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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

TYREE ROBERTS, SK6012
aka ABDIYYAH BEN ALKEBULANYAHH ..... Petitioner,

v.

STATE OF SOUTH CAROLINA ..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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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.*

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[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

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[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

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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.

III. PETITIONER REFUSED TO PARTICIPATE IN THE PENALTY PHASE OF HIS CAPITAL TRIAL.

Petitioner's defense at the guilt-or-innocence phase of the trial was based largely on his own 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. *App. p.3448, l.6 – p.3449, l.5.* 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. p.3449, l.21 – p.3450, l.6.* 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. p.3486, ll.10-16.

The trial court tried to reason with petitioner to no avail, and ultimately concluded that petitioner would remain as his own counsel and also remain in the courtroom for sentencing. *App. p.3541, ll.1-13.* The trial court 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. *App. p.3514, ll.10-17.* The trial judge took a "wait and see" approach. When the prosecution called its first witness, petitioner stood up, in the presence of the jury, and said:

"Blessed be the Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." *App. p.3550, ll.14-19.* The trial judge briefly attempted to "plow ahead," but petitioner repeated the above refrain when the next question was asked. *App. p.3550, l.22 – p.3551, l.4.* The trial judge removed petitioner from the courtroom, sent the jury to the jury room, and brought petitioner 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. p.3551, l.20 – p.3552, l.5.* 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. *App. p.3552, l.10 – p.3553, l.7.*

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 be Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." *App. p.3556, ll.3-5.* 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." *App. p.3556, ll.18-21.* The court also ordered that petitioner be shackled and said he would gag petitioner if he had another outburst. *App. p.3561, ll.21-23 and p.3557, ll.6-7.* Standby counsel was ordered to resume representation to a limited extent including the responsibility to lodge any objections to inadmissible evidence. *App. p.3556, l.24 – p.3557, l.2.* 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.

IV. APPELLATE AND POST-CONVICTION PROCEEDINGS.

On direct appeal, petitioner was represented by Joseph Savitz and Robert Dudek of the Office of Appellate Defense.[6] 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. *App. pp.4535-4544.* Glenn Waters and Carl Grant were appointed by Judge Roger Young to serve as PCR counsel. *App. p.5249, l.1 – p.5251, l.11.* 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). PCR counsel's inexperience worked to petitioner's detriment, since counsel 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

[6] 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.

fees. PCR counsel filed an amended application raising a single claim for relief. *App. pp.4562-4568.*[7]

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 his grievances with trial and appellate counsel. *App. pp.4599-4920.* On September 17, 2009, Judge Carmen Mullen signed verbatim the state's order denying post-conviction relief.[8] *App. pp.5176-5229.*

Petitioner filed a timely notice of appeal. 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. On March 5, 2010, this Court relieved Mr. Walters and appointed undersigned counsel to represent petitioner in connection with this appeal.

Petitioner, through undersigned counsel, filed a Motion to Remand for Additional Post-Conviction Proceedings on the bases that: (1) PCR counsel were not qualified pursuant to S.C. Code § 17-27-160(B); and, (2) PCR counsel failed to raise a number of potentially meritorious claims for post-conviction relief. *App. pp.5230-5260.* Respondent argued that PCR counsel were in fact qualified according to Chief Justice Toal's interpretation of § 17-27-160(B) as set forth in her August 15, 2003 Letter To All Circuit Court Judges. *App. pp.5261-5262.* Given

[7] 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.*" *App. p. 4564.*

[8]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. 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. The order also noted on a number of occasions that no new evidence of incompetency was presented in the post-conviction proceedings.

respondent's reliance on the letter and the authority of the Chief Justice to issue such a ruling, petitioner further moved to recuse the Chief Justice in this matter. *App. pp.5299-5302.* Chief Justice Toal declined to recuse herself, stating that "promulgation of an administrative order or directive does not include a determination that it is valid because that would constitute an advisory opinion." *App. p.5305.* This Court denied the Motion to Remand on October 20, 2010. *App. p.5297.*

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION UNDER *BATSON V. KENTUCKY.*

As explained above, petitioner objected to the State's strikes against four potential African-American jurors: Edith Owens, Matthew Young, Antwoine Crosson and Kerry Brown. The prosecution gave the following reasons for these peremptory challenges.

- **Edith Owens** – She was afraid of the defendant, weak on the death penalty, and did not know anything about the case.
- **Matthew Young** – He knew a potential witness, was weak on the death penalty, and knew too much about the case.
- **Antwoine Crosson** – He had a brother who had been in trouble before and he was just not a "good" juror.
- **Kerry Brown** – She was the victim in a pending domestic violence proceeding and she had not heard about the case.

The prosecution's alleged race neutral reasons for these challenges are self-contradictory, not supported by the record and thus, they are pretextual.

