon by the jurors would have clearly been inadmissible had the State attempted to introduce them as evidence, if they had, the petitioner would have at least had the opportunity to properly cross examine witnesses regarding the meaning of passages at issue. Yet, the Bibles were not admitted into evidence, thus depriving the Petitioner the opportunity address the information as required under the Sixth and Fourteenth Amendments. *See Oliver*, 541 F.3d at 340 ("The Bible served as an external influence precisely because it may have influenced the jurors simply to answer the questions [of future dangerousness and mitigating factors] in a manner that would ensure a sentence of death instead of conducting a thorough inquiry into these factual areas."). None of this information was subjected to the adversarial process. *Turner,* 379 U.S. at 473. Because of the fundamental rights that were called into question when the jurors relied on extraneous evidence, prejudice is presumed. *Remmer*, 347 U.S. at 229. Thus the burden is on the State to demonstrate that the information was harmless. *Id.*

The deliberations were further corrupted when a juror sought guidance from a member of the clergy. A juror sought advice from her minister on whether to vote for the death penalty in this case. Although "[a]ny private communication, contact or tampering, directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States,* 347 U.S at 229, where a juror seeks advice from family, clergy, or other members of the public with particular authority and influence over the juror, the impact of the bias is particularly marked. *See, e.g., Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002), (allegations that a juror's spouse encouraged the juror to vote to convict and for the death sentence warranted a new hearing due to improper extraneous influence on the juror).[36]

C. Petitioner is Entitled to an Evidentiary Hearing Due to Juror Misconduct Resulting in Deprivation of Petitioner's Right to a Fair Trial.

An evidentiary hearing is required where extrinsic influence or relationships have tainted the deliberations. *See Smith v. Phillips, 455 U.S. 209 (1978); Remmer v. United States, 347 U.S. 227 (1954).* Any private communication, contact, or tampering directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. Prejudice is presumed due to the impracticality of determining the effect of such contact on the jurors and because "[tlhe rules of evidence make it difficult for either party to offer direct proof of the impact an improper contact may have had on the deliberations of the jury." *Stockton v. Virginia*, 852 F.2d 740, 741, 743-44 (4th Cir. 1989), *cert. denied*, 489 U.S. 1071 (granting new

[36]Jury consideration of such impermissible external evidence violates the Sixth and Fourteenth Amendments because it has not been subjected to the crucibles of adversary testing: cross- examination, confrontation, and counsel, *Turner v. Louisiana*, 379 U.S. at 473, and may involve erroneous statements of the law. *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998) ("[T]here is error in [the cases involving a Bible in the jury room] not because the book was the Bible, but because the book was not properly admitted evidence.")

penalty phase trial where man merely commented to jurors on lunch break that they "ought to fry the son of a bitch"). Given the difficulty of ascertaining the impartiality of jurors post-hoc, "the law must impute bias to jurors" where prejudice may have occurred. *Smith v. Phillips, 455* U.S. at 215 *(1978)*. The remedy for alleged juror partiality is a hearing in which the defendant has the opportunity to demonstrate the presence of an extraneous influence. The burden then shifts to the state to demonstrate that there was no actual prejudice. *Id.*, (citing *Remmer v. United States,* 247 U.S. at 229 (1954)). Given the evidence presented by petitioner, a hearing must be ordered if this Court does not grant the writ.

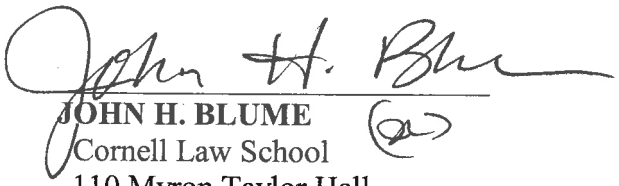
D. Conclusion.

The jurors in the petitioner's trial were exposed to multiple prejudicial extraneous influences. The combined effect of the exposure to extraneous prejudicial material resulted in the denial of Petitioner's right to a fair trial before a fair and impartial jury. Therefore, this Court should grant the writ of habeas corpus or, at a minimum, remand the case to the circuit court for an evidentiary hearing in connection with this ground for habeas corpus relief.

IV. CONCLUSION.

WHEREFORE, for all of the foregoing reasons, this Court should issue the writ of habeas corpus. Alternatively, because petitioner was denied basic due process in the lower court proceedings and was deprived of competent post-conviction representation by qualified counsel this Court should remand and order a new post-conviction relief hearing. This court should also grant petitioner discovery and access to funds for investigative and expert services in order that he may present additional evidence in support of his claims for habeas corpus relief.

Respectfully submitted,



JOHN H. BLUME
Cornell Law School
110 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

Counsel for Petitioner

February 18, 2011.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Applicant's Petition for Writ of Habeas Corpus has been served upon Respondent's counsel by first class mail, postage prepaid, this 18th day of February, 2011, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

Jill A. Rider

Attachment A

Lowcountry Forensic Psychiatry, LLC

18 Leinbach Dr., Suite F
Charleston, SC 29407
Phone (843) 573-2133
Fax (843) 573-2550

John Blume, Esq.
Center for Capital Litigation
P.O. Box 11744
Columbia, SC 29211

January 28, 2011

Dear Mr. Blume:

At your request I performed a psychiatric evaluation, including a review of records, on South Carolina Death Row Inmate Abidiyyah ben Alkebulanyahh , and I am writing this letter to relate to you my opinions regarding Mr. Alkebulanyahh. Any and all professional opinions are given to a reasonable degree of medical certainty.

My clinical evaluation consisted of two interviews of Mr. Alkebulanyahh on March 31, 2010 and May 24, 2010, for a total of 3.25 hours. In addition I reviewed records related to Mr. Alkebulanyahh's case including the following transcripts: The portion of his pretrial hearing in which he made a motion to proceed pro se, his testimony during the guilt determination phase of the trial, the presentencing testimony in which he indicated his desire to not be present for the proceedings, the portion of the proceedings during sentencing in which he became unruly, and the PCR hearing. I reviewed the report of Donna Schwartz-Watts, MD dated July 29, 2003 and the deposition of Dr. Schwartz-Watts dated August 13, 2008. I reviewed the forensic evaluation report by Dr. Richard Frierson dated March 10, 2003. Finally, I reviewed writings of Mr. Alkebulanyahh including a voluminous narrative titled "Manuscript Part One".

Mr. Alkebulanyahh was charged with two counts of Murder resulting from his actions on or about January 8, 2002, and as a result the State sought the death penalty. Prior to his capital murder trial, Mr. Alkebulanyahh underwent multiple psychiatric evaluations to assess his competency to stand trial, criminal responsibility, and capacity to conform his behaviors to the requirements of the law. Mr. Alkebulanyahh was interviewed by Dr. Richard Frierson on four occasions between December 4, 2002 and February 26, 2003. Dr. Frierson was designated by the South Carolina Department of Mental Health to conduct a forensic psychiatric evaluation ordered by the Court. Mr. Alkebulanyahh was interviewed by Dr. Donna Schwartz-Watts on three

occasions between December 2002 and April 10, 2003. Dr. Schwartz-Watts evaluated Mr. Alkebulanyahh at the request of his attorney, Gerald Kelly, Esq.

As a result of Dr. Frierson's evaluation, he identified clinical diagnoses for Mr. Alkebulanyahh and also provided opinions regarding his mental state. He composed a report outlining his opinions in March 2003. Dr. Frierson diagnosed the defendant with Personality Disorder, NOS with Narcissistic and Antisocial Features. Dr. Frierson opined that the defendant was capable of understanding the nature of his charges and was capable of assisting counsel in his defense. He opined that the defendant did have the ability to differentiate right from wrong at the time of the alleged offenses, on or about January 8, 2002, and that he had the capacity to conform his conduct to the requirements of the law. Dr. Frierson described that although the defendant had described a previous hallucinatory experience when he felt God had spoken to him and also had some unusual cultural beliefs, that he found no evidence that Mr. Alkebulanyahh was delusional or psychotic at the time of his evaluation.

As a result of Dr. Schwartz-Watts' evaluation, she also identified clinical diagnoses for Mr. Alkebulanyahh and provided opinions regarding his mental state. In her report dated July 29, 2003, she diagnosed him with Bipolar Disorder, Most Recent Episode Manic with Psychotic Features and Narcissistic Personality Traits. She indicated that at the time of her final interview of the defendant on April 10, 2003, he met the criteria for a manic episode and that history gathered indicated the presence of prior hypomanic episodes as well. Dr. Schwartz-Watts opined that at the time of her report the defendant did not have sufficient capacity to assist his attorney in his defense, due to his mental illness. She opined that although the defendant had a major mental illness, she found no evidence that his illness prevented him from knowing the difference between legal and moral right from wrong. However, she further opined that the defendant's capacity to conform his conduct at the time of the offense was seriously impaired due to his mental illness.

In her report, Dr. Schwartz-Watts stated, "It is this examiner's opinion that [the defendant's] beliefs represent major mental illness which has a fluctuating course. It is this examiner's opinion that his mental state will continue to deteriorate during a trial during periods where his belief system is confronted." Dr. Schwartz-Watts recommended that if the defendant were found competent to stand trial that he be evaluated intermittently to monitor his mental status due to the fluctuating nature of his illness.

Mr. Alkebulanyahh was ultimately found to be competent to stand trial. He was focused on conspiracy theories regarding his defense team and as a result of his paranoia sought to represent himself. That request was granted, he endured a capital trial with pro se representation, and he was found guilty of the charges against him. After being found guilty of capital murder, Mr. Alkebulanyahh requested to waive his right to a penalty phase of the trial. He indicated he did not wish to present any mitigating evidence during a penalty phase and that if a penalty phase were held he did not intend to be present at the proceedings. He also indicated that if he were forced to be present in the courtroom he would be "unruly" and a "disruption".

A penalty phase of the trial did take place, and Mr. Alkebulanyahh did in fact act in an unruly manner. As witness testimony began, he began chanting in a hyperreligious manner and refused to cease that behavior. He was ultimately removed from the courtroom, shackled, and placed in an adjoining room where he could see the proceedings and hear them via microphone but not be disruptive to the court. No mitigating evidence was presented, and the outcome of the penalty phase was a sentence of death.

The last psychiatric interview by Dr. Frierson was on February 26, 2003, and the last interview by Dr. Schwartz-Watts was on April 10, 2003. The penalty phase of the trial took place in October 2003. Mr. Alkebulanyahh's mental status showed evidence of significant deterioration throughout the course of the trial. He became increasingly paranoid, hyperreligious, erratic, and self-destructive. Despite his decline, at no time during either the guilt phase or the penalty phase was Mr. Alkebulanyahh's competence to stand trial reevaluated.

Both of my interviews with Mr. Alkebulyanyahh took place at Lieber Prison. He was dressed in standard death row attire and had fair hygiene. He was pleasant and cooperative with both interviews. He displayed a baseline level of slight paranoia, and his thought content had a consistent religious undertone. He maintained intense eye contact. His speech was of regular rate and volume, although he spoke voluminously on both occasions and his speech was slightly pressured (nonstop and difficult to interrupt).

Mr. Alkebulanyahh's historical symptoms, his behaviors during his capital murder trial, and his clinical presentation are consistent with a diagnosis of Temporal Lobe Epilepsy (TLE), a relatively common form of epilepsy. Typically seizures in TLE are not accompanied by convulsions or physical changes. Individuals with TLE display symptoms including hallucinations and intense emotions during seizure activity. High levels of stress increase the expected frequency of seizures in TLE.

Between seizures persons with TLE are typically hyperreligious, emotional, and hypergraphic (compelled to write). Symptoms of TLE are often misattributed to a psychiatric illness such as schizophrenia or bipolar mania. A neuropsychological examination was conducted on February 4, 2011. The results of the evaluation, which included a quantitative EEG, were consistent with temporal lobe dysfunction in general and temporal lobe epilepsy (TLE) in particular.

Studies have shown that TLE may be caused by brain injuries. Mr. Alkebulanyahh's prior head injuries include a right temporal lobe laceration with loss of consciousness from a motorcycle accident in November 1986 (resulting in a scar on his right temple going back to his hairline) and a severe head injury from hitting his head on the windshield in a car accident. Prison reports from prior incarcerations describe several instances where Mr. Alkebulanyahh lost consciousness and exhibited symptoms consistent with seizures.

Following his head injuries, Mr. Alkebulanyahh founded his own religion with detailed rituals and multiple followers to whom he continues to provide spiritual

guidance from prison through correspondence and written sermons. He also describes visions which include "hear[ing] the voice of God," seeing various bizarre images including shapes floating in the air and "diamond people," and being visited by a "powerful spirit." Hyperreligiosity is one of the cornerstone traits of TLE, and Mr. Alkebulanyahh's description of his multiple religious visions are consistent with seizures associated with TLE.

Mr. Alkebulanyahh's symptoms also include hypergraphia; in one letter, for example, he acknowledges writing up to five or six hours a day as well as his plans to write a book. As aforementioned, hypergraphia is very common in persons with TLE. Mr. Alkebulanyahh's paranoid ideation, the circumstantiality of his speech, his egocentricity and his delusions of grandeur are also consistent with temporal lobe epilepsy. Mr. Alkebulanyahh would benefit from a full neurological evaluation, comprehensive neuropsychological testing, and magnetic resonance imaging (MRI) of the brain to further assess his condition and more firmly delineate his diagnosis.

The reports of Drs. Frierson and Schwartz-Watts and their descriptions of Mr. Alkebulanyahh's mental status indicate that his symptoms became more prominent and intense during the months leading up to his capital murder trial. Mr. Alkebulanyahh's behaviors during both phases of his trial displayed a further progression of his psychiatric symptoms and a decline in mental status. The obvious stress associated with a capital murder trial would be expected to increase seizure activity in a person with TLE, therefore increasing the frequency and severity of the associated psychiatric symptoms.

Mr. Alkebulanyahh was found competent to stand trial prior to the guilt phase of his trial; however, his competence was not reassessed at any point during the progression of his trial. His testimony at the end of the guilt phase was rambling and disjointed. His summation revealed a heightened level of paranoia and further development of the conspiracy theories he held. He was unable to give a rational reason for refusing to be present at the penalty phase of his trial. Although determined to be competent prior to the initiation of the trial, Mr. Alkebulanyahh's documented behaviors, particularly just prior to and during the penalty phase of the trial, indicate his mental status had then declined to an extent consistent with a lack of capacity to rationally understand the proceedings or participate in his defense at that point in time.

If I can provide further information regarding my opinions in this case please do not hesitate to contact me.

Sincerely,



Rikki Lynn Halavonich, M.D.
ABPN Certified Forensic Psychiatrist

Attachment B

TYREE ALPHONSO ROBERTS,
a/k/a
ABDIYYAH BEN ALKEBULANYAHH,
Petitioner.,

v.

STATE OF SOUTH CAROLINA
Respondent.

Case No.

AFFIDAVIT OF MARGARET O'LEARY

1. I am a law student at Cornell Law School, where I am enrolled in the Capital Punishment clinic. Caroline Colangelo, Kara Noel, Sonali Shahi, and I were asked to interview the jurors in Mr. Roberts' case. We interviewed several of the jurors who served on Mr. Roberts' case between January 11 and January 18, 2011. We interviewed the following jurors: Stanley Leavitt, Cynthia Milanesi, Kristen Lindsay, John Keener, Joy Smith, Mamie Clark, Isaac Buckner, and Jeannine Savage. I have read the affidavit of Kara Noel, and agree that it is an accurate and truthful account of our interviews with the above jurors.

Further affiant saith naught:

Margaret O'Leary

Sworn to and subscribed in my presence this 1st day of February, 2011.

Rosemary Lacey
Notary Public

ROSEMARY LACEY
Notary Public, State Of New York
No. 01LA6074889
Qualified In Cayuga County
Commission Expires May 27, 2014

TYREE ALPHONSO ROBERTS,
a/k/a
ABDIYYAH BEN ALKEBULANYAHH,
Petitioner.,

v.

STATE OF SOUTH CAROLINA
Respondent.

Case No.

AFFIDAVIT OF CAROLINE COLANGELO

1. I am a law student at Cornell Law School, where I am enrolled in the Capital Punishment clinic. Margaret O'Leary, Kara Noel, Sonali Shahi, and I were asked to interview the jurors in Mr. Roberts' case. We interviewed several of the jurors who served on Mr. Roberts' case between January 11 and January 18, 2011. We interviewed the following jurors: Stanley Leavitt, Cynthia Milanesi, Kristen Lindsay, John Keener, Joy Smith, Mamie Clark, Isaac Buckner, and Jeannine Savage. I have read the affidavit of Kara Noel, and agree that it is an accurate and truthful account of our interviews with the above jurors.

Further affiant saith naught:

Caroline Colangelo

Caroline Colangelo

Sworn to and subscribed in my presence this 11 day of February 2011.

Donna O. Dingy

Notary Public

Notary Public, State of New York
Residing in Cayuga Co. at time of Appt.
Official No. 4841407
My Commission Expires ~~March 30, 19~~ April 30, 2011

TYREE ALPHONSO ROBERTS,
a/k/a
ABDIYYAH BEN ALKEBULANYAHH,
Petitioner.,

v.

STATE OF SOUTH CAROLINA
Respondent.

AFFIDAVIT OF KARA NOEL

Affidavit, being duly deposed, sworn and says:

1. Sonali Shahi, Margaret O'Leary, Caroline Colangelo and I are law students at Cornell Law School, where we are enrolled in the Capital Punishment clinic. As part of our work for the clinic, we were asked to interview the jurors in Mr. Roberts' case. We interviewed several of the jurors who served on Mr. Roberts case between January 11 and January 18, 2011. We interviewed the following jurors: Stanley Leavitt, Cynthia Milanesi, Kristen Lindsay, John Keener, Joy Smith, Mamie Clark, Isaac Buckner, and Jeannine Savage.
2. Several jurors remembered holding hands and praying during deliberations, specifically during the penalty phase of the trial A few jurors mentioned that they brought a Bible or copies of scripture into the jury room during deliberations. These jurors stated that they relied on passages to make their decision; specifically, one or more jurors stated that they relied on passages supporting the principle of "an eye for an eye." Additionally, one juror stated

that in addition to praying, she asked a minister for guidance on how to make a decision during the sentencing phase.