A. 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*, 476 U.S. at 89. This mandate is violated where even a single juror is removed on the basis of his or her race. *Id.* at 95. A defendant has standing to raise an equal protection challenge under *Batson* 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 (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 96. 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]." *Batson*, 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, 339 (2003) (*Miller-El I*) (quoting *Purkett v. Elem,* 514 U.S. 765, 768 (1995) (*per curiam*)). At bottom, "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 Supreme Court held 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 v. Kentucky*, 106 U.S. 1712, 1716 (1986). Furthermore, the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id.* The competence of a person to serve as a juror is unrelated to race and depends on their "ability impartially to consider evidence presented at trial." *Id.* Allowing jurors to be selected in a discriminatory manner harms the defendant and undermines the confidence of the public. *Id.* at 1718. The Equal Protection clause forbids the prosecutor to exercise peremptory challenges in a discriminatory manner. *Id.* at 1719.

B. 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. *See App. p.1340, l.1 – p.1353, l.1.* In fact, the state challenged four of the five African-American jurors that were presented. Given the number of challenges against black jurors excluded and the percentage that constituted of jurors in the 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 (just not a "good" juror) is highly doubtful, the prosecution's explanation were 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. p.1340, ll.11-15.* 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, Joy Smith, a white juror, did state that "[her] heart was about to jump out of [her] skin." *App. p.671, ll.8-9.* Yet, the prosecution found her to be completely satisfactory. Furthermore, other white jurors were seated with substantially weaker views on the death penalty and who had the same amount of information about 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. p.279, ll.8-23.* Bruce Batastini, a white male, however, gave virtually identical answers about the death penalty and he too said he had not heard anything about the case. *See e.g., App. p. 564, l.1 – p.566, l.14.* Jannie Glover, also white, stated that she had not heard or read anything about the case. *App. p.987, ll.18-20.* Yet the prosecution did not challenge either juror. Therefore, because there is nothing to support the assertion that Ms. Owens was afraid of the defendant, and because other jurors who did not know anything about the case and who had similar views on the death penalty were seated, Ms. Owens exclusion raises to the level of purposeful discrimination.

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. p.1342, ll.6-11.* 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. p.1345, ll.19-23.* 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. p.543, ll.10-12.*[9] Like Mr. Young, Ms. Wilson indicated she was a category three individual, and she would have to listen to all the evidence before imposing the death penalty. *App. p.545, l.6 – p.546, l.21.* Because other similarly situated white jurors were not challenged by the prosecution, it was purposeful discrimination to challenge 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. p.1350, ll.1-3.* However, Mr. Crosson assured the trial judge he would not harbor any bias against the State based on his brother's prior arrest. *App p.538, ll.7-16.* Furthermore, several white jurors had family members that had been arrested and prosecuted. Cynthia Milanesi's fiancé had been arrested for a DUI. *App. p.583, ll.13-17.* Michelle Wilson's husband had been arrested for a DUI. *App. p.549, ll.13-18.* Neither Ms. Milenesi nor Ms. Wilson was 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.

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[9]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. p.441, l.23.*

Finally, the prosecution struck Kerri Brown allegedly because she had not heard about the case and because she was the victim of a pending criminal domestic violence proceeding. *See e.g., App. p.1351, ll.16-18.* As for the domestic violence proceeding, it is difficult – if not impossible – to imagine how being a victim of domestic violence would render her a poor juror for the State. If anything, it would have made her more likely to favor the prosecution. Additionally, as noted above, the prosecution seated Jannie Glover who also had not heard or read anything about the case. *App. p.987, ll.18-20.* 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. p.1009, ll.11-13.* No similar questions were asked of white jurors. Because the prosecution dismissed Ms. Brown for not knowing enough about the case after dismissing others for knowing too much, seating other jurors that also had not heard or read about the case, and based on the disparate questioning of Ms. Brown, 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.

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.

A. RELEVANT LAW REGARDING COMPETENCY.

This Court has held that the test for determining competency is "'whether [a 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 a factual understanding of the proceedings

against him.'" *State v. Reed*, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998) (quoting *Dusky v. United States*, 362 U.S. 402, 403 (1976)).

Prior to petitioner's trial, the trial court held a competency hearing, found him competent, and permitted him to proceed *pro se*. That finding, however, did not end the trial court's duty to inquire further when petitioner later began to behave irrationally. The United States Supreme Court has held that:

> [e]ven 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 v. Missouri, 420 U.S. 162, 181 (1975). This principle applies to both phases of a capital trial. *See, e.g., United States v. Mason*, 52 F.3d 1286, 1293 (4th Cir. 1995) (rejecting the district court's holding that defense counsel's failure to raise the issue of competence until after the first phase of the trial was a valid reason for denying the motion for a competency hearing in the penalty phase). At any stage of a criminal trial, "the 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 (citing *Pate v. Robinson*, 383 U.S. 375 (1966)).