3. One or more jurors said they believed they were being sequestered because of threats to the jury from Mr. Roberts' "followers." Additionally, several jurors recalled they entered the jury box one day and discovered a pile of dog manure. They were then told that there had been threats from associates of Mr. Roberts and that the manure came from a bomb sniffing dog that was being used daily to look for bombs that may have been planted by associates of Mr. Roberts. Some of the jurors stated that this was frightening and that they were, and continue to be, quite scared of Mr. Roberts, his "followers," friends, and family.

4. One or more jurors recalled Mr. Roberts being removed from the courtroom during sentencing and that Mr. Roberts was shackled "right at the desk" and then taken to the back room where he remained in shackles.

Further affiant saith naught

Kara Noel

Sworn to and subscribed in my presence this 7 day of February, 2011.

Notary Public

ROSEMARY LACEY
Notary Public, State Of New York
No. 01LA6074889
Qualified In Cayuga County
Commission Expires May 27, 2014

TYREE ALPHONSO ROBERTS,
a/k/a
ABDIYYAH BEN ALKEBULANYAHH,
Petitioner.,

v.

STATE OF SOUTH CAROLINA
Respondent.

AFFIDAVIT OF SONALI SHAHI

1. I am a law student at Cornell Law School, where I am enrolled in the Capital Punishment clinic. Kara Noel, Margaret O'Leary, Carye Colangelo, and I were asked to interview the jurors in Mr. Roberts' case. We interviewed several of the jurors who served on Mr. Roberts' case between January 11 and January 18, 2011. We interviewed the following jurors: Stanley Leavitt, Cynthia Milanesi, Kristen Lindsay, John Keener, Joy Smith, Mamie Clark, Isaac Buckner, and Jannine Savage. I have read the affidavit of Kara Noel, and agree that it is an accurate and truthful account of our interviews with the above jurors.

Further affiant saith naught:

Sonali Shahi

Sonali Shahi

Sworn to and subscribed in my presence this 15 day of February 2011.

Rosemary Lacey

Notary Public

ROSEMARY LACEY
Notary Public, State Of New York
No. 01LA6074889
Qualified In Cayuga County
Commission Expires May 27, 20 14

TYREE ALPHONSO ROBERTS,
a/k/a
ABDIYYAH BEN ALKEBULANYAHH,
Petitioner.,

v.

STATE OF SOUTH CAROLINA
Respondent.

AFFIDAVIT OF SONALI SHAHI

1. I am a law student at Cornell Law School, where I am enrolled in the Capital Punishment clinic. Kara Noel, Margaret O'Leary, Carye Colangelo, and I were asked to interview the jurors in Mr. Roberts' case. We interviewed several of the jurors who served on Mr. Roberts' case between January 11 and January 18, 2011. We interviewed the following jurors: Stanley Leavitt, Cynthia Milanesi, Kristen Lindsay, John Keener, Joy Smith, Mamie Clark, Isaac Buckner, and Jannine Savage. I have read the affidavit of Kara Noel, and agree that it is an accurate and truthful account of our interviews with the above jurors.

Further affiant saith naught:

Sonali Shahi

Sonali Shahi

Sworn to and subscribed in my presence this 15 day of February 2011.

Rosemary Lacey

Notary Public

ROSEMARY LACEY
Notary Public, State Of New York
No. 01LA6074889
Qualified In Cayuga County
Commission Expires May 27, 2014

TYREE ALPHONSO ROBERTS,
a/k/a
ABDIYYAH BEN ALKEBULANYAHH,
Petitioner.,

v.

STATE OF SOUTH CAROLINA
Respondent.

AFFIDAVIT OF SONALI SHAHI

1. I am a law student at Cornell Law School, where I am enrolled in the Capital Punishment clinic. Kara Noel, Margaret O'Leary, Carye Colangelo, and I were asked to interview the jurors in Mr. Roberts' case. We interviewed several of the jurors who served on Mr. Roberts' case between January 11 and January 18, 2011. We interviewed the following jurors: Stanley Leavitt, Cynthia Milanesi, Kristen Lindsay, John Keener, Joy Smith, Mamie Clark, Isaac Buckner, and Jannine Savage. I have read the affidavit of Kara Noel, and agree that it is an accurate and truthful account of our interviews with the above jurors.

Further affiant saith naught:

Sonali Shahi

Sonali Shahi

Sworn to and subscribed in my presence this 15 day of February 2011.

Rosemary Lacey

Notary Public

ROSEMARY LACEY
Notary Public, State Of New York
No. 01LA6074889
Qualified In Cayuga County
Commission Expires May 27, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

TYREE ROBERTS AKA,
ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General

South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

PETITIONER'S ISSUES PRESENTED

1. Petitioner was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitutional and South Carolina law because a) the trial judge failed to inquire into Petitioner's competency; b) Petitioner was incompetent in fact; c) the trial judge failed to secure a knowing and intelligent waiver of Petitioner's right to present mitigating evidence and d) the trial judge failed to terminate Petitioner's *pro* se status.

2. Petitioner's death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without individualized determination by the trial judge.

3. Petitioner was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel during the penalty phase of the proceedings.

4. The prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Petitioner's rights guaranteed by the Sixth and Fourteenth Amendments.

5. Petitioner was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.

STATEMENT OF THE CASE

In March 2002, the Beaufort County Grand Jury indicted Petitioner for two charges of murder for the shooting deaths of two Beaufort County Sheriff's Deputies (02-GS-07-0369 & 0370). (App. 4534-35). The state gave notice of intent to seek the death penalty, and served its notice of evidence in aggravation.

Petitioner represented himself at his jury trial, but Attorneys Gerald Kelly and Sean Thornton remained throughout the trial to assist. Voir dire in the case began before the Honorable Daniel F. Pieper on October 6, 2003. Trial began on October 10, 2003. (App. 1316). On October 21, 2003, Petitioner's jury convicted him of both charges. (App. 3472-73).

The sentencing phase of his trial began on October 22, 2003. Judge Pieper submitted the following aggravating factors to the jury:

> The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.
>
> Two or more persons were murdered by the defendant by one act or pursuant to on scheme or course of conduct.

(App. 3847; 4529). The following mitigating factors were submitted to the jury:

> Whether the existence of any non-statutory mitigating circumstance was supported by the evidence.

(App. 3851, 4529).

On October 22, 2003, Petitioner's jury found the existence of the aggravating factors and recommended a sentence of death on the murder counts. That same day, Judge Pieper sentenced Petitioner to death. (App. 3861-68; 3873; 4533).

A timely Notice of Appeal was filed with the South Carolina Supreme Court. Petitioner was represented on direct appeal by Joseph L. Savitz, III, and Robert M. Dudek, of the South Carolina Office of Appellate Defense, after the South Carolina Supreme Court denied Petitioner's motion to proceed on direct appeal *pro se*. State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (2005) (App. 4973-81). On March 7, 2006, Petitioner submitted a Final Brief of Appellant to the state supreme court, in which he raised the following issue:

> The judge erred by refusing to allow appellant to waive his right to be present at the sentencing phase, instead confining him to a holding cell attached to the courtroom in which he was visible to the jury, particularly since appellant's absence during sentencing was his pro se trial strategy and the State advanced no countervailing reason for requiring him to be present.

The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent on February 17, 2006. Oral argument was held before the South Carolina Supreme Court on May 24, 2006. The South Carolina Supreme Court issued an opinion dated July 24, 2006, affirming the sentence. State v. Roberts, 369 S.C. 580, 632 S.E.2d 871 (2006).

Following a Petition for Stay of Execution by Petitioner and a Return by the State, the South Carolina Supreme Court issued an Order dated September 7, 2006, in which it stayed the execution so that Petitioner could file a petition for writ of certiorari with the United States Supreme Court. Petitioner filed his petition dated November 9, 2006, in which he raised the following issue:

> May a capital defendant waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reasons for requiring him to be present?

The State, through Assistant Attorney General S. Creighton Waters, filed a Return to the Petition for Writ of Certiorari dated February 5, 2007. The United States Supreme Court denied the Petition for Writ of Certiorari by Order dated March 19, 2007.

Petitioner filed a *pro se* Application for Post-Conviction Relief dated March 12, 2007. (App. 4535-44). Following a Petition for a Stay of Execution, the South Carolina Supreme Court issued an order on May 4, 2007, assigning Judge Young continuing jurisdiction over the matter. In August 2007, Judge Young signed an Order appointing Glenn Walters, Esquire, and Carl Grant, Esquire, as attorneys for Petitioner, and giving them until February 8, 2008, to file an Amended Application. On October 9, 2007, the State served its Return, Motion to Dismiss and Motion for Summary Judgment in response to Petitioner's *pro se* Application for Post-Conviction Relief. (App. 4569-98). On February 8, 2008, PCR counsel filed an Amended Application for post-conviction relief, asserting "[t]rial judge failed to make the proper findings to determine if the Applicant knowingly and intelleigently[sic] understood the implications of prooceding[sic] pro se." (App. 4562-68). The State filed its Amended Return on March 21, 2008. (App. 4545-61).

An evidentiary hearing was held in the post-conviction relief action at the Charleston County Courthouse before the Honorable Roger M. Young, Sr., Circuit Court Judge on October 13-14, 2008. (App. 4599-4920). Petitioner was present and was represented by Glenn Walters, Esquire and Carl B. Grant, Esquire. Id. Respondent was represented by Assistant Attorneys General S. Creighton Waters and Alphonso Simon, Jr. Id. Several exhibits were introduced at the hearing. Further, the

depositions of Joseph L. Savitz, III, Esquire; Robert M. Dudek, Esquire; Dr. Donna Schwartz-Watts; Gerald Kelly, Esquire; Sean Thornton, Esquire; and Solicitor I. McDuffie Stone, III were introduced into evidence as well.[1] (App. 4877-79, 5019-5133). On December 18, 2008, the post-conviction relief action was transferred to the jurisdiction of the Honorable Carmen T. Mullen, Circuit Court Judge. On September 17, 2009, the PCR Court filed an Order of Dismissal with Prejudice, denying relief upon all of the claims raised in the post-conviction relief action. (App. 5176-5229).

Petitioner timely filed a Notice of Appeal. Initially, Petitioner was represented by Glenn Walters, Esquire, one of his PCR counsel. Mr. Walters moved to be relieved from representing Petitioner. Pursuant to Petitioner's request, this Court appointed John Blume, III, Esquire to represent Petitioner in his appeal of the Order in the post-conviction relief action.

On July 21, 2010, Petitioner filed a Motion to Remand for Additional Post-Conviction Proceedings. In the Motion, Petitioner argued PCR trial counsel was not properly qualified, and some issues PCR appellate counsel believed were meritorious were not raised in the PCR. (App. 5230-60). This Court denied the Motion on October 20, 2010. (App. 5297). Petitioner subsequently filed a Petition for Writ of Certiorari and this Petition for Writ of Habeas Corpus on February 18, 2011.

---

[1] Respondent would note that some of the depositions that were submitted after the evidentiary hearing are not included in the Appendix.

STATEMENT OF FACTS[2]

In January 2002, Petitioner lived in a trailer owned by Brenda Smith on Riley Road in Beaufort County. Also residing at the trailer were Smith's husband, Isaac, and Petitioner's wife Nzuri. At the time of the crime in this case, a girl named Kimberly Blake, with whom Petitioner had an infant daughter, was also staying there. On January 8, 2002, Kimberly Blake asked her friend, Strawberry Washington, to call police to come to the house to assist her in leaving because Petitioner had hit her. Beaufort County Sheriff's Deputies Dyke Coursen and Dana Tate responded. According to Kimberly Blake, when police arrived, Petitioner hid in the bedroom closet with his rifle. He gave Kimberly the okay to go out of the bedroom. She left the bedroom and Brenda Smith gave the officers permission to search the bedroom. Officers Coursen and Tate went into the bedroom. Smith and Blake heard gunshots. Blake ran outside and down the road. She was joined shortly after by Petitioner coming through the woods with a gun in his hands. Petitioner stated, "I just killed those two white bitches and I'm going to say it was self-defense." Blake left Petitioner and returned to the scene to talk to police.

When backup officers responded to the scene, they found officers Coursen and Tate dead; Coursen had suffered six gunshot wounds, Tate had seven. Petitioner was subsequently found hiding in the mud under a bridge with a shoulder and hip wound. Petitioner was arrested. At the time, he had a black fanny pack carrying ammunition

---

[2] State v. Roberts, 369 S.C. 580, 581-83, 632 S.E.2d 871, 872-73 (2006)

for an M-14 assault rifle, a cell phone and a knife. Police subsequently found a rifle magazine and an SKS assault rifle in the area in which Petitioner had fled. The bullets and casings recovered from the victims and the scene of the crime were conclusively matched to the assault rifle.

Petitioner was charged with capital murder. At the guilt or innocence phase of trial, he chose to represent himself. However, two attorneys remained as stand-by counsel to assist him at trial. While the jury was deliberating, Petitioner indicated to the trial court that if the jury returned a guilty verdict, he did not intend to participate at sentencing. He also indicated he did not want his stand-by attorneys to present a defense. Petitioner indicated that if the trial court required him to be present at the sentencing hearing, he would be unruly and would have to be restrained.

The jury convicted Petitioner of two counts of murder. Petitioner advised the court he did not intend to offer any mitigating evidence and expressed his desire to absent himself from the sentencing; he indicated he would probably be unruly if required to be present. Stand-by counsel conferred with Petitioner and then advised the court as follows:

He says that he doesn't agree to any changes in his status as attorney of record, and that if the court makes any change, they'll have to do it on their own motion ... and that if the judge-if the attorneys on stand-by are to perform in any capacity, the judge will have to order that on his own motion ... He says that he doesn't want to be present in this courtroom in order to hear the evidence in the second phase. And that if the judge-but he does not intend to disrupt the proceedings ... but if the judge determines that he should be in one of the side rooms ... that's a decision

that his honor will have to make himself. He says that he is withdrawing from any further discussion with the court .... he does not intend to cooperate with stand-by counsel, to bring any witnesses....

The trial court was concerned with Petitioner' decision, but was also disturbed that to appoint counsel to represent Petitioner at sentencing might compromise his right to proceed *pro se*. Petitioner continued to maintain that he did not intend to confront any witnesses, and did not want to see the witnesses. He persisted in advising the court that if forced to remain present, he would be disruptive. As neither party could point to specific case law governing the circumstances, the court determined the best course of action was to proceed with Petitioner present in the courtroom, with the condition that if he became disruptive, the trial judge would take such action as necessary. Petitioner indicated his desire that counsel not represent him in any way, but ultimately decided counsel could remain as stand-by counsel to object to the introduction of improper evidence.

The sentencing proceeded with Petitioner seated at counsel table. As soon as the first witness was sworn, Petitioner stood and began to chant aloud, "Blessed be Yahweh, El Shaddai, Jehova, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." He was told by the court to be seated, and when he continued chanting, he was removed and a brief hearing was held in the hearing room at the back of the courtroom. Petitioner was brought back into the courtroom and once again began chanting when the witness began to testify. The jury was removed, and Petitioner was placed in a conference room at the back of the courtroom which had a glass partition to allow him to hear and see into the courtroom. He was initially

restrained, but the restraints were removed before the jury was returned to the courtroom.

Throughout sentencing, the court offered to allow Petitioner to come back into the courtroom if he could do so without being disruptive; however, Petitioner indicated he would rather remain in the back room. Petitioner ultimately returned to the courtroom to make a closing statement to the jury. After deliberations, the jury found the existence of the two aggravating circumstances and recommended a sentence of death.

I. THIS PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED BECAUSE IT IS NOT PROPER AT THIS TIME.

Habeas relief will be granted only for a constitutional claim rising to the level of "a violation, which in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Green v. Maynard, 349 S.C. 535, 564 S.E.2d 83 (2002), citing Gibson v. State, 329 S.C. 37, 39, 495 S.E.2d 426, 428 (1998) (holding that habeas relief was not available, even if precedent was overruled in petitioner's direct appeal and a new rule was created on the issue of juror qualification) and Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). See Tucker v. Catoe, 346 S.C. 483, 485, 552 S.E.2d 712, 713 (2001) (writ granted finding trial judge's instructions to deadlocked jury unconstitutionally coercive). Importantly, this Court has stated that:

> [w]e caution that not every intervening decision, nor every constitutional error at trial will justify issuance of the writ. Rather, the writ will issue only under circumstances where there has been a "violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice.

Butler, 302 S.C. at 468, 397 S.E.2d at 88. In Butler, the Court granted relief where the errors were determined to be a "grave constitutional error." See also Simmons v. State, 322 S.C. 49, 471 S.E.2d 455 (1993); Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991) (this Court will exercise its original jurisdiction where there is an extraordinary reason such as a question of significant public interest or an emergency). See also, McWee v. State, 357 S.C. 403, 407, 593 S.E.2d 456, 458 (S.C.,2004) (failure to charge the jury that petitioner was parole eligible is not shocking to the universal sense of justice).

A habeas corpus petition must support the requested relief. Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (1994). Although the allegations in the petition are to be treated as true, Tillman v. Manning, 241 S.C. 221, 127 S.E.2d 721 (1962), the petition must make out a prima facie case showing petitioner is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (1962). Petitioner must present sufficient factual allegations to support the petition. Hayes v. State, 242 S.C. 328, 130 S.E.2d 906 (1963). It must allege petitioner has exhausted all other remedies, and it must set out a constitutional claim that meets the standard delineated in Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S.Ct. 442, 112 L.Ed.2d 425 (1990). If the petition, on its face, meets these requirements, petitioner is entitled to a hearing.

Habeas corpus is available only when other remedies are inadequate or unavailable. Gibson, 329 S.C. 37, 495 S.E.2d 426 (1998). Procedurally, a petitioner seeking habeas corpus must first exhaust all available PCR remedies. Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994). Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review. "A matter may not be before this Court by a writ of certiorari and in our original jurisdiction." Binney v. State, 384 S.C. 539, 548 n.1, 683 S.E.2d 478, 483 n.1(2009). Further, petitioner must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate. Gibson, 329 S.C. at 42, 495 S.E.2d at 428. Here, Petitioner has not made the requisite showings that he has fully exhausted all other remedies and that other remedies are either unavailable or inadequate. First, Petitioner currently has a pending petition for writ of

certiorari appealing the order denying his application for post-conviction relief. That petition was filed on the same day as this habeas action. Second, Petitioner has not shown that he has exhausted any state remedies available for most of his claims now raised. Petitioner's claims in Ground Five were never raised to either the trial court or in a post-conviction relief action. Similarly, Petitioner's claims in Grounds Two and Three were not raised at all at trial or in his post-conviction relief action. While Ground Four was raised in PCR, it was not properly raised because it was a freestanding claim. Further, the argument now raised in Ground Four was not raised by Petitioner at trial. Finally, most of Petitioner's claims in Ground One were not raised in post-conviction relief. Since these claims were not properly raised in state court, and Petitioner has not shown relief is unavailable by other means for these claims, he is not entitled to habeas review at this time.

II. PETITIONER IS NOT ENTITLED TO HABEAS RELIEF UPON THE CLAIMS RAISED IN THIS PETITION.

Ground One: Petitioner was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States A) the trial judge failed to inquire into Petitioner's competency, B) Petitioner was incompetent in fact, C) the trial judge failed to secure a knowing and intelligent waiver of Petitioner's right to present mitigating evidence and D) the trial judge failed to terminate Petitioner's pro se status.

A. Trial judge failed to inquire into Petitioner's competency.

1. What occurred at trial

At a pre-trial hearing before Judge Perry M. Buckner on November 12, 2002, Petitioner complained to the judge that he had filed a motion to dismiss his attorneys because he felt they were sabotaging his case. (App. 3889). The solicitor requested

that the competency evaluation be done by a certain date, and when counsel Thornton indicated he had no objection to that, Petitioner stated he objected to it. (App. 3888-91).

At a pre-trial hearing before Judge Pieper on July 25, 2003, there was an extensive colloquy regarding Petitioner=s motion to represent himself. Petitioner noted he had finished high school and had taken some college coursework, and had also educated himself on the criminal justice system by studying the Constitution, PCR materials, trial proceedings, and statutes. He pointed out he had done PCR work for other inmates and filed numerous motions in his case. Petitioner stated he thought his lawyers were incompetent and lazy, and further complained about them withdrawing his speedy trial motions. Petitioner also complained that his lawyers hired an expert to make him look like he had a mental problem, when in fact the State expert found him competent; and he thought the State expert was far more professional and qualified. Petitioner noted his lawyers had given him a sheet on the dangers of self-representation, and the appointed defense lawyers agreed that if Petitioner was found to be competent he could in fact represent himself. The trial court discussed the fact that by waiving counsel, Petitioner was waiving it for the entire case. The trial court also noted Petitioner might find himself shocked and dazed by a guilty verdict when faced with proceeding on with the penalty phase. The court also warned Petitioner that his failure to properly raise issues at trial would preclude them on appeal and he would have no one to blame in PCR. Despite this, Petitioner continued to indicate his desire to represent himself, and the court specifically noted Petitioner was very coherent. After Petitioner reiterated his free, knowing, and intelligent decision, the

court indicated its intent to allow Petitioner to proceed *pro se*, pending a Blair hearing. (App. 3900-3945).

As the hearing progressed and various housekeeping and logistical matters were discussed, Petitioner listed for the court a relatively long list of people he wished to subpoena, including law enforcement personnel, DSS employees, and other witnesses. (App. 3951-55). After some further housekeeping matters, the court accepted as a court's exhibit the document setting forth the dangers of *pro se* representation that counsel Kelly had given to Petitioner. (App. 3955-56). The court inquired again if Petitioner understood everything that transpired, and after Petitioner indicated he did, the court gave him an additional week to think over *pro se* representation. The court also noted that Petitioner would need to be prepared at the hearing the following week to argue any motions he may have if the case was to go forward as soon as possible as Petitioner desired. (App. 3955-58). Before the hearing concluded, Petitioner and the judge discussed some expert witnesses he wished to pursue, and Petitioner explained to the judge why he wished to have a psychological expert on false statements and a firearms expert. (App. 3958-64).

The Blair hearing was held on August 1, 2003. Defense-retained psychiatrist Dr. Schwartz-Watts testified that Petitioner was not competent to represent himself, based on her assessment of his paranoia, psychosis, and reasoning for wanting to represent himself. Specifically, Dr. Schwartz-Watts stated that at their third interview Petitioner was psychotic and not in touch with reality, and had since refused to see her. She felt Petitioner did not have the capacity to assist his attorneys, because he thought they were conspiring with the solicitor. She also felt he did not have the

capacity to look at different decisions about how to defend himself, because he refused to consider any kind of mental health mitigation. She admitted, though, that she could not give an opinion as to his competency at that moment since he had refused to see her again. (App. 3975-91).

When cross examined by Petitioner, Dr. Schwartz-Watts acknowledged that Petitioner did not want to meet with her on any occasion. During the second interview, while Petitioner agreed that while he initially consented to having the interviews taped, he forgot it was recording, and was very angry that Dr. Schwartz-Watts might disclose the tape to other people. Schwartz-Watts also acknowledged that she was aware Petitioner was upset about the videotaping when she attempted to speak with Petitioner a third time. (App. 3991-97).

During cross examination by the solicitor and questioning by the judge, Dr. Schwartz-Watts stated Petitioner's intelligence was sufficient, but she was concerned not with the decisions he makes but with the reasoning behind them - given that he thought he could do better than his attorneys, and that they were Masons who were conspiring with the solicitor to deny him a fair trial based on his religious beliefs. She also thought his mental illness precluded him from considering issues in mitigation. However, she admitted she thought some of Petitioner's decisions about experts were "brilliant." Further, she conceded to the judge that if Petitioner decided to accept the opinion of another expert who thought he was competent that certainly could be a rational decision, unless he was doing so because of his illness. Ultimately, she stated Petitioner had some "good" and "strong" ideas about how to defend his case, but she questioned the reasoning by which he arrived at those ideas. She stated it would not

be unusual for him to be mistrusting since he was accused of killing two police officers, but felt he "crossed the line" with his belief that his attorneys were part of a conspiracy. Dr. Schwartz-Watts acknowledged that making an irrational decision does not render one incompetent. (App. 3997-4011).

The defense psychologist stated Petitioner refused to see him, and he had elevated scores on a portion of a test indicating defensiveness and underreporting of symptoms. On cross by Petitioner, he agreed Petitioner had average intelligence, no neuropsychological deficits, and no indications of malingering. (App. 4017-25).

The court's psychiatrist and psychologist both found Petitioner competent to stand trial, and criminally responsible. The psychiatrist, Dr. Richard Frierson, diagnosed Petitioner as having a personality disorder with narcissistic and anti-social traits. Frierson noted that was not a major mental illness. He stated he would expect Petitioner to have elevated scores on the PAI because Petitioner tries to present himself in best light. (App. 4028-32).

On cross, Dr. Frierson testified he scheduled another meeting with Petitioner after viewing Dr. Schwartz-Watts' videotape of the interview. He discussed in detail these issues with Petitioner and concluded Petitioner's thoughts about the Masons and the court system were not delusional but an ideology shared by a number of people. Dr. Frierson had found information on the internet about books written on the Masons, and Petitioner agreed he had reason some of those books. Since Petitioner's beliefs were similar to what other people believe about these organizations, Dr. Frierson found it to be a cultural belief that may be false rather than a delusion that was caused by mental illness. While Dr. Frierson certainly agreed Petitioner displayed

narcissism and might overestimate his abilities, he saw no evidence Petitioner ever had a major depressive or manic episode. (App. 4032-39).

The court's psychologist, Dr. Musick, examined Petitioner four times and also agreed he was competent to stand trial. He noted Petitioner did show elevated scores on the positive impression management scale of the Personal Assessment Inventory test, or "PAI" test. This meant Petitioner was unwilling to disclose minor shortcomings to which others might admit. However, since Petitioner was presenting himself in the best light, Dr. Musick found that not to be surprising. (App. 4041-46).

During defense counsel's cross examination, Dr. Musick agreed that when there are scores on the positive impression management scale similar to Petitioner's score, the PAI manual cautions that the other scores might underestimate any psychopathology. Dr. Musick noted they compensated for that by spending a lot of time in the interviews as to any symptoms Petitioner might have. Dr. Musick also did not think Petitioner's beliefs about the Masons was a delusion but a cultural or subcultural belief, partly because Petitioner agreed he did not know if what he had read about Masons was true, and partly because there was information on the internet and in books reflecting similar views. (App. 4046-54).

During Petitioner's cross examination, Dr. Musick stated Petitioner was not retarded. Dr. Musick agreed that while Petitioner did have some suspiciousness and distrustfulness, that did not necessarily make one abnormal. He further noted Petitioner was well aware of his rights. Dr. Musick agreed with Petitioner's questioning that simply because one tried to portray himself in a positive light or did not admit to minor annoyances, that did not necessarily mean he was hiding larger issues. Dr.

Musick agreed that one would not be delusional if he believed in the existence of the Ku Klux Klan, Free Masonry, or "enemies." (App. 4055-58).

The court found based on the court's examiners' testimony as well as its own observations and interactions with Petitioner that he was competent, stating:

> THE COURT: I have watched the defendant in court, I gave the defendant the opportunity to ask questions in these proceedings for the very purpose of evaluating the defendant's demeanor, his behavior, whether the defendant is rational, whether he has an appreciation of these proceedings. The defendant asked some questions when he was addressing the witnesses, the questions were pertinent. I think the defendant listened to the testimony, he referenced some of that testimony in his questions and there is evidence in the record from the psychiatric testimony that the defendant is competent to so proceed and the Court upon review of all of these - - with the entire record finds that defendant does have such a rational understanding of these proceedings and does have the ability to present his defense, that I find that he is competent to proceed.

(App. 4060-61). The court then held another colloquy with Petitioner on his desire to represent himself, and engaged in a detailed and lengthy discussion with Petitioner on the responsibilities, dangers, and issues with *pro se* representation, particularly in a capital case. The judge further advised Petitioner not to represent himself, and told him he may be overwhelmed by the prospect of a sentencing phase if he were convicted. Petitioner held firm to his desire to represent himself. (App. 4061-67).

The discussion then moved to standby counsel. Petitioner noted he had requested different counsel, but he understood that trial was approaching and he wanted a speedy trial. Petitioner stated that if he had to have Kelly and Thornton as standby counsel he would accept them rather than no counsel at all. The judge pointed out that there was no obligation to appoint standby counsel at all, and that even if standby counsel were appointed there would be no hybrid representation.

Petitioner specifically stated he did not expect his standby attorneys to be able to assist in the presentation of his case, and the judge agreed to allow Kelly and Thornton to remain in that capacity. After one final colloquy on Petitioner's decision to represent himself, Judge Pieper accepted Petitioner's request, finding it to be a free, voluntary, and intelligent decision. Again, the judge noted that in reviewing Petitioner's motions and discussing the case with Petitioner, the judge believed Petitioner "does seem to have the ability to proceed and handle his defense in this case." Appointed counsel Kelly and Thornton were ordered to remain as standby counsel to assist Petitioner with advice and logistical support. (App. 4067-79).

For the remainder of that pre-trial proceeding, Petitioner was able to make and logically discuss a number of motions. These motions included a motion for bond; withdrawal of motion to change venue; motion to dismiss indictments for use of his former name; motion to dismiss indictments based on 4th Amendment issue; motion for a speedy trial; motion for release from segregation; motion to dismiss based on a conspiracy between judge, prosecutor and detention officials; motion to dismiss because arrest warrant is false based on error in one of the deputy's names; motion for *voir dire*; motion to sequester jurors; motion to dismiss based on false testimony allegedly being presented to the Grand Jury; motion to dismiss because of the failure to include aggravating circumstances in the indictment; motion based on the lack of representation of minorities on the grand jury; motion to preclude the State from using any information gleaned during the competency evaluation, a motion to allow his investigators to examine the evidence, and a motion for a room wherein the defense team could meet during the trial. (App. 4080-4222). In *ex parte* proceedings,

Petitioner then cogently discussed his requests for experts, including a false memory expert, a forensic evidence expert, a jury selection expert, and a firearms expert. Some of these requests were granted. (App. 4224-4257). An additional pre-trial hearing was held on October 1, 2003, at which Petitioner raised a number of other appropriate motions, as well as conducted an evidentiary hearing on his Fourth Amendment claims. (App. 4260-4449). Petitioner handled motions to quash in opposition to his subpoenas as well as *voir dire* issues at the pretrial hearing on October 3, 2003. (App. 4451-4522).

When trial commenced on October 6, 2003, Petitioner successfully conducted the capital *voir dire* without any significant incident, asking a number of questions that were probative of the jurors as to race, involvement with law enforcement, and the death penalty. He engaged in jury selection, made a motion for a Batson hearing, and discussed parameters of opening statement with the judge. (App. 63-1230, 1318-1350).

Petitioner then gave a long opening statement. While it may not have been as focused as a traditional opening statement given by a lawyer, it was pertinent, logical, and relevant to the issues in the case. Petitioner argued prosecution's opening statement was not the truth, that some of the witnesses were going to be lying, that some witnesses were be intimidated by officers, that Kimberly Blake kept changing her story, that he was shot and fled but was not the shooter of the officers, that the officers were not following the law and proper procedure when they searched the house, that the jury should not overlook lies, discrepancies, and inconsistencies in making its decision, that the case was not about race because injustice could happen to any

citizen, and that he was being falsely characterized as some sort of "radical guy, some Jamaica guy, or some poor black, racist-type, militant type of guy," when that was not the case. Petitioner concluded by appropriately thanking the jury, and reminding them of their promise to be impartial and give him a fair trial. (App. 1385-1414). By no means could one characterize Petitioner's argument as the irrelevant ramblings of an incompetent man. In fact, the argument to the jury might be the best indication of Petitioner's competence, because it is a long unprompted exposition coming purely from Petitioner himself.

Without now recounting from this large transcript every witness and every time Petitioner did something "right" - - or even clever - - Petitioner then engaged in lengthy arguments and examinations of witnesses in an emotionally charged case. A reading of the guilt phase shows that while Petitioner may have occasionally had trouble with rules of evidence and the like, he had no trouble whatsoever during the guilt phase in maintaining proper demeanor in the courtroom and displaying proper respect for the court, opposing counsel, and the witnesses. Petitioner repeatedly expressed his appreciation and respect to the trial court throughout the entirety of the guilt phase process. See, e.g. (App. 1914; 1976-79; 1991; 3456). Thus, this was not a situation where a defendant requested to represent himself and misbehaved the whole time or repeatedly showed an inability to follow basic courtroom decorum.

The only serious issue developed after closing argument was completed in the guilt phase, while the jury was still in the deliberation. The court noted that while it had honored Petitioner's desire to represent himself, and even appointed stand-by counsel to help Petitioner, Petitioner apparently had said he did not intend to participate in

sentencing. Petitioner agreed that he did not intend to present anything in mitigation. The court highlighted the importance of a case in mitigation, but Petitioner remained firm, stating that it would make no difference to him. (App. 3448-50).

Petitioner stated he wanted to continue to represent himself, but that he would not be attending the sentencing. When the judge said that he would need to be present, Petitioner replied he "wouldn't be able to sit there and attend that proceeding," and then proclaimed that he "waive[d] all the rights to any objections to anything in the event that I'm found guilty." The judge engaged in another colloquy on Petitioner's right to give a statement to the jury, but Petitioner was adamant he did not want to present a sentencing case. (App. 3450-54).

The judge then held a meeting just with defendant and his stand-by attorneys. Petitioner stated that he did not want to participate in sentencing because:

> [I]t wouldn't have no bearing on me, because if I'm in prison for life, that's death to me. I can never accept that. You know, I don't find that [a life sentence] as a easy or something positive or good in my position. Death would be more preferable than life until I die in - - in prison.

Petitioner went on to say he did not want to be sentenced to death, but that life in prison was a form of death itself. Petitioner also told the court he did not want counsel appointed for sentencing, and this was a decision he had thought long and hard about. (App. 3454-58).

After the meeting, the court found Petitioner's decision to be voluntarily and knowingly made with regard to his sentencing phase rights. When the judge said Petitioner was going to remain present, though, Petitioner said he would probably be "unruly" and would have to be restrained. The court stated that Petitioner was not going to be unruly and that he would be restrained if need be, and lamented that

Petitioner had not caused any other problems to this point. The court pointed out that "you asked to represent yourself, and you'll need to follow that through." (App. 3460-63).

Petitioner continued to make guilt phase motions and otherwise represent himself even after a verdict the next morning. He again reaffirmed his intention not to offer anything in sentencing. (App. 3463-82). However, as the parties discussed logistics, Petitioner stated that he had no intention of sitting in the courtroom listening to the case, and while he would NOT be violent, he would be unruly. The court responded that it had honored Petitioner's request to represent himself, and that a capital case required the defendant's presence. (App. 3482-83).

Petitioner again reaffirmed his waiver of his sentencing phase rights, even reciting them himself - - but warned that he would make a statement whenever he wanted to if he was in the presence of the jury. According to Petitioner, he did not care for the jury to know anything about him, because he had already presented everything he wanted to present in the guilt phase. Petitioner declined the court's suggestion that he sit in the back room where he could observe the proceedings. (App. 3484-88).

As the conversation continued, Petitioner said that from the beginning he had instructed his stand-by attorneys and investigators that there would be no mitigation witnesses called. The court decided to break for lunch, but warned Petitioner that his presence may be required and the court would deal with any misconduct. (App. 3490-92).

Before the break, Petitioner's standby attorneys conferred with him and reported their conversations with the judge. According to them, Petitioner (1) did not want to be supplanted as attorney of record, (2) did not want to put up evidence but did not care if standby counsel objected to or examined witnesses during the state's case, (3) did not want to be present, but felt it was going to be up to the judge whether to put him in the back room. They then discussed the possibility of standby counsel representing Petitioner in a limited capacity during the sentencing phase. The court reviewed some cases, and standby counsel proposed that consistent with Petitioner's wishes they be limited in action to three things: to make objections, to give argument, and to stipulate. Petitioner expressly refused to comment. (App. 3494-3505).

After lunch, the court again took up the issue, phrasing it as attempting to balance Petitioner's right to represent himself with his right not to present evidence or testify. Petitioner then spoke up and again said he would be a disruption if forced to remain. The court told Petitioner it would deal with that if it arose. (App. 3512-14).