Accordingly, a trial court has a continuing obligation to *sua sponte* order a mental examination – at any time – whenever there is reason to believe that the defendant is not fit to stand trial because he "lacks the capacity to understand the proceedings or to assist in his own defense as a result of a lack of mental capacity." S.C. Code Ann. § 44-23-410 (1976). In determining whether there is "reason to believe" a mental examination is necessary, a court must consider all evidence before it, including: (1) evidence of irrational behavior; (2) the defendant's demeanor at trial; and, (3) any medical opinions concerning the defendant's competence. *State*

v. Blair, 275 S.C. 529, 273, S.E.2d 536, 538 (1981) (citing *Drope*, 420 U.S. at 180)). "[E]ven one of these factors standing alone may, in some circumstances, be sufficient." *Id.* Moreover, seemingly normal behavior at some stage in the proceedings does not justify ignoring other evidence of incompetence. *See, e.g., Pate*, 383 U.S. at 385 (rejecting the notion that because defendant displayed "mental alertness and understanding" during the trial there was no need for a competency hearing); *Mason*, 52 F.3d at 1293 (holding that the lower court was not permitted to ignore evidence establishing reasonable cause for a competency hearing just because the defendant appeared to behave normally during the trial).

Because competency is a fluid concept, courts must remain alert to potential competency issues throughout the entire proceeding, particularly where there is already reason to believe that a defendant's mental state could change. For example, in *United States v. Rushton*, 565 F.3d 892 (5th Cir. 2009), the defendant was found competent and allowed to proceed *pro se*. *Id.* at 894-95. A forensic psychologist testified that Rushton was presently competent, but cautioned that "delusional material continue[d] to be present in Rusthon's thinking and could impair his future capacity for entirely independent strategic legal decision making." *Id.* at 895. The court eventually found Rusthon not guilty by reason of insanity after the Attorney General stipulated to that result. *Id.* In a later hearing to determine whether Rusthon should be released, the district court relied on the pre-trial finding of competency and did not order a new competency hearing. Rusthon, representing himself, behaved strangely during the hearing by "continuing to assert that the government was engaged in a plot to kill him and that Katie Couric may have been involved in the plot. He actively insinuated that law enforcement agents tampered with witnesses. He also alleged that he was attacked by fellow inmates." *Id.* at 903. The Fifth Circuit Court of

Appeals held that the district court abused its discretion when it did not *sua sponte* order another competency hearing upon observing this behavior. *Id.* at 903-04.

B. RELEVANT LAW REGARDING *PRO SE* STATUS.

A criminal defendant who is competent to stand trial has the right to proceed without counsel "when he voluntarily and intelligently elects to do so." *Faretta v. California*, 422 U.S. 806, 807 (1975). But "the right to self-representation is not absolute." *Martinez v. Court of Appeal of California*, 528 U.S. 152, 161 (2000). A trial court may "terminate self-representation or appoint 'standby counsel' – even over the defendant's objection – if necessary." *Id.* (citing *Faretta*, 422 U.S. at 834, n.46). At times, "the government's interest in ensuring the integrity and efficiency of the trial . . . outweighs the defendant's interest in acting as his own lawyer." *Id.* at 162. More recently, the United States Supreme Court has held that the Constitution does not forbid states from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. *Indiana v. Edwards*, 554 U.S. 164 (2008).

Thus, even where a criminal defendant is competent to stand trial, there may be other reasons that a trial court should deny or revoke *pro se* status. In *Davis v. Grant*, 532 F.3d 132 (2nd Cir. 2008), the Second Circuit Court of Appeals held that a state court's failure to revoke *pro se* status and appoint standby counsel after the defendant was involuntarily removed from the courtroom for disruptive behavior was not contrary to clearly established federal law. *Id.* at 145. The court made clear that it believed this decision was dictated by the confines of the Antiterrorism and Effective Death Penalty Act, which it described as "a highly deferential standard of review." *Id.* at 139. Had the court been free to decide the merits of the issue on a

"clean slate," it would have likely found that the state court's decision was erroneous.[10] *Id.* at 144.

The *Davis* court discussed several specific concerns favoring termination of *pro se* status where a defendant is absent from the courtroom. First, the court explained that

> respect for all of a defendant's Constitutional rights, including his Fifth Amendment right to due process of law, and his Sixth Amendment rights to an impartial jury and to be confronted with the witnesses against him support the appointment of standby counsel. . . . [A]n absent defendant can protect neither his constitutionally guaranteed trial rights nor his interest in the outcome of the proceeding.

Id. at 143 (citations omitted). Second, the court discussed the state and the public's interest in ensuring that criminal trials are fair and accurate:

> [i]f no counsel is appointed to represent an absent 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 accuracy of the truth-determining process."

Id. (citations omitted). The United States Supreme Court acknowledged this same concern in *Indiana v. Edwards,* when it found that a mentally ill defendant's lack of capacity undermines fair trial interests. *