When the court asked Petitioner how he planned on being disruptive, Petitioner said "just verbally . . . [but] not any profanity or anything like that, or disrespectful." Petitioner said he did not want to see any of the witnesses, and again stated that he wanted to "waive any defense in reference to that proceeding," and wanted to "waive my right to not even be there if I have the right." He was "respectfully" ready to accept the jury's sentence when that time came. (App. 3516-18). Petitioner had no problem with standby counsel handling the witnesses and the objections, and freely and voluntarily waived his right to be present. (App. 3518-20).

The court then discussed with the lawyers whether they had to wait for Petitioner to be disruptive to exclude him, or whether they could just take him at his word that he would be. Standby counsel asserted that Petitioner could waive his right to be present. (App. 3521-23). The court stated that was the question at issue, but pointed out that Rule 16 of the rules of criminal procedure seemed to require a capital defendant's presence. (App. 3523-30).

Ultimately, the judge concluded that Rule 16 required Petitioner to be present. The court offered to allow Petitioner's father to sit at counsel table with Petitioner, but Petitioner declined. The court then directed that the trial proceed, and stated he was going to continue to honor Petitioner's desire to represent himself. (App. 3532-36).

The next morning, after a detailed colloquy Petitioner again stated he still wanted to continue to represent himself. Petitioner agreed that standby counsel could make objections and give a closing statement. (App. 3538-42).

After an opening charge by the judge, the State began its sentencing phase case. As soon as the solicitor asked his first question, Petitioner stood up and recited, "blessed be Yahweh, el Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." The court asked Petitioner to take a seat, which he did, and the solicitor tried to ask the question again. Petitioner stood up a second time and recited the same religious phrase. At this point the court ordered the jury to step out. (App. 3548-51; 3553).

Petitioners told the judge that he intended to continue interrupting the proceedings. The court noted that he had already warned Petitioner about misbehavior, but was going to warn him one last time, and that if he continued to

misbehave, he would be removed from the courtroom and placed in the back room. (App. 3551-53). When the jury returned, the trial court immediately gave a curative instruction. (App. 3555).

When the solicitor started questioning the witness again, Petitioner stood up and recited the same religious phrase. The court ordered jury out, and put on the record that since Petitioner repeatedly refused to behave, he would be put in the back room where there was a glass partition allowing him to see the proceedings and hear the testimony. The court noted that Petitioner had authorized his counsel to make objections and give closing statement. Petitioner requested that the sound be turned off in the back room, but the judge said he could not do that. Instead, Petitioner could cover his ears if he wanted. Again, Petitioner asked to be "exempted" from or to "waive" the proceeding, but the court denied it, stating the rules required his presence. (App. 3555-60). When the jury returned, the trial court gave another curative instruction. (App. 3566-67). The sentencing phase finally began.

After a couple of witnesses testified, the lunch recess was taken. The judge offered to let Petitioner back to counsel table, but Petitioner told the court he would rather remain in the back. Petitioner promised not to be disruptive again if his restraints were removed, and the court agreed. Petitioner said he could hear everything, but he would raise his hand if he could not. (App. 3596-97).

After a number of further witnesses, the court again invited Petitioner to return to counsel table. Petitioner again declined, saying he was "fine" in the back, that he could hear and see everything, and that he did not mind standby counsel operating on

his behalf in the limited fashion. (App. 3681). Witnesses continued for the rest of the day. (App. 3682-3735).

The next morning, the trial court asked Petitioner if he would make outbursts in placed in court, and Petitioner said he would. Petitioner said he preferred to stay in the back room, and again said that he had no problem with standby counsel representing him in the limited fashion consistent with his desire not to present a case in mitigation. (App. 3738-40).

Finally, at the close of the State's case, the court gave Petitioner one last chance to present a case in mitigation, testify or give a closing statement. Petitioner declined to present a case or testify, but agreed his counsel could argue in closing. (App. 3760-63). Upon inquiry, Petitioner again stated he would not return to the front of the courtroom without making outbursts. (App. 3765).

During the State's closing argument, Petitioner apparently decided to participate again, by twice making objections through his counsel. Despite these actions, Petitioner again declined to return to counsel table, stating that he preferred to remain in the back. (App. 3789-90; 3795-97). Petitioner ultimately decided to return to the courtroom. He gave a fairly lengthy closing statement to the jury in which he personally apologized to the victim's families. Like his other arguments, the closing argument Petitioner gave was logical, appropriate, and relevant to the issues. After finishing his argument, Petitioner returned to counsel table for the rest of the case. (App. 3829-40).

Petitioner remained calm and coherent after the sentencing phase verdict, renewed his motions, apologized to the family, and thanked the trial judge. (App. 3871-73).

2. Argument

Petitioner is not entitled to habeas relief upon this claim. He has not made the requisite showing that the trial court's handling of Petitioner's competency constituted "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. Contrary to Petitioner's assertions, Petitioner's conduct at trial did not warrant a sua sponte examination of Petitioner's competency.

The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally incompetent defendants. See Pate v. Robinson, 383 U.S. 375, 384-86, 86 S.Ct. 836 (1966). The test for mental competence is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. McLaughlin v. State, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003). At the time of Petitioner's trial, the level of competence required to waive counsel was the same as the level of competence to stand trial, as long as the waiver was knowing and voluntary. Sims v. State, 313 S.C. 420, 438 S.E.2d 253 (1993) (discussing and quoting Godinez v. Moran, 509 U.S. 389 (1993)).

> A petitioner may make a procedural competency claim by alleging that the trial court failed to hold a competency hearing after the defendant's

> mental competency was put in issue. To prevail, the petitioner must establish that the state trial court ignored facts raising a "bona fide doubt" regarding the petitioner's competency to stand trial. Pate, 383 U.S. at 384-86, 86 S.Ct. 836; see also Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir.1995). Even if a petitioner is mentally competent at the beginning of the trial, the trial court must continually be alert for changes which would suggest that he is no longer competent. See Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Although there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant." Id.

Burket v. Angelone, 208 F.3d 172, 191-92 (4th Cir. 2000).

"[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope, 420 U.S. at 172, 95 S. Ct. at 904 (citing Pate, 383 U.S. 375, 86 S.Ct. 836 (1966)). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope, 420 U.S. at 181, 95 S. Ct. at 908.

First, the trial court held a thorough Blair hearing in which he was found competent to stand trial and represent himself. Thus, Petitioner can only prevail on this claim if there was evidence to support his assertion that his demeanor at trial warranted a second competency hearing. In this case, the trial court had no basis upon which to find Petitioner was no longer competent to either stand trial or represent himself at trial. As noted above and as found by the PCR Court, Petitioner reasonably represented himself during the course of his trial. "A sane demeanor may alone obviate the need for the court to inquire into a defendant's competence. Drope, supra, 420 U.S. at 179, 95 S.Ct. 896.... And the court need not inquire if no other

circumstances signal a need for a competency examination." Jermyn v. Horn, 266 F.3d 257, 289 (3d Cir. 2001). Further, "bad trial tactics do not prove a defendant incompetent. A defendant has the right to conduct his own defense to his detriment." Wise v. Bowersox, 136 F.3d 1197, 1204 (8th Cir. 1998) (finding a second competency hearing was not required even though petitioner alleged he made "foolish decisions" during his trial)(citing Faretta, 422 U.S. at 834, 95 S.Ct. at 2540-41).

The trial court was previously made aware that Petitioner would attempt to argue that his arrest was the result of a conspiracy. Whether Petitioner's conspiracy theories indicated he was competent was very much at issue during the Blair hearing. Both Dr. Frierson and Dr. Musick indicated the beliefs did not support a finding of a serious mental illness in Petitioner's case because his thinking was not delusional; it was instead an ideology/cultural belief that was shared by a number of people regarding the Masons. (App. 4034-37, 4051-52). Further, Frierson noted he did not find sufficient evidence of a major depressive episode or a manic episode. (App. 4038). Thus, the fact that Petitioner alluded to a conspiracy theory during his examination of witnesses did not constitute new information that would given the trial court reason to believe Petitioner's competency was an issue.

Petitioner's decision against having the trial court consider whether the lesser included offense of voluntary manslaughter was also not evidence of incompetency. Petitioner clearly enunciated that he did not want to have a lesser included offense charged because he did not commit the act. (App. 3272-74). This was consistent with Petitioner's assertion that self-defense was not an issue in his case, because he contended there was no act by him. (See App. 3276).

Finally, Petitioner's actions at the beginning of the sentencing phase did not constitute evidence of incompetence. From the discussion regarding the sentencing phase that was conducted while the jury was deliberating, it is clear in the record that Petitioner did not want to be a part of the sentencing phase of trial. That was in part to Petitioner's assertion that he was ambivalent towards his sentence.

> My position - - position is - - is that I can't differentiate between life and death if it cames (sic) to a guilty verdict. And it wouldn't have no bearing on me, because if I'm in prison for life, that's death to me. I can never accept that. You know, I don't find that as a easy or something positive or good in my position. Death would be more preferable than life until I die - - in prison. . .

(App. 3455). After the jury's verdict, Petitioner again insisted the sentencing verdict was of no concern to him. (App. 3487). Petitioner was adamant that he did not want to participate in the sentencing phase. He consistently informed the court that he would be disruptive is forced to stay in the courtroom, but he would not act violently. (App. 3483, 3514, 3516-17, 3521-22). And, as was noted by Mr. Thornton, standby counsel,

> He handled himself, as far as - - his demeanor in the courtroom was fine. He treated the judge with respect; he treated opposing counsel with respect; he did not make any outbursts. Regardless of what my opinion is on how well he did as a layman, you know, in a death penalty case, the fact of the matter is he comported as he was supposed to during the trial, and even at the end when he decided he did not wish to be present during the sentencing, he did not make any large disturbance in the courtroom.

(App. 4892-93). In all, there is insufficient evidence in the record to support a finding the trial court should have conducted a second competency hearing in Petitioner's case. The trial judge, who observed Petitioner throughout the pretrial and trial proceedings, had the most occasion to discern whether Petitioner's competency was

waning. At no point during the course of the trial on the record does the court indicate Petitioner's competency was in question. Since there was not sufficient evidence to warrant a second competency hearing, Petitioner is not entitled to relief upon this claim. It should therefore be denied and dismissed.

B. Petitioner has not shown that he was incompetent-in-fact during the course of his trial.

Petitioner asserts that he was incompetent in fact during the entire course of his trial. In support of this second claim in Ground One, Petitioner attached a letter from Dr. Rikki Lynn Halavonich, who claims Petitioner has symptoms consistent with Temporal Lobe Epilepsy. Further, Dr. Halavonich wrote

> [H]owever, his competence was not reassessed at any point during the progression of his trial. His testimony at the end of the guilt phase was rambling and disjointed. His summation revealed a heightened level of paranoia and further development of the conspiracy theories he held. He was unable to give a rational reason for refusing to be present at the penalty phase of his trial. Although determined to be competent prior to the initiation of the trial, [Petitioner's] documented behaviors, particularly just prior to and during the penalty phase of the trial, indicate his mental status had then declined to an extent consistent with a lack of capacity to rationally understand the proceedings or, participate in his defense at that point in time.

(Attachment A to Petition, at pg. 4).

First, Respondent submits this letter, and the affidavit that was attached to a prior Motion to Remand for Additional PCR Proceedings cannot be relied upon in finding Petitioner was mentally incompetent at trial. See generally Drope, 420 U.S. at 181, n. 17, 95 S. Ct. at 908, n. 17; Pate v. Robinson, 383 U.S. 375, 387, 86 S. Ct. 836, 843, 15 L. Ed. 2d 815 (1966) (noting Supreme Court has emphasized the difficulty of retrospectively determining an accused's competence to stand trial.). "Retrospective determinations of whether a defendant is competent to stand trial or to plead guilty are

strongly disfavored." Weisberg v. State of Minnesota, 29 F.3d 1271, 1278 (8th Cir.1994), cert. denied, 513 U.S. 1126, 115 S.Ct. 935 (1995).

Second, Dr. Halavonich's opinion is based upon her belief that there was some agreement that Petitioner suffered from a serious mental illness. That was not the case. At the Blair hearing, Dr. Frierson testified that Petitioner suffered from "a personality disorder with narcissistic and antisocial traits." (App. 4031). He further testified that was not considered a major mental illness. (App. 4031). Dr. Musick's testimony at the hearing also did not support a finding that Petitioner was suffering from a serious mental illness. (See App. 4035-60). The only testimony at the hearing that indicated Petitioner suffered from a serious mental illness was that of Dr. Schwartz-Watts. She found Petitioner suffered from bipolar disorder. (App. 3983). However, she also noted that she could not state what Petitioner's mental state was at the hearing because he refused to talk with her. (App. 3990). Halavonich does not make a diagnosis that Petitioner suffers from or previously suffered from a serious mental illness. In fact, Halavonich does not even diagnose Petitioner with any illness. Instead, she only finds that he has symptoms consistent with TLE, which she asserts can be confirmed with further testing. Furthermore, Halavonich indicates in both the letter and her affidavit that she did not review Petitioner's trial transcript in its entirety. In light of the discrepancies between the findings made by those who examined Petitioner before trial, Halavonich's lack of a diagnosis of a serious mental illness, and the fact that post-conviction determinations of one's competence to stand trial are generally disfavored, Petitioner has failed to establish "a denial of fundamental

fairness shocking to the universal sense of justice." Green, supra. As a result, this claim in Ground One should be denied and dismissed with prejudice.

C. The trial judge did not fail to secure a knowing and intelligent waiver of Petitioner's right to present mitigating evidence.

1. What occurred at trial.

After the end of the guilt phase, Petitioner moved to withdraw his motion for a 24 hour delay. During the discussion after this motion, the trial court asked Petitioner if he was prepared to present a mitigation case. (App. 3481). Petitioner informed the court that he was not presenting a mitigation case. (App. 3481-82). He further indicated that he did not intend to present any evidence during the sentencing phase. (App. 3482). The trial court then engaged in a colloquy with Petitioner regarding his decision not to present evidence during the sentencing phase. (App. 3482-). Petitioner was informed the sentencing phase was an opportunity for Petitioner to provide the jury with information about him. (App. 3486). Petitioner responded by stating he did not want the jury to know anything about him. (App. 3486-87). He further indicated he was not concerned with their verdict on sentencing, and he had presented the jury with all of the information that he wanted to present to them. (App. 3487).

Standby counsel indicated they had not had an opportunity to discuss mitigating circumstances with Petitioner. (App. 3489). Later, Petitioner informed the court that he told his investigators that "there will be no mitigating witnesses for me in reference to anything if it came down to this point." (App. 3491). Petitioner further requested that be excluded from the sentencing phase. (App. 3492). After a conversation with Petitioner, standby counsel informed the court that Petitioner indicated to them he did

not intend to cooperate with standby counsel, bring any witnesses on his behalf, and Petitioner reaffirmed his decision to stop all mitigation preparation as of the date he was appointed to represent himself. (App. 3495). Counsel did affirm that Petitioner was advised of the purpose of the sentencing phase of trial and the importance of presenting mitigating evidence. (App. 3497-98). Mr. Kelly also indicated that he informed Petitioner that he would present witnesses for mitigation if he were appointed as attorney of record, and Petitioner wanted to remain counsel of record to prevent those witnesses from testifying. (App. 3498-99).

After the State rested its case in the sentencing phase, the trial court had another colloquy with Petitioner. During that colloquy, Petitioner acknowledged the court had explained to him that he has the opportunity to present his case and/or witnesses if he wanted to do so. (App. 3760-61). Petitioner also acknowledged that he understood his right to testify. Further, Petitioner indicated he understood that the presentation of mitigation evidence could be crucial to the jury's consideration of his sentencing. (App. 3761). The court and Petitioner further discussed whether Petitioner was going to make a closing statement. (App. 3761-62). At the end, the court asked Petitioner again if it was his strategy not to present any mitigating evidence or witnesses. Petitioner confirmed that was correct. Petitioner also confirmed that he had sufficient time to consider the issue, and despite the court's advice to the contrary, Petitioner did not want to present mitigation evidence. (App. 3762-63).

2. Discussion

Petitioner is not entitled to habeas relief upon this claim; he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. First, as acknowledged by Petitioner in the habeas petition, there is currently no requirement that a court conduct a hearing to determine whether a defendant is knowingly and intelligently waiving his right to present mitigation evidence. Schriro v. Landrigan, 550 U.S. 465, 479, 127 S. Ct. 1933, 1942, 167 L. Ed. 2d 836 (2007) ("We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence.")(generally citing to Iowa v. Tovar, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) (explaining that waiver of the right to counsel must be knowing and intelligent)). In Landrigan, the Supreme Court found the Arizona state court's findings were reasonable when the state court found trial counsel was not ineffective in not presenting mitigation evidence because the defendant waived his right to present the evidence at trial. Id. at 478-81, 127 S. Ct. 1933, 1942-44.

The "knowing, intelligent and voluntary" standard for a waiver, which is traceable to Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), applies to a defined and limited class of issues that, because of their stature as "fundamental" decisions, are waivable only by the defendant. See United States v. Teague, 953 F.2d 1525, 1531 (11th Cir.) (en banc), cert. denied, 506 U.S. 842, 113 S.Ct. 127, 121 L.Ed.2d 82 (1992). In Teague, the Eleventh Circuit noted the dichotomy between "fundamental" rights, such as the right to plead guilty, see Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the right to a jury trial, see Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942), the right to pursue an appeal, see Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9

L.Ed.2d 837 (1963), and other trial rights that "primarily involve trial strategy and tactics," including the decision as to "what evidence should be introduced." Teague, 953 F.2d at 1531. Having thus established this dichotomy, the Eleventh Circuit stated that fundamental rights are waivable only by the defendant because of the personal nature and importance of the right. Id. In contrast, however, the court expressly found that nonfundamental trial rights, including evidentiary matters, "are waivable by defense counsel on the defendant's behalf." Id.

In all, since there is no requirement under either federal law or South Carolina law that required the trial court to determine if Petitioner's waiver of the presentation of mitigation evidence was knowingly and intelligently made, this claim for habeas relief should be denied and dismissed.

Furthermore, Petitioner does not establish that his waiver of the presentation of mitigation evidence was not knowingly and intelligently made. As already noted, standby counsel discussed the matter with Petitioner. The trial court discussed the matter with Petitioner several times. Petitioner indicated on the record that he understood the purpose of presenting mitigation evidence, and he still declined to present such evidence. (App. 3449-60, 3740, 3760-63). Respondent submits that even if a knowing and intelligent waiver is required, the waiver made by Petitioner in this case was sufficient to establish his waiver was knowing and intelligent. The record clearly reflects Petitioner had an understanding of both what constitutes mitigation evidence and why mitigation evidence is important. Petitioner actively chose not to investigate and present a mitigation case during the sentencing phase. In all, Petitioner has not shown there was "a denial of fundamental fairness shocking to

the universal sense of justice." Green, supra. As a result, this claim for habeas relief should be denied and dismissed.

D. The trial judge failed to terminate Petitioner's pro se status.

Petitioner is not entitled to habeas relief upon this claim; he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. First, Petitioner's contention that the trial court both removed Petitioner from the courtroom and restricted standby counsel's ability to proceed is not supported by the record. While Petitioner was removed from the defense table, he remained in the courtroom in a back room from where he was able to both observe and hear the proceedings. (See App. 3552). Furthermore, it was Petitioner, and not the court, who placed the restrictions on what standby counsel could present. Petitioner consistently maintained that he did not want a mitigation case presented at trial. Standby counsel informed both Petitioner and the trial court that if they were made counsel of record, they would not abide by Petitioner's request not to present a mitigation case. (App. 3525-29). Thus, the only way Petitioner could maintain control over the presentation of his defense case in the sentencing phase was to maintain his status as counsel of record.

Second, a defendant who is not willing to abide by courtroom protocol does not automatically forfeit his right to self-representation. See Davis v. Grant, 532 F.3d 132, 149 (2d Cir. 2008) (finding state court's failure to instruct standby counsel to represent defendant when he was removed from courtroom was not an objectively unreasonable application of Supreme Court precedent); see Clark v. Perez, 510 F.3d 382, 395-96 (2d Cir. 2008) (finding no violation of Sixth Amendment rights when court did not

revoke pro se status of defendant who removed herself from courtroom through conduct). Altogether, it is within the trial court's discretion whether to revoke a defendant's pro se status based upon disruptive conduct. Here, the trial court did not abuse its discretion in not relieving Petitioner of his pro se status. Petitioner indicated he did not want to be relieved as counsel of record, and he did not want to present a case during the sentencing phase. Standby counsel indicated to the court that they would present a case, contrary to Petitioner's wishes, if made counsel of record. In balancing Petitioner's clear statement of his strategy for the sentencing phase, the fact his strategy would not be followed if he was relieved, and the fact the court had the alternative of having Petitioner remain in the courtroom and still maintain control of his case, the trial court clearly reasoned the best alternative would be to not terminate Petitioner's pro se status. This was not an abuse of discretion. Thus, Petitioner has not shown there was "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. As a result, this claim for habeas relief should be denied and dismissed.

Ground Two: Petitioner's death sentence does not violate the Fifth, Eighth, and Fourteenth Amendments; there is no credible evidence he was visibly shackled without justification and without an individualized determination by the trial judge.

During the discussions regarding the sentencing phase held during jury deliberations in the guilt phase, and again at the beginning of the sentencing phase, Petitioner warned the trial court that he planned on being disruptive if he was required to stay in the courtroom for the sentencing proceedings. (App. 3461-63, 3483). Petitioner followed through with his threat during the testimony of the first witness presented by the State during the sentencing phase. As the first witness started

testifying, Petitioner stood up and began to state "Blessed by Yahweh . . . El Shaddai . . . Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, and Jacob, and Jesus." (App. 3550-51). Petitioner was removed from the courtroom at that time. Outside the presence of the jury, the court asked Petitioner if he recalled the instructions that were given to him if he were to become unruly or disruptive. Petitioner indicated that he recalled those instructions. Petitioner further indicated that he intended to continue disrupting the proceedings because he did not wish to engage in them. (App. 3552). The trial court gave Petitioner one last warning, and further informed Petitioner that if he did it again, "I'm going to put you in the back room where you can hear the testimony and the proceedings as you wish. The glass panel will allow you to watch the proceedings completely." (App. 3552). Petitioner informed the court that he would be noisy back there as well. (App. 3552). The trial court told Petitioner that Petitioner would be shackled or gagged if necessary to keep Petitioner from disrupting the proceedings. (App. 3553).

After the jury returned to the courtroom, and the witness resumed testifying, Petitioner again stood up and started chanting "Blessed by Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." (App. 3556). The jury was sent out of the courtroom. (App. 3556). The trial court ordered Petitioner be placed in a room at the back of the courtroom that had a glass partition so Petitioner could see the proceedings. (App. 3556). The court also again warned Petitioner that if he had another outburst, he would be gagged. (App. 3557). While setting up the back room for Petitioner's seating, the trial court indicated it wanted Petitioner restrained. (App. 3561). The court further authorized Petitioner's

hands not be restrained. (App. 3562-63). However, Petitioner was warned that if he became disruptive again, his hands would be restrained. (App. 3563).

After the lunch recess, the trial court had a discussion with Petitioner regarding whether he would be disruptive if brought back into the main portion of the courtroom. (App. 3596). Petitioner indicated he would rather stay in the back room, and requested that he no longer be restrained. Petitioner informed the trial court that he would not be disruptive if the restraints were removed. (App. 3596). The trial court acquiesced and ordered that Petitioner's restraints be removed once he re-entered the back room. (App. 3597). There is no indication in the record that Petitioner further attempted to disrupt the court proceedings. Petitioner was asked if he wished to be seated in the main area of the courtroom multiple times, and he declined each time. (App. 3596-97, 3681, 3738).

A. Discussion

> [C]ourts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.

Deck v. Missouri, 544 U.S. 622, 633, 125 S. Ct. 2007, 2014-15 (2005).

"[W]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'"

Deck, 544 U.S. at 635, 125 S. Ct. at 2015-16 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

B. This claim is procedurally defaulted

Petitioner is not entitled to habeas relief upon this claim; he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. First, this claim is procedurally defaulted. A freestanding due process claim based upon improper shackling is a direct appeal claim. See generally Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975)(noting claims that could be raised at trial and on direct appeal cannot be raised post-conviction). Further, Petitioner could have raised this claim in his direct appeal if it was properly preserved for review. The United States Supreme Court's opinion in Deck was filed on May 23, 2005, while Petitioner's direct appeal was pending, and well before his Final Brief of Appellant was filed. That being said, Petitioner did not properly preserve this claim for direct review. At no point in time during the discussions regarding Petitioner being shackled did Petitioner object. The only complaint raised to his shackling was to Petitioner's hands being shackled. (App. 3562). After that issue was raised to the trial court, the court authorized Petitioner's hands not be shackled. (App. 3563). Since this issue was not preserved for appellate review, it could not be raised in Petitioner's direct appeal. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct.App.2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

Since Petitioner was acting pro se, and at trial he did not raise the argument now raised in this habeas action against shackling, he could not raise this claim in PCR as an ineffective assistance of counsel claim. See Faretta, 422 U.S. at 834 n.46; see, e.g., Gall v. Parker, 231 F.3d 265, 320 (6th Cir. 2000) (*pro se* defendant cannot complain about quality of defense by arguing ineffective assistance of counsel); Peoples v. U.S., 403 F.3d 844, 849 (7th Cir. 2005) (*pro se* defendant was not permitted to argue that self-representation on direct appeal deficient because he had fired his lawyers and exercised right to self-representation); U.S. v. Flewitt, 874 F.2d 669, 675 (9th Cir. 1989) (*pro se* defendant who refused standby counsel and failed to utilize discovery procedures may not claim own ineptitude as grounds for reversal).

Since this claim was available to Petitioner, but he did not properly preserve the issue for appeal and could not raise it in PCR, this claim should be denied and dismissed. . Wheeler v. State, 247 S.C. 393, 402, 147 S.E.2d 627, 631 (1966). Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965). Accord Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998)(noting in Tyler, "this Court stated that habeas corpus cannot be used as a substitute for appeal or other remedial procedure for the correction of errors for which a criminal defendant had an opportunity to avail himself.").

C. This claim is without merit

Petitioner is not entitled to relief upon this claim because it is without merit. First, contrary to Petitioner's assertions, the record clearly reflects that Petitioner was only shackled for a limited period of time during the sentencing phase. As already noted, Petitioner was first shackled when he was sent to the room at the back of the

courtroom. (App. 3561). His hands were not shackled after he complained. (App. 3562-63). This occurred shortly before 12:20 p.m. (See App. 3565). The trial court ordered the restraints be removed during the lunch recess. (App. 3597). This occurred shortly before 2:14 p.m. on the same day, and was after the testimony of four short witnesses. Also, there is no indication in the record that Petitioner's restraints were visible to the jury.

Second, the trial court did place a sufficient explanation on the record to support the shackling of Petitioner for a short period of time. Petitioner had continuously indicated that he would be disruptive if he was required to remain in the main portion of the courtroom. Petitioner also indicated that he would be similarly disruptive of the court proceedings if he was forced to observe the proceedings from the back room in the courtroom. The trial court warned Petitioner that if he planned to continually disrupt the proceedings, he would be shackled or gagged. (App. 3553). After Petitioner resumed disrupting the proceedings after his final warning, he was placed in shackles in the back room. In doing so, the trial court did state as follows:

> Let the record reflect that the defendant once again has disrupted these proceedings with his outburst contrary to the court's previous warnings. The court said it would not give him further warning.
>
> The court will place him in a room at the back of the courtroom that has a glass partition to allow him to hear all of the proceedings. He can also see the proceedings as he desires. There's a system that fees into the room that allows him to hear all of the testimony.
>
> Previously the defendant indicated he did not wish to be here. He has authorized stand-by counsel to interject objections, handles the exhibits, and make the closing statement if necessary.
>
> Because he continues to maintain that he will constantly interrupt these proceedings, the court has taken this action.

> The court has also warned the defendant that if necessary he will be gagged.
>
> We will put him back in the room and see if he - - if he has another outburst. Then at that point we will take the step of actually gagging him, which I hope we do not have to do.

(App. 3556-57). In light of the statements made by Petitioner and the disruptions that occurred prior to the court's restraining Petitioner, Respondent submits the trial court made a specific, individualized finding that warranted the action taken. Thus, the shackling of Petitioner did not violate due process.

Finally, the record reflects that the brief shackling of Petitioner did not contribute to the verdict obtained. The jury found two aggravating circumstances for each of the two murders. Each victim was a law enforcement officer killed because of the performance of his official duties. Also, two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. (App. 3861-62). Those determinations were clearly supported by the record. Further, Petitioner presented no mitigation case. The fact that Petitioner was shackled for a short period of time was not to the finding of any aggravating circumstance or mitigating circumstance. In all, Petitioner is not entitled to habeas relief upon this claim; he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra.

Ground Three: Petitioner was not deprived of his Sixth and Fourteenth Amendment Rights to Effective Assistance of Counsel during the Sentencing Phase of His Trial.

As already noted, the trial court had discussions concerning whether standby counsel should supplant Petitioner as counsel of record for the sentencing phase. Petitioner maintained that he wanted to remain counsel of record; he did not want to

participate in the sentencing phase; and he planned to present no mitigation case. During the discussions, Petitioner agreed to authorize standby counsel to make objections, motions, and closing argument in the sentencing phase. However, he maintained his status as counsel of record.

A. Discussion.

Petitioner's claims of ineffective assistance of standby counsel are without merit. A defendant may waive his constitutional right to counsel and choose to represent himself during criminal proceedings, if such waiver is effected willingly and intelligently. See Faretta v. California, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Upon such an election, standby counsel may be appointed to assist the *pro se* defendant. However, there is "no constitutional right to hybrid representation where the defendant shared the duties of conducting [his] defense with a lawyer." United States v. Morrison, 153 F.3d 34, 55 (2d Cir.1998) (internal citations, quotation marks and modification omitted); United States v. Schmidt, 105 F.3d 82, 90 (2d Cir.1997) (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984)); State v. Stuckey, 333 S.C. 56, 57-8, 508 S.E.2d 564 (1998). Accordingly, "without a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel" unless "that title [was held] in name only and, in fact, [standby counsel] acted as the defendant's lawyer throughout the proceedings." Morrison, 153 F.3d at 55; (internal citations and quotation marks omitted). Without a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective. United States v. Cochrane, 985 F.2d 1027, 1029 n. 1 (9th Cir.1993) (rejecting ineffective assistance of standby counsel argument in this context

without foreclosing argument in future); United States v. Windsor, 981 F.2d 943, 947 (7th Cir.1992) ("court knows of no constitutional right to effective assistance of standby counsel"); Morrison, supra ("without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel") (citing Schmidt, supra).

Here, Petitioner was never relieved from his *pro se* status. As a result, Petitioner's claim in Ground Three should be dismissed because Petitioner is not entitled to effective assistance of standby counsel. Thus, he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra.

Ground Four: The Prosecution Exercised Its Peremptory Challenges in a Racially Discriminatory Manner in Violation of Petitioner's Rights Guaranteed by the Sixth and Fourteenth Amendments.

After jury selection, Petitioner requested a Batson hearing. (App. 1339-40). At the hearing, Petitioner objected to the strikes used by the State against four jurors. First, Petitioner challenged the strike of Juror Edith Owens. The State argued she was dismissed because "in observing her during the *voir dire*, I had the impression that she was afraid of the defendant." The solicitor also noted that she was weak on the death penalty and she stated during *voir dire* that she knew nothing about the case. (App. 1340). The trial court found that to be a facially neutral reason. Petitioner contended that Kristen Lindsay was a similarly situated juror, specifically asserting "I wouldn't want to use the characteristic - - afraid of the prosecution, but in similarity as far as she would not be - - would feel intimidated by the prosecution - - authority of the prosecution." (App. 1341). The trial court found the Juror Lindsay was not similarly situated, and denied the Batson motion as to Juror Owens.

Second, Petitioner challenged the strike of Juror Matthew Young. (App. 1342). The solicitor stated he struck Juror Young because he indicated that he knew a defense witness named Jabari. (App. 1342). The solicitor also noted that Young indicated he heard about the incident on the street, and Young was weak on the death penalty. (App. 1342). The trial court found the reasons to be facially neutral. Petitioner initially indicated that Juror Jeannine Savage was similarly situated. (App. 1345-46). He then withdrew her name because she knew a law enforcement official at the time. Instead, Petitioner asserted Colene Murray was similarly situated. In further support of his argument that the strike was pretextual, Petitioner argued that Murray indicated she knew Mr. Stone, the solicitor. In response, the trial court noted that the solicitor was not a defense witness, and again asked Petitioner for something to indicate the strike was pretextual. Petitioner continued to argue Ms. Murray was similarly situated. The trial court denied the Batson motion as to Juror Young.

Third, Petitioner challenged the striking of Juror Antwoine Crosson. The solicitor stated that Crosson was from the solicitor's hometown; the solicitor knew Crosson's brother; the solicitor's wife taught at Crosson's high school for over twenty years; and the solicitor had prosecuted Crosson's brother for criminal sexual conduct. (App. 1349-50). The trial court found that to be a facially neutral reason for striking Crosson. Petitioner did not contend any other juror had a family member that had been prosecuted by the solicitor. As a result, the trial court denied the Batson motion to Juror Crosson. (App. 1351).

Fourth, Petitioner challenged the striking of Juror Kerrie Brown. (App. 1351). The solicitor stated Brown was struck because she had a pending criminal domestic

violence charge, and Petitioner's case started from a criminal domestic violence incident. (App. 1351). The trial court found that was a facially neutral reason. (App. 1351, 1352). Petitioner did not assert that any member of the jury was similarly situated to Juror Brown. (App. 1352). Thus, the trial court denied the Batson motion as to Juror Brown. (App. 1352-53).

A. This issue is not proper for habeas review because it could have been raised at trial and in Petitioner's direct appeal.

Habeas corpus is not a substitute for appeal. Wheeler v. State, 247 S.C. 393, 402, 147 S.E.2d 627, 631 (1966). Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965). Accord Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998)(noting in Tyler, "this Court stated that habeas corpus cannot be used as a substitute for appeal or other remedial procedure for the correction of errors for which a criminal defendant had an opportunity to avail himself.").

The PCR Court denied relief upon this claim because it was a freestanding claim that was improper for post-conviction relief. (App. 5216). Respondent submits the same is true for this claim now. Petitioner could have properly raised this claim at trial, and challenged the trial court's ruling in his direct appeal. He did not. As a result, this claim should be denied and dismissed.

B. The issue as raised in the habeas petition is not preserved for review.

Even if this Court finds Petitioner's allegation in Ground Four is appropriate for habeas review, Petitioner is not entitled to relief because the argument raised is not preserved for review. As already noted, Petitioner had the opportunity at trial to identify jurors who were similarly situated to the ones struck by the solicitor during jury selection. While Petitioner did raise a Batson question as to the four jurors now

challenged, Petitioner did not raise the arguments now presented in his habeas petition as part of his argument at trial. Since these arguments were not preserved for appellate review, they should be denied and dismissed. See generally State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

Ground Five: Petitioner Was Not Deprived of His Sixth and Fourteenth Amendment Rights to a Fair Trial Before Twelve Fair and Impartial Jurors

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); see also S.C. Const. art I, §§ 3 & 14. To safeguard these rights, "it is required that the jury render its verdict free from outside influences of whatever kind and nature." State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App.1993). In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict. State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999); State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998).

> The trial court has broad discretion in assessing allegations of juror misconduct. Relevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the

> prejudice. Generally, the determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the trial court. 23A C.J.S. Criminal Law § 1365 (1989).

Kelly, 331 S.C. at 141-42, 502 S.E.2d at 104.

The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence. State v. Smith, 338 S.C. 66, 525 S.E.2d 263 (Ct.App.1999). Where a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice. State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct.App.2004); see also State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) (a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial).

Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case. Smith, 338 S.C. at 71, 525 S.E.2d at 266. In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Kelly, 331 S.C. at 141, 502 S.E.2d at 104; see also State v. Salters, 273 S.C. 501, 257 S.E.2d 502 (1979) (finding a defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury and, in order to fully safeguard this basic protection, it is required that the jury render its verdict free from outside influences).

Initially, the trial judge must make a factual determination as to whether juror misconduct has occurred. See Smith, 338 S.C. at 71, 525 S.E.2d at 266; see also Aldret, 333 S.C. at 315, 509 S.E.2d at 815 (holding where affidavits supporting juror misconduct are credible, the trial court must conduct an evidentiary hearing to

determine if misconduct occurred). "Only if the trial court finds a juror is guilty of misconduct must the judge determine whether the misconduct affected the verdict, warranting a new trial." Covington, 343 S.C. at 164, 539 S.E.2d at 70.

As a general rule, juror testimony is inadmissible to impeach a jury verdict. Under Rule 606(b), SCRE, juror testimony regarding external prejudicial information or improper outside influence is allowed. Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Thus, juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence. See State v. Franklin, 341 S.C. 555, 534 S.E.2d 716 (Ct.App.2000); see also Aldret, 333 S.C. at 310, 509 S.E.2d at 812 (juror testimony or affidavits are generally admissible in the case of an extraneous influence); Hunter, 320 S.C. at 88, 463 S.E.2d at 316 (juror testimony may normally be used when an extraneous influence is alleged). External influence on a jury involves situations where jurors receive information during deliberations from some outside source. Galbreath, 359 S.C. at 405, 597 S.E.2d at 848.

A. Discussion

First, Petitioner's assertion that the jury was exposed to external sources of information as a result of jurors possibly reading the Bible and/or specific Bible

passages is without merit. In Robinson v. Polk, the Fourth Circuit Court of Appeals noted

> the reading of Bible passages invites the listener to examine his or her own conscience from within. In this way, the Bible is not an "external" influence. In addition, reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence.

Polk, 438 F.3d 350, 363-64 (4th Cir.2006). (See also Fields v. Brown, 431 F.3d 1186, 1209 (9th Cir. 2005) on reh'g en banc, 503 F.3d 755 (9th Cir. 2007)(finding juror having notes with Bible passages had no substantial and injurious effect or influence in determining the jury's verdict). Thus, Respondent submits that Petitioner's claim that jurors improperly considered Bible passages is without merit and should be dismissed.

To the extent Petitioner asserts that one juror was improperly influenced by external sources because of a statement the juror may have sought guidance from a minister on how to make a decision during the sentencing phase, this claim is without merit. In addition to not identifying the juror who allegedly made the statement, the affidavit does not indicate if the juror actually received any advice from her minister, and/or what that guidance was. Since it is not established the juror received any advice, Petitioner has not shown there was any improper external influence, or that he was prejudiced as a result. Thus, this claim should be denied and dismissed.

To the extent Petitioner asserts the jury was improperly influenced by alleged statements regarding a bomb threat, Respondent submits the affidavit provided by the investigating law student does not support Petitioner's request for relief. First, the affidavit does not identify which jurors claimed they were told of a bomb threat. More importantly, there is no indication in the affidavit as to who informed the juror(s) about

an alleged bomb threat. The affidavit does not indicate that the alleged threat influenced the jury's deliberations. In all, Petitioner has not shown there was "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. As a result, Ground Five should be denied and dismissed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny this habeas petition. Respondent further requests any other relief this Court deems appropriate.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

By: _____
Alphonso Simon Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

March 21, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

TYREE ROBERTS AKA,
ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I, Alphonso Simon Jr., certify that I have served the *Return to Petition for Writ of Habeas Corpus* on Petitioner by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorneys of record:

John H. Blume, III
Blume, Weyble, & Norris, LLC
P.O. Box 11744
Columbia, SC 29211

This 21st day of March, 2011.

Alphonso Simon Jr.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAY 18 2011
S.C. Supreme Court

IN THE ORIGINAL JURISDICTION

TYREE ROBERTS AKA,
ABDIYYAH BEN ALKEBULANYAHH, #6012, *PETITIONER*,

V.

STATE OF SOUTH CAROLINA, *RESPONDENT*.

PETITIONER'S REPLY

JOHN H. BLUME
Cornell Law School
110 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

Counsel for Petitioner

ARGUMENT IN REPLY

I.

HABEAS CORPUS IS AN APPROPRIATE VEHICLE FOR PETITIONER'S CONSTITUTIONAL CLAIMS.

Respondent initially asserts that the petition for writ of habeas corpus should be denied because it is not proper at this time." Respondent's Return at 12 (hereinafter "RR"). Respondent appears to suggest that petitioner should instead file a second application for post-conviction relief. Certainly petitioner can do so, if this Court so advises or if it otherwise becomes clear that a second PCR application is the appropriate procedural vehicle. However given that petitioner previously filed a motion to remand the case to the circuit court for additional post-conviction proceedings, which this Court denied on October 20, 2010, petitioner elected to file a petition for writ of habeas corpus in this Court's original jurisdiction.

Regardless, petitioner is only seeking that which he has been previously denied; one legitimate opportunity at post-conviction review of his convictions and death sentence. During the initial post-conviction proceedings, petitioner was represented by counsel who not only did not have the requisite experience required by S.C. Code §17-27-160 but who also obtained no funds for investigative and expert services, conducted no independent investigation, who did not even obtain trial counsel's files and other than petitioner, called no witnesses at the PCR hearing. While respondent has taken the position that the adequacy of petitioner's post-conviction representation is irrelevant, this Court has previously suggested that, in some circumstances, ineffective assistance of post-conviction counsel may be cognizable or a grounds for allowing additional collateral proceedings. *See Washington v. State*, 478 S.E. 2d 833, 835 (S.C. 1996) (allowing second post-conviction application to proceed due to "many procedural irregularities" in the first post-conviction

proceedings). Other jurisdictions also have held that in some circumstances inadequate post-conviction representation warrants additional post-conviction review. *See, e.g., Stevens v. Mississippi*, No, 2011-DR-006570SCT (Miss. S. Ct. May 5, 2011). Furthermore, on March 21, 2011, the United States Supreme Court granted a petition for a writ of certiorari in *Maples v. Maples*, 2011 WL 940889 (U.S.) to decide whether the Eleventh Circuit properly held that there was no "cause" to excuse a procedural default where Maples' state post-conviction counsel unreasonably failed to file an appeal. In light of *Maples*, the Supreme Court further granted a stay of execution to Daniel Wayne Cook pending disposition of his petition for a writ of certiorari, which raises the more general question of whether Cook is entitled under the Sixth and Fourteenth Amendments to have effective state post conviction counsel. *See Miscellaneous Order in Cook v. Arizona, 10-9742 (April 4, 2011).* On the following day, the Court also granted a stay of execution to Cleve Foster, allowing him to file a petition for rehearing raising essentially the same issue as in *Maples*. *See Miscellaneous Order in Foster v. Texas, 10-8317 (April 5, 2011).* Thus, given that petitioner was denied basic due process in his initial post-conviction proceedings, this Court should review petitioner's habeas claims or, at a minimum, remand the case to the Circuit Court for appropriate additional proceedings. Alternatively, this Court should hold this case pending the Supreme Court's decision in *Maples*.

II.

PETITIONER WAS DEPRIVED OF A FAIR AND RELIABLE DETERMINATION OF THE APPROPRIATE SENTENCE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONAL AND SOUTH CAROLINA LAW BECAUSE A) THE TRIAL JUDGE FAILED TO INQUIRE INTO PETITIONER'S COMPETENCY, B) PETITIONER WAS INCOMPETENT IN FACT, C) THE TRIAL JUDGE FAILED TO SECURE A KNOWING AND INTELLIGENT WAIVER OF PETITIONER'S RIGHT TO PRESENT

MITIGATING EVIDENCE, AND D) THE TRIAL JUDGE FAILED TO TERMINATE PETITIONER'S *PRO SE* STATUS. (PETITIONER'S GROUND 1).

Respondent offers five main arguments concerning the merits of Mr. Alkebulanyahh's claim: (1) the trial judge satisfied the burden of inquiring as to petitioner's competency at trial; (2) petitioner was competent-in-fact at trial; (3) the trial judge secured a knowing and intelligent waiver of petitioner's right to present mitigating evidence; (4) the trial judge did not abuse his discretion by failing to terminate petitioner's pro se status; and, (5) trial counsel were acting in the role of standby counsel during the sentencing phase of the trial and therefore did not provide ineffective assistance of counsel. These arguments are unavailing.

1. The Trial Judge's Failure to Inquire into Petitioner's Competency to Stand Trial When the Circumstances Raised a Bona Fide Doubt Regarding Competency Violated the Due Process Clause.

A. *A Pre-trial Blair hearing is not dispositive*

Respondent first argues that because "the trial court held a thorough *Blair* hearing in which [petitioner] was found competent to stand trial and represent himself," petitioner can only prevail if the evidence supports "his assertion that his demeanor at trial warranted a second competency hearing." Respondent's Return at 30 (hereinafter "RR"). Respondent effectively argues that because the judge ordered the initial *Blair* hearing and was also in the best position to perceive the defendant's behavior throughout the trial, petitioner's clam fails. However, the Supreme Court has explicitly recognized that even when a defendant has previously been deemed competent, a second competency hearing may become necessary. *Drope v. Missouri*, 420 U.S. 162, 181 (1975). A judge "must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competency to stand trial." *Id.* In *Pate v. Robinson*, 383 U.S. 375

(1966), and *Drope v. Missouri*, 420 U.S. 162 (1975), the Supreme Court established that a trial judge has an ongoing duty to scrutinize the defendant's mental competency throughout the course of the trial and be vigilant of any behavior that creates a bona fide doubt as to the defendant's mental fitness to participate in the proceeding. *Pate*, 383 U.S. at 385-86; *Drope*, 420 U.S. at 179.

In *Drope*, for example, the Supreme Court held that a trial court violated the defendant's due process rights by failing to suspend the trial for a competency hearing in the face of accumulating evidence of incompetency. *Id.* 420 U.S. 162. "In order to determine whether there is a reasonable cause to order a competency hearing, a trial court must consider all evidence before it, including evidence of irrational behavior, the defendant's demeanor at trial, and medical opinions concerning the defendant's competence." *United States v. Mason*, 52 F.3d 1286, 1290 (4th Cir. 1995) (citing *Drope*, 420 U.S. at 180; *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987); *Thompson v. Blackburn*, 776 F.2d 118, 123 (5th Cir. 1985)). A judge faced with possible evidence of incompetence "must 'look at the record as a whole and accept as true all evidence of possible incompetence' in determining whether to order a competency hearing." *Mason*, 52 F.3d at 1290 (quoting *Smith v. Ylst*, 826 F.2d 872, 877 (9th Cir. 1987)). A pretrial competency hearing and finding of competency is only one piece of the record, not a dispositive fact.[1]

[1] While the petitioner was found competent at his *Blair* hearing, the psychiatric testimony proffered by the experts put the trial court on notice that his mental state was at best precarious. Dr. Schwatz-Watts concluded that petitioner likely suffered from bio-polar disorder, and Dr. Frierson and Dr. Musick noted that petitioner seemed unable to appreciate his shortcomings. Trial Tr. 4043-44. While the psychiatrists diverged in their conclusions, all of their testimony about the defendant raised disconcerting observations about petitioner's intellectual and psychological deficiencies. The Court in *Drope* noted that "[t]here are of course, no fixed or immutable signs which indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts." *Drope*, 350 U.S. at 180. Here, the testimony of the three psychiatrists put the judge on notice that petitioner was prone to delusional thinking and was unable to grasp his own limitations. Armed with such information, the judge had a duty to be especially alert to the petitioner's behavior throughout the

B. *Defendant's Bizarre Demeanor at Trial*

Drope recognized that the competency inquiry includes not only medical opinions, but also the defendant's behavior and demeanor at trial. *Id.* at 180. Respondent claims that petitioner made rational choices when he decided not to play an active role in his trial, not to have the aide of counsel, to restrict the role of his appointed counsel during sentencing, and to refuse presentation of any mitigating evidence. Simply because a defendant articulates a trial strategy, and makes definitive choices, does not mean that defendant is competent.

> If the mental state of the accused prevents a rational understanding of the proceeding, the foundation for the accused's power to control the defense is lacking. An incompetent is no longer 'in control' of his decision-making process and is therefore incapable of making the decisions required by the process that may result in a finding of blame and imposition of punishment."

Norma Schrock, *Defense Counsel's Role in Determining Competency to Stand Trial*, 9 GEO. J. LEGAL ETHICS 639, 654 (1996). Throughout the trial the defendant behaved in an increasingly bizarre manner: he referred to himself in the third person,[2] at one point in the trial he seemed completely baffled by a witness' use of a protractor,[3] he espoused wide ranging conspiracy theories,[4] and at various times was unable to comprehend simple instructions from the judge.[5] Petitioner was in an especially vulnerable position given that he was representing himself. Just as the judge predicted at the start of the trial, the guilty verdict lead to "disorientation and confusion" and the

---

trial. When the defendant's behavior became increasingly bizarre during the penalty phase, that coupled with the previous testimony of the psychiatrists, raised a bona fide doubt as to the petitioner's competency.

[2] *See, e.g., Trial Tr.* 1406.

[3] *Trial Tr.* 2411–2413.

[4] *See, e.g., Trial Tr.* 1587, 2016, 2036, 2335, 3223.

[5] *Trial Tr.* 806.

petitioner's ultimate mental collapse.[6] During sentencing, petitioner refused to represent himself, and seemed unable to cope with the stresses and responsibility of directing the rest of the trial. Petitioner's unpredictable and strange conduct culminated in him disrupting the trial more than once, chanting "Blessed be Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus."[7] Rather than ordering a competency hearing upon viewing the defendant's bizarre and unreasonable behavior, the judge simply shackled petitioner and removed him from the courtroom.[8]

Just as in *Drope*, when petitioner was forced to leave the courtroom, his "absence bears on the analysis [of competency] in two ways: first, it was due to an act which suggests a rather substantial degree of mental instability contemporaneous with the trial . . . second, as a result of petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him." Petitioner's incompetence is further highlighted by the fact that he had already manifested an inability to assist his counsel—a direct outgrowth of his paranoia and irrational understanding of their role and their ability to aid him in his criminal defense. The record as a whole demonstrates that the trial judge was constitutionally required to order a competency hearing when the defendant's behavior at the penalty phase of the trial raised a bona fide doubt regarding his competency.

C. *Dr. Halavonich's Retrospective Determination of Petitioner's Competency.*

---

[6] *Trial Tr.* 3935.

[7] *Trial Tr.* 3550.

[8] *Id.*

Respondent criticizes Dr. Halavonich's report noting "retrospective determinations of whether a defendant is competent to stand trial or to plead guilty are strongly disfavored." RR at 33–34. Respondent also mischaracterizes Dr. Halavonich's report, asserting that Dr. Halavonich failed to definitively diagnose petitioner as suffering from mental illness.

"Although retrospective competency hearings are disfavored, they are permissible 'whenever a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant.'" *Clayton v. Gibson*, 199 F.3d 1162 (10th Cr. 1999) (citing *Moran v. Godinez*, 57 F.3d 690, 696 (9th Cir. 1994)). "A 'meaningful' determination is possible where the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original state proceedings." *Reynolds v. Norris*, 86 F.3d 796, 802 (8th Cir. 1996). Here, the record clearly establishes that petitioner's behavior became increasingly bizarre and erratic as the trial progressed. Petitioner's ultimate breakdown occurred after the start of the sentencing phase when he became so disoriented and overwhelmed that he was unable to participate in the trial and had to be removed from the courtroom. Relying on the trial transcript, the PCR hearing transcript, the report of Dr. Schwart-Watts dated July 29, 2003, the deposition of Dr. Schwartz-Watts dated August 13, 2008, the forensic evaluation report by Dr. Richard Frierson dated March 10, 2003, the voluminous writings of petitioner, as well as several interviews with the petitioner, Dr. Halavonich's report concluded that "Mr. Alkebulanyahh's documented behaviors, particularly just prior to and during the penalty phase of the trial, indicate his mental status had then declined to an extent consistent with a lack of capacity to rationally understand the proceedings or participate in his defense at that point in time." Report of Dr. Halavonich, page 4, dated January 28, 2011. Dr. Halavonich also wrote in her report, "Mr. Alkebulanyahh's historical symptoms, his behaviors during his capital murder trial, and his

clinical presentation are consistent with a diagnosis of Temporal Lobe Epilepsy (TLE)." Report of Dr. Halavonich, page 4, dated January 28, 2011.

Given Dr. Halavonich's report and the evidence she relies on to draw her conclusion, a retrospective determination that petitioner was not competent at the time of his trial is permissible, and at a minimum, further testing and another competency hearing should be ordered. Respondent argues that petitioner cannot prevail on his claim that he was incompetent at trial because he has not sufficiently developed the facts to prove that he was incompetent-in-fact. RR at 34–35. However, Dr. Halavonich opines, to a reasonable degree of medical certainty, that petitioner became incompetent during the penalty phase. Respondent presented no counter professional opinion on this issue in its Return. Furthermore, petitioner has previously asked for funding for experts, a remand for a hearing and other opportunities to develop the facts, all of which have been denied at this time. Thus, at a minimum, petitioner is entitled to funding to further develop the claim and present additional evidence of his incompetency.

2. The Trial Judge Erred in Failing to Terminate Petitioner's *Pro Se* Status.

Respondent claims that petitioner was not actually removed from the courtroom because he was shackled and removed to a glass partition in the back of a large courtroom. RR at 39. Respondent also argues that petitioner chose to be removed from the courtroom, chose not to present any mitigating evidence, and chose to limit his attorneys actions. *Id.* These arguments are inconsistent with the record evidence, common sense, and legal precedent.

Simply because petitioner could hear and see what was occurring in the courtroom, does not mean that he was in fact present. *See Illinois v. Allen*, 387 U.S. 337 (1970). A defendant who is removed from the courthouse and allowed to watch a live internet stream of the trial, for example,

is not present even though he is able to see and hear what is happening in his trial. In *Allen*, the Court noted that "one of the defendant's primary advantages of being present at trial, [is] his ability to communicate with his counsel." *Id.* at 344. The Confrontation Clause is meant to prohibit *ex parte* proceedings where the defendant is not present to challenge the veracity of the evidence presented against him. *Snyder v. Com. of Mass.*, 291 U.S. 97, 105-06 (1934). Here, petitioner was removed to a glass enclosure in the back of a large courtroom making communication with counsel, the court, and/or witnesses impractical, and diminishing his ability to perceive the testimony of the witnesses.[9]

Petitioner's removal for virtually the entirety of the sentencing trial made it impossible for him to present or control his case. Petitioner was removed at the sentencing stage of the trial—arguably the most important phase of a capital case as it determines whether defendant will receive life or death. *See Woodson v. North Carolina*, 428 U.S. 280 (1979). A trial judge may and should terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. *Faretta*, 422 U.S. at 834 n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."); *see also Allen*, 397 U.S. at 343 ("The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated."). To allow a defendant to remain counsel of record while he is simultaneously removed from the courtroom is to allow for the prosecution of a defenseless defendant.[10]

[9] Not only was petitioner removed from the courtroom, but the trial court failed to terminate his *pro se* status. A *pro se* defendant who is placed in glass partition where he is only able to watch the trial cannot meaningfully be said to be present for the purposes of the trial.

[10] Respondent relies on *Davis v. Grant*, 523 F.3d 132 (2d. Cir. 2007), for the proposition that a *pro se* defendant who is not willing to abide by courtroom protocol can be removed from the courtroom without automatically forfeiting his right to self-representation. However, *Davis*, an appeal from

Finally, respondent claims that petitioner made a strategic choice to maintain his *pro se* status while simultaneously being removed from the courtroom. Return at 40. However, in light of petitioner's dubious competency, any waiver of the right to be present at his sentencing trial cannot be said to be voluntary. While a defendant who is intentionally disruptive may waive his right to be present in the courtroom, when the defendant's misbehavior is the result of a mental disease or defect, the defendant cannot be said to have made an intelligent and voluntary choice to waive his right to be present. *Cf. Pate v. Robinson*, 383 U.S. 375 (1966) ("it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial"). Here, petitioner's disruptive behavior came in the form of religious chanting—a sign that defendant was suffering from hyper-religious delusions. Some rights are so fundamental to the fairness of the proceedings that they may not be waived absent the defendant's competent and voluntary waiver. Among these rights, are the defendant's right to counsel, and the defendant's right to be present during his trial. *See Westbrook v. Arizona*, 384 U.S. 150 (1966); *Johnson v. Zerbst*, 304 U.S. 458 (1938). The court had the power and responsibility to terminate petitioner's *pro se* status when he began chanting disruptively, and exhibited signs of severe mental illness as well as an unwillingness an inability to participate in the trial.

---

a denial of federal habeas corpus relief, was decided under AEDPA. Moreover, the defendant in *Davis* was only removed for a limited portion of the trial and therefore lost the opportunity to cross-examine only three of the prosecution's witnesses. Here, the petitioner missed the entire sentencing phase of the trial. Finally, the court in *Davis* espoused numerous arguments against the removal of a *pro se* defendant without appointing counsel, including the argument that "the government's 'independent interest' in ensuring that criminal trials are fair and accurate favors the appointment of replacement counsel." *Id.* at 143 (citing *Wheat v. United States*, 486 U.S. 153, 160 (1988)). Thus, the dicta in *Davis* expressly advocates the appointment of counsel when a *pro se* defendant is removed from the courtroom.

III.

PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH, EIGHTH,AND FOURTEENTH AMENDMENTS BECAUSE HE WAS VISIBLY SHACKLED WITHOUT JUSTIFICATION AND WITHOUT AN INDIVIDUALIZED DETERMINATION BY THE TRIAL JUDGE.(PETITIONER'S GROUND II).

Respondent argues both that petitioner was properly shackled and that he was not prejudiced by appearing before the jury in restraints. These arguments are inconsistent with *Deck v. Missouri*. 544 U.S. 622 (2007).

Respondent identifies no compelling security interest at stake when petitioner was "disruptive" by way of speaking out of turn on two occasions. The record makes clear that petitioner was not threatening the court or its spectators, that he posed no security risk, and that he was placed in a back room where he could not interrupt the proceedings at the time he was shackled.[15] Respondent identifies no security interest outweighing the increased likelihood that jurors would perceive him as dangerous or violent.

Respondent also asserts that petitioner was "only shackled for a limited period of time," RR at 44, when in fact petitioner was shackled for the entire penalty phase. Moreover, under *Deck v. Missouri*, the duration of shackling is irrelevant. 544 U.S. at 628. The evidence unquestionably indicates that petitioner was shackled during the penalty phase and that his shackles were visible to

[15]Respondent simultaneously argues that petitioner's behavior was so abnormal as to warrant the use of shackles, but not to raise doubts as to his competency.

jurors.[16] However, if this court believes a material factual dispute exists as to the visibility of petitioner's shackles, the case should be remanded to the Circuit Court for a hearing on the issue.

Finally, respondent argues that petitioner was not prejudiced by being shackled because the circumstances of the crime established two aggravating factors, and no mitigating evidence was presented. *See* RR at 46. Contrary to Respondent's theory, conviction of a capital crime does not dictate a death sentence; indeed, if respondent were correct, then the Supreme Court's decision in *Deck* would be a dead letter.

IV.

PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF THE PROCEEDINGS (PETITIONER'S GROUND III).

Respondent claims that petitioner was not deprived of the effective assistance of counsel because Mr. Thorton and Mr. Kelly were acting merely as standby counsel, and they were following limitations imposed by petitioner. The record belies this assertion. Moreover, even within the limited range of duties imposed on them by the court, Mr. Kelly and Mr. Thorton failed to provide competent representation.

While petitioner clearly acted as his own counsel during the first phase of the trial, when he was removed from the courtroom for the vast majority of the sentencing phase and his standby counsel was appointed to control the rest of his case, they were no longer acting merely as standby counsel. During the sentencing phase, Mr. Thorton and Mr. Kelly were the only ones at the defense table, the only ones to question witnesses, the only ones to speak in the presence of the jury and the

[16]Respondent, although conceding that petitioner was shackled during the penalty phase, complains that we have not designated particular jurors who observed petitioner shackled. However, both the trial record and the uncontradicted, sworn evidence presented supports petitioner's position that he appeared before the jury with visible shackles. Respondent has presented no contradictory evidence.

judge, and the only ones to make objections to evidence.

In *U.S.* v. *Schmidt*, 105 F.2d 82 (2d. 1997), the Second Circuit stated that "in a case where standby counsel held that title in name only and, in fact, acted as the defendant's lawyer throughout the proceeding, we would consider a claim of ineffective assistance of standby counsel." *Id.* at 90. Here, Mr. Thorton and Mr. Kelly were acting as counsel of record during the sentencing phase and held the "title [of standby counsel] in name only." There was a clear and drastic change in the roles of Mr. Kelly and Mr. Thorton during the sentencing phase of the trial. Before that time they had acted within the range of standby counsel duties; however, when petitioner was removed from the courtroom and they began conducting all the duties of counsel: of objecting, cross-examining, and presenting a summation, they were effectively acting as counsel of record.

Even evaluated within the restrictions imposed on Mr. Thorton and Mr. Kelly by the court, their performance was deficient and prejudiced the defendant. Mr. Thorton and Mr. Kelly were charged with protecting the record and objecting to inadmissible evidence. However, they failed to adequately perform either of these responsibilities. Not only did they fail to object to the impermissible testimony and the Solicitor's closing argument about prison conditions, they also failed to object to the prosecution's introduction of substantial amounts of inflammatory victim-impact evidence. Their failure to protect the record allowed the jury to hear extensive evidence introduced in order to sway the jury's passions preventing a death sentence based on reason as opposed to "caprice" and "emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

V.

PETITIONER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BEFORE TWELVE FAIR AND IMPARTIAL JURORS AS A RESULT OF MULTIPLE PREJUDICIAL EXTRANEOUS INFLUENCES (PETITIONER'S GROUND V).

Respondent argues that: (1) the applicable standard for evaluating juror misconduct claims involving an extraneous influence is whether there is in fact misconduct and, if so, whether any harm resulted to the defendant as a consequence; the burden, they claim, rests squarely on the petitioner to prove both the existence of misconduct as well as the resulting prejudice RR at 52; (2) the jury's use of the Bibles and scripture was not an extraneous influence; and, (3) petitioner's claims regarding improper influence from a minister and from knowledge of alleged bomb threats lacks merit because there is insufficient information to show prejudice.

1. THE CONSIDERATION OF EXTERNAL AND EXTRANEOUS SOURCES OF INFORMATION VIOLATES THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Relying on several cases decided by the Court of Appeals, respondent argues that the "general test" for evaluating alleged juror misconduct is whether there is in fact misconduct and, if so, whether any harm resulted to the defendant as a consequence RR at 52. Furthermore, respondent argues that where a defendant seeks a new trial on the basis of juror misconduct, the defendant must prove both the existence of misconduct as well as the resulting prejudice. The decisions respondent cites to support the use of this test consists entirely of South Carolina state law. While the cases relied upon involve juror misconduct, three of the five cases cited by the

respondent do not involve any extraneous influence.[17] The two cases respondent cites which do involve extraneous influences, *Galbreath* and *Kelly,* do not controvert the Supreme Court's decision in *Remmer v. United States*, 347 U.S. 227 (1954) (holding presumption of prejudice applies when unapproved private communication, contact or tampering with a juror occurs during criminal trial). [18]

Remmer establishes that juror exposure to extraneous material generally creates a presumption of prejudice that the government bears a heavy burden to rebut. *Remmer,* 347 U.S. at 229. This presumption may be overcome by: (1) a showing that the extrinsic material is merely cumulative; (2) that overwhelming evidence of the defendant's guilt rendered exposure to the information harmless; or, (3) that the allegedly prejudicial materials to which the juror was exposed are not extrinsic evidence at all. *Id.,* at 229. One of the two extraneous influence cases respondent cites for the propostion that there is no presumption of prejudice warranted in Mr. Robert's case is *State v. Galbreath.* The court in *Galbreath* held that when an allegation is made that extraneous information may have improperly influenced jurors, the factors to be considered are the "number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice." *State v. Galbreath* 359 S.C. 398, 400 (Ct.App.2004). *Galbreath*, however, is compatible with *Remmer's* acknowledgement that in some cases, exposure to extraneous information will be sufficiently prejudicial for the court to find an improper. The *Galbreath* court held that the State presented four witnesses who testified against defendant, and thus the evidence of the defendant's guilt

---

[17] *State v. Smith* 338 S.C. 66 (Ct.App.1999) (involving a sleeping juror); *State v. Grovenstein* (involving a sleeping juror); *State v. Aldret* 333 S.C. 307 (1999) (finding no prejudice where the jury engaged in premature deliberations).

[18] *State v. Galbreath* 359 S.C. 398 (Ct.App.2004).

rendered a single juror's exposure to a comment made by an acquaintance of the defendant harmless.

Respondent also relies upon *State. v. Kelly* in which this Court concluded that the defendant's right to a fair trial by impartial jurors was not violated where a juror brought a pro-death penalty pamphlet into the jury room. *State. v. Kelly*, 331 S.C. 132 (1998). However, the juror did not show the pamphlet any other members of the jury and the trial judge subsequently removed that juror and replaced her with an alternate thereby eliminating the influence altogether. *Id,* at 134.

Thus, *Galbreath* and *Kelly,* read in context, reveal only conflation of the presumption of prejudice test of *Remmer* with its burden of rebuttal on the government. *Galbreath* by finding that the comment in *Galbreath* was not sufficiently prejudicial to overcome the overwhelming evidence of the defendant's guilt, and *Kelly*, by finding that the exposure to the information was harmless because the trial court excised the existence of extrinsic evidence.

2. THE USE OF THE BIBLE BY THE JURY DURING THE DELIBERATIONS CONSTITUTED EXTRANEOUS PREJUDICIAL INFORMATION.

Respondent also argues that petitioner was not deprived of a fair trial because the Bibles and scripture relied upon by the jurors did not constitute an extraneous influence. In support of this, respondent relies upon *Robinson v. Polk. Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006) In *Robinson,* the court stated that "[R]eading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence." *Id.*, at 358. However, respondent fails to give any reason why this particular decision should receive more weight than the other numerous Circuit Court decisions holding that the use of the Bible during

deliberations constitutes an extraneous influence. The First, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits have been confronted with cases where a Bible was used during jury deliberations. Of these federal courts of appeal, only the Fourth has held that the Bible is *not* an extraneous influence. *See Robinson* 438 F.3d 350 (2006). The Ninth Circuit did not reach the issue of whether the Bible is an extraneous influence.[19] The remaining four circuits all held that juror exposure to the Bible during deliberations constitutes an extraneous influence. [20] As the Fifth Circuit explained, "the Bible served as an external influence precisely because it may have influenced the jurors simply to answer the questions in a manner that would ensure a sentence of death instead of conducting a thorough inquiry into these factual areas. ... A contrary holding would eviscerate the rule from *Remmer* that jurors must rely on only the evidence and law presented in an open court room." *Oliver v. Quarterman*, 541 F.3d 329, 340-341 (2008).

3. THE INFORMATION REGARDING BOMB THREATS AND THE CONSULTATION WITH A MINISTER

[19] The only case in the Ninth Circuit to deal with the issue of whether a jury's use of a Bible is an extraneous influence is *Fields v. Brown* 503 F.3d 755 (9th Cir 2007). In *Fields*, the court declined to decide the issue of juror misconduct: "[W]e do not need to decide whether there was juror misconduct because even assuming there was, we are persuaded that [the juror's bible notes] had no substantial and injurious effect or influence in determining the jury's verdict."

[20] *See Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008) (holding that a jury's consultation of the Bible passages . . . during the sentencing phase of the trial amounted to an external influence on the jury's deliberations.; *United States v. Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008) (holding that presence of a Bible in the jury room was an external influence on the jury's deliberations and that the Bible is no different from any other type of external influence that enters the jury's conscience); *McNair v. Campbell*, 416 F.3d 1291, 1307-08 (11th Cir. 2005) (holding that in a case where the jury foreman brought a Bible into the jury room during deliberations and read aloud from it, as well as leading other jurors in prayer, "it is undisputed that jurors in the guilt phase of McNair's trial considered extrinsic evidence during their deliberations, [therefore] our analysis focuses on whether the State can rebut the resulting presumption of prejudice"; *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998)(holding that the presence of a Bible in the jury room is an external influence that might prejudice the jury's deliberations and stating that "there is error in [the cases involving a Bible in the jury room] not because the book was the Bible, but because the book was not properly admitted evidence.")

CONSTITUTED EXTRANEOUS PREJUDICIAL INFORMATION.

Respondent's claim is that there is insufficient information regarding both of the instances of improper and extraneous influence cannot survive scrutiny in light of Rule 606(b) of the *South Carolina Rules of Evidence* (SCRE), which states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

SCRE 606(b) disallows testimony about emotional reactions or mental impressions developed during deliberations. Rule 606(b) contains two exceptions regarding juror testimony that (1) a juror may provide testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention," and (2) the jury may testify "whether any outside influence was improperly brought to bear upon any juror." These exceptions provide sufficient basis for petitioner's claims.

Respondent dismisses the petitioner's claim regarding the juror's consultation of a minister as without merit because petitioner failed to provide any indication whether the juror received any advice from the minister, what the advice was, or whether it resulted in prejudice. Respondent similarly argues that the jurors knowledge of the alleged bomb threats does not constitute an improper influence because no prejudice is shown. Both are presumptively prejudicial. RR at 54 "[A]ny private communication, contact or tampering, directly or indirectly with a juror during a trial

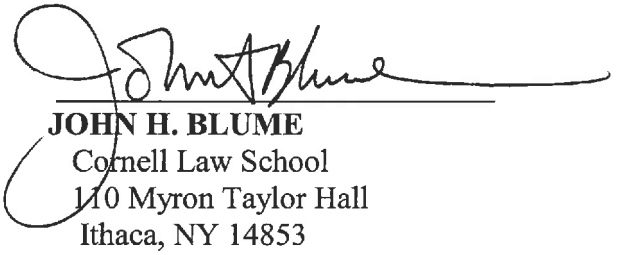
about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States,* 347 U.S at 229.

IV.

CONCLUSION.

Wherefore, for all of the foregoing reasons, this Court should issue the writ of habeas corpus. Alternatively, because petitioner was denied basic due process in the lower court proceedings and was deprived of competent post-conviction representation by qualified counsel this Court should remand and order a new post-conviction relief hearing. This court should also grant petitioner discovery and access to funds for investigative and expert services in order that he may present additional evidence in support of his claims for habeas corpus relief.

Respectfully submitted,



JOHN H. BLUME
Cornell Law School
110 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

Counsel for Petitioner

May 18, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Tyree Roberts aka,
Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

RECEIVED
MAY 18 2011
S.C. Supreme Court

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Reply has been served upon Respondent's counsel by first class mail, postage prepaid, this 18th day of May, 2011, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

The Supreme Court of South Carolina

Tyree Roberts a/k/a Abdiyyah Ben Alkebulanyahh,
Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-185866

RECEIVED

MAR 1 2 2013

S.C. SUPREME COURT

ORDER

Petitioner seeks a writ of habeas corpus. We deny the petition.

C.J.

J.

J.

J.

I would grant the petition.

J.

Columbia, South Carolina

February 22, 2013

cc:
John W. McIntosh
Alan McCrory Wilson

Alphonso Simon, Jr.
Donald J. Zelenka
John H. Blume, III

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

TYREE ROBERTS, SK6012
aka ABDIYYAH BEN ALKEBULANYAHH ..... Petitioner,

v.

STATE OF SOUTH CAROLINA ..... Respondent.

PETITION FOR WRIT OF CERTIORARI

JOHN H. BLUME
Cornell Law School
112 Myron Taylor Hall
Ithaca, New York 14853
(607)255-1030

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

I. The trial court found Petitioner competent and allowed him to proceed *Pro Se* .. 2

II. The trial court denied Petitioner's motion under *Batson v. Kentucky* 7

III. Petitioner refused to participate in the penalty phase of his capital trial 10

IV. Appellate and post-conviction proceedings 12

ARGUMENT 14

I. The trial court erred in denying Petitioner's motion under *Batson v. Kentucky* . 14

A. Relevant Legal Principles 15

B. The Prosecution's Purported Race Neutral Reasons Were Clearly Pretextual 16

II. The trial Court abused its discretion by failing to *sua sponte* order a new competency hearing prior to sentencing and/or terminate Petitioner's *pro se* status, and Petitioner was incompetent during his capital trial 19

A. Relevant Law Regarding Competency 19

B. Relevant Law Regarding *Pro Se* Status 22

C. The Trial Court Had Reason to Believe Petitioner was no Longer Competent and Able to Represent Himself in the Penalty Phase 24

D. Petitioner was Incompetent During His Capital Trial 25

III. Petitioner was denied due process and equal protection of law and is therefore entitled to a new post-conviction relief proceeding 26

A. Petitioner's PCR Counsel Were not Qualified Under S.C. Code Ann. § 17-27-160(b) 26

B. Petitioner was Denied Due Process and Equal Protection of the law . . . 27

CONCLUSION 32

TABLE OF AUTHORITIES

FEDERAL CASES

Batson v. Kentucky, 106 U.S. 1712 (1986) 1, 15, 16

Bounds v. Smith, 430 U.S. 817, 821-22 (1977) 29

Coleman v. Thompson, 501 U.S. 722 (1991) 28

Darden v. Wainwright, 477 U.S. 168 (1985) 31

Davis v. Grant, 532 F. 3d 132 (2nd Cir. 2008) 22

Deck v. Missouri, 544 U.S. 622 (2005) 31

Douglas v. California, 372 U.S. 353, 357-58 (1963) 27, 29

Drope v. Missouri, 420 U.S. 162, 181 (1975) 20, 21, 25, 30

Dusky v. United States, 362 U.S. 402, 403 (1976) 20, 30

Evitts v. Lucey, 469 U.S. 387, 393 (1985) 28, 30

Faretta v. California, 422 U.S. 806, 807 (1975) 22, 31

Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963) 27

Griffin v. Illinois, 351 U.S. 12 (1956) 29

Hernandez v. New York, 500 U.S. 352, 365 (1991) 15

Indiana v. Edwards, 554 U.S. 164, 208 (2008) 22, 23, 31

Martinez v. Court of Appeal of California, 528 U.S. 152, 161 (2000) 22

Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) 15

Miller-El v. Dretke, 5454 U.S. 231 (2005) 15

Pate v. Robinson, 383 U.S. 375 (1966) 20, 21

Payne v. Tennessee, 467 U.S. 1025 (1993) 31

Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) 28

Powers v. Ohio, 499 U.S. 400 (1991) 15

Purkett v. Elem, 514 U.S. 765, 768 (1995) 15

Tucker v. Moore, 56 F.Supp. 2d 611, 613-14 (D.S.C. 1999) 26

United States v. Mason, 52 F.3d 1286, 1293 (4th Cir. 1995) 20, 21

United States v. Rushton, 565 F.3d 892 (5th Cir. 2009) 21

STATE CASES

Hall v. Catoe, 601 S.E. 2d 335 (S.C. 2004) 31

McKague v. Warden, 912 P.2d 255, 258 n. 5 (Nev. 1996) 30

Southerland v. State, 524 S.E. 2d 833 (S.C. 2002) 31

State v. Blair, 275 S.C. 529, 273 S.E. 2d 536, 538 (1981) 21

State v. Reed, 332 S.C. 35, 39, 503 S.E. 2d 747, 749 (1998) 20

State v. Roberts, 614 S.E. 2d 626, 627 (S.C. 2005) 12

State v. Roberts, 632 S.E. 2d 871 (S.C. 2007) 12

Steele v. Kehoe, 724 So. 2d 1192, 1194 n.4 (Fla. App. 1998) 29

FEDERAL STATUTES

28 U.S.C. §§ 2261(b)-(c) 26

STATE STATUTES

S.C. Code §17-27-160(B) 1, 12, 13, 26, 27, 28, 30

S.C. Code §44-23-410 (1976) 20

MISCELLANEOUS

Rule 59(e), S.C. R. Civ. Pro. 32

ISSUES PRESENTED

I.

Whether the trial court erred in denying petitioner's motion under *Batson v. Kentucky*, 106 U.S. 1712 (1986).

II.

Whether the trial court abused its discretion and thereby denied petitioner's constitutional rights to due process and a fundamentally fair trial by failing to *sua sponte* order a new competency hearing prior to sentencing and/or terminate petitioner's *pro se* status, and whether petitioner was in fact incompetent during his trial proceedings.

III.

Whether Petitioner was denied due process and equal protection of the law and is thus entitled to a new post-conviction relief proceeding where: (a) petitioner's PCR counsel were not qualified under S.C. Code § 17-27-160(B); (b) PCR counsel were ineffective; and, (c) Judge Carmen Mullen signed the state's order denying post-conviction relief, which contained numerous credibility findings, even though Judge Mullen was not present during the PCR hearing and did not hear the testimony of any witness.

STATEMENT OF THE CASE

Petitioner, Abdiyyah Ben Alkebulanyahh,[1] was charged with two counts of murder and other offenses arising from the deaths of two Sheriff's Deputies on January 8, 2002, in Beaufort County, South Carolina. *App. pp. 4532-33.* The officers were killed after responding to a possible domestic disturbance at petitioner's home. On January 22, 2002, the State notified petitioner of its intent to seek the death penalty. *App. p. 4524.*

I. THE TRIAL COURT FOUND PETITIONER COMPETENT AND ALLOWED HIM TO PROCEED *PRO SE.*

Prior to trial, petitioner filed a motion to dismiss his appointed counsel, Gerald Kelly and Sean Thorton, and proceed *pro se.* At a pre-trial hearing on November 12, 2002, the Honorable Perry M. Buckner agreed to delay ruling on petitioner's motion until a competency evaluation could be completed. *App. p.3888, l.1 – p.3891, l.25.* During the hearing, petitioner repeatedly stated that he believed his defense counsel was "sabotaging" his case:

THE COURT:	Just a moment, counsel, have a seat.
MR. ROBERTS:	Objection, I'm going to ---
THE COURT:	You talk to your attorney ---
MR. ROBERTS:	I don't have an attorney, I have filed a motion to dismiss attorney and I am not without representation. These attorneys are not representing me. I have filed a motion for these ---
THE COURT:	Mr. Alkebullanyahh, Mr. Alkebullanyahh ---

[1] Petitioner was formerly known as Tyree Roberts. He legally changed his name in 1998. *App. p. 3880, l.21 – p.3881, l.4.* This petition refers to him as simply "petitioner" or by his present legal name, except for instances of direct quotations from the record where he is sometimes referenced by his former name.

MR. ROBERTS: --- attorney to be dismissed as my attorneys because they are sabotaging my case.

THE COURT: Mr. Alkebullanyahh, I'm going to ask you one more time to have a seat, we are going to deal ---

MR. ROBERTS: I am without representation. They are sabotaging my case.

THE COURT: --- with the motions in the order in which they are filed.

MR. ROBERTS: They are sabotaging my case.

THE COURT: Anything further from the State?

SOLICITOR: Yes, sir. If Your Honor please, I would at this time move that the Court enter an order requiring the defendant, Tyree Roberts, to be examined pursuant to your order of I think July 8th, sometime in July, July 27th, whatever it was in July. I'll get that date.

. . .

THE COURT: All right, sir. Mr. Kelley?

MR. ROBERTS: I am without attorney. Mr. Kelley is not my attorney, I have no attorney representing me, I have filed a motion ---

THE COURT: Mr. Alkebullanyahh ---

MR. ROBERTS: --- for dismissal of attorneys.

THE COURT: I'm going to hear that motion at the appropriate time. Take a seat, sir.

MR. ROBERTS: Any court action by the attorneys is sabotaging my defense, it is not representing me.

THE COURT: Take a seat.

MR. ROBERTS: It is against my will, it's not against my defense or my best interest.

THE COURT:	All right, if you continue in these outbursts, I'm going to have to ask you to be removed from the courtroom.
MR. ROBERTS:	I am being represented without
MR. ROBERTS:	--- to speak in my behalf.
THE COURT:	For the last time, please be seated, I'm going to hear the motion at the appropriate time.
MR. ROBERTS:	I am objecting to them speaking my behalf.
THE COURT:	Mr. Thorton, any objection on behalf ---
MR. ROBERTS:	Anything on behalf of myself ---
THE COURT:	--- of your client at this time?
MR. ROBERTS:	--- I am in objection to it.
MR. THORTON:	No, sir.
SOLICITOR:	Your Honor please, I would move that we adjourn, sir.
THE COURT:	Court's adjourned, motion is granted.

App. p. 3889, l.1 – p.3891, l.25.[2]

On August 1, 2003, the Honorable Daniel F. Pieper held a competency hearing. *App. p. 3969.* Dr. Donna Schwartz-Watts, a forensic psychiatrist retained by the defense, testified that she met with petitioner on three occasions. *App. p. 3976, ll.5-10.* During their first interview in 2002, petitioner was relatively comfortable, and extremely cooperative and pleasant. *App. p. 3976, l.22 – p.3977, l.6.* The second interview occurred early in 2003. *App. p. 3977, l.25 – p.3978, l.2.* Again, petitioner was comfortable and cooperative, although he expressed some

[2] Petitioner had similarly moved to dismiss his first two appointed counsel based on his belief that "they have conspired to deny me a fair trial, they have conspired to deny me proper representation." *App. p. 4146, ll.15-17.*

paranoid thoughts about the former trial judge in his case and his defense team. *App. p. 3978, ll.2-22.* However, during a third interview in April 2003, Dr. Schwartz-Watts observed a dramatic change in petitioner's behavior. He was "incredibly angry." *App. p.3979, l.1.* He "was cursing, he looked extremely tired, he spoke very rapidly, he was very paranoid, [and] he threatened [Dr. Schwartz-Watts]." *App. p. 3979, ll.2-3.* Petitioner demonstrated "a very different change in his affect, which is how he expresses his emotion." *App. p. 3979, ll.4-5.* He "spoke very rapidly and was very tangential in how he expressed his thoughts." *App. p. 3979, ll.16-18.* Dr. Schwartz-Watts also interviewed petitioner's mother who stated that even as a child petitioner was always "off," that he exhibited strange behaviors, that he had an abnormally large head, and that there were times when she observed wild shifts in her son's mental and emotional state. *App. p.3982, l.8 – p.3983, l.9.*

Dr. Schwartz-Watts concluded that petitioner suffers from bipolar disorder, depression and paranoia. *App. p.3983, l.17 – p. 3984, l.9.* She opined that during her later interviews with petitioner he was "clearly psychotic" because "his paranoia had reached the point that he was not in touch with reality." *App. p.3984, ll.6-9.* Further, Dr. Schwartz-Watts testified that petitioner "does not have a rational understanding of these proceedings" and "because of his mental illness he doesn't have a capacity to assist in his defense." *App. p. 4012, ll.17-21.* Thus, petitioner was likewise incompetent to represent himself. Specifically, "[h]e does not have the capacity to look at different decisions, at different pleas, different options available to him so that he can make reasonable decisions in defending himself." *App. p. 3987, ll.18-21.*

Finally, Dr. Schwartz-Watts explained to the Court that competency is a fluid concept. *App. p. 3985, ll.21-22.* She attempted to interview petitioner on the morning of the competency hearing to assess his then-existing mental state, but he refused to speak with her. *App. p. 3985,*

ll.22-25.[3] Dr. Schwartz-Watts found this behavior consistent with her later evaluations of petitioner:

> Because competency [is] a fluid concept and certainly with the kind of disorder he has it's very possible, Your Honor, that his mood disorder could be under control right now. I don't know. I haven't seen him since April, so I don't know what his symptoms are like at this time. But in my opinion his refusing to see me is certainly consistent with my view of how paranoid he's been in the past.

App. p. 3988, ll.2-10. Further, Dr. Schwartz-Watts advised the Court that, even if it found petitioner competent on the date of the hearing, another competency evaluation could later become necessary if his condition changed during the trial:

> We've certainly had cases before, Your Honor, where we've done serial competency examinations if there's – in my opinion if there were any times during the Court's proceedings if one were to notice a change in Mr. Alkebulanyahh's state that it would benefit him to have an evaluation at that point during the proceedings.

App. p.3989, ll.13-19.[4]

Dr. Richard L. Frierson evaluated petitioner on behalf of the Department of Mental Health. *App. p. 4029, ll.10-22.* Dr. Fierson's last contact with petitioner occurred on February 26, 2003, two months before the last evaluation by Dr. Schwartz-Watts and four months before petitioner refused to be evaluated by Dr. McKee. *App. p. 4029, ll.23-25.* Based on his interviews with petitioner, Dr. Frierson concluded that he suffered from no major mental illnesses and that he was competent to stand trial. *App. p.4030, ll.10-14 and p. 4031, ll.9-14.*

---

[3] Petitioner had also refused to speak with his attorneys in the months prior to the competency hearing. *App. p. 3912, ll.12-13.*

[4] Dr. Goeffrey McKee also testified that "just because somebody is competent at one point does not necessarily mean that that has not changed in the course of a few weeks or a few months." *App. p.4023, ll.13-17.* Dr. McKee attempted to evaluate petitioner on June 23, 2003, but petitioner refused to see him. *App p. 4019, ll.6-17.*

Dr. Jeffrey Musick, also from the Department of Mental Health, examined petitioner alongside Dr. Frierson and similarly testified that petitioner was competent. *App. p. 4044, ll.1-10.* Dr. Musick admitted that petitioner scored highly on the Personal Assessment Inventory, which demonstrated that petitioner "was unwilling to disclose minor shortcomings that most people will admit to." *App. p. 4045, ll.11-22.* Dr. Musick further admitted that an elevated score indicates "if they're not willing to even admit to [common shortcomings], maybe they are not willing to admit to more serious problems. And at that point you need to investigate if there might be any more going on in terms of mental health problems." *App. p.4049, l.23 – p.4050, l.2.* But Dr. Musick did not mention any further investigation into petitioner's mental health symptoms. Instead, he simply dismissed the elevated score as insignificant, stating "we were not surprised to find that the scale was elevated as he was consistently trying to present himself in a very favorable way." *App. p. 4046, ll.1-4.*

At the conclusion of this testimony, the trial court found petitioner competent and granted his motion to proceed *pro se*. *App. p. 4060, l.24 – p.4061, l.1 and p. 4077, ll.4-7.* Gerald Kelley and Sean Thornton continued as standby counsel. *App. p.4077, ll.9-10.*

II. THE TRIAL COURT DENIED PETITIONER'S MOTION UNDER *BATSON V. KENTUCKY.*

Jury selection began on October 6, 2003. *App. p. 41.* Although petitioner initially asked some relevant questions, he later began to appear confused and disoriented, repeatedly asking the same questions despite sustained objections.[5] In many instances, petitioner was unable to clearly

---

[5]Mr. Alkebulanyahh: Could you give me an example of when you would vote for a life sentence for a person convicted of an intentional and deliberate murder?

Mr. Murdaugh: Your honor, please. He already asked that question.

The Court: Yes.

Mr. Alkebulanyahh: Have I?

articulate his questions, such as asking: "So you wouldn't want to harbor any un-biasness or any impartial in reference to the death penalty itself?" or "Are you the type of person who would make a distinction between different types of murder or between people who were charged, and

---

The Court:	Restate your question.
Mr. Alkebulanyahh:	Could you give me an example of when you would vote for a life sentence for a person convicted of intentional and deliberate murder?
The Court:	No. You can --- I told you before you can ask if they have opinions on what would distinguish the two, between life and death.

App. p. 806, ll.5-18.

Mr. Alkebulanyahh:	What does your religion or spiritual teach regarding the death penalty?
The Court:	I'm not going to allow that question. Do you want to ask --- Mr. Alkebulanyahh, from this point on the only question I'll allow you to ask is would any religious beliefs affect your ability to be fair and impartial; that's it.
Mr. Alkebulanyahh:	Thank you, your honor, sir.
The Court:	All right.
Mr. Alkebulanyahh:	Will you tell me what kind of guidance have you received from your religion or spiritual affiliation regarding how you should feel about the death penalty?
The Court:	That's what I just instructed you on.

App. p.811, l.18 – p.812, l.5.

The Court:	Mr. Alkebulanyahh, let me make sure I understood the question to which I sustained the objection. Were you just trying to ask what I'd already explained about it not being available in every case or were you trying to ask him that does he think the death penalty – that he thinks the death penalty should be in every murder case? Is that what you're trying to ask?
Mr. Alkebulanyahh:	I don't recall, your honor.

. . .

Mr. Alkebulanyahh:	I don't know what the question was. I don't recall it.
The Court:	All right. You don't have it in your notes?
Mr. Alkebulanyahh:	Yes, but, you know, I ask so many questions, you know, then. I was just asking the juror – I don't know what the question really was. I don't.

App. p.1072, l.22 – p.1073, l.21.

you would feel that each case should be treated exactly the same?" *App. p. 886, ll.4-5* and *p.812, ll.21-24.*

Following *voir dire*, the State struck a number of potential African-American jurors including Edith Owens, Matthew Young, Antwoine Crosson and Kerry Brown. *App. p. 1321, l.17 – p.1322, l.6; p.1325, ll.14-21; p. 1327, l.25 – p.1328, l.8; p.1338, ll.5-12.* Petitioner made a *Batson* motion. *App. p.1339, l.25 – p.1340, l.1.* The prosecution stated that they struck juror Edith Owens because she seemed afraid of petitioner, she was weak on the death penalty, and, "most important," she did not know anything about the case. *App. p. 1340, ll.10-15.* The court asked petitioner whether he could pinpoint a juror that the prosecution had seated with similar characteristics. Petitioner responded:

> Well, the characteristics that she had that was similar was pretty much to the extent that she seemed like she was more – I wouldn't want to use the characteristic – afraid in similarity as far as she would not be – would feel intimidated by the prosecution – authority of the prosecution.

App. p.1341, ll.14-20. The court denied petitioner's motion as to Ms. Owens.

The prosecution stated that it struck juror Matthew Young because he knew a potential witness, he was weak on the death penalty, and he knew too much about the case. *App. p.1342, ll.6-11.* The prosecution stated that it struck Antwoine Crosson because he had a brother who had been in trouble before and because he was just not a "good" juror. *App. p.1350, ll.1-3.* Finally, the prosecution stated that they struck juror Kerry Brown because she had a pending criminal domestic violence proceeding (she was the victim) and because she had not heard about the case. *App. p. 1351, l.14 – p.1352, l.2.* The trial court found all of these reasons to be racially neutral and denied petitioner's *Batson* motion as to each juror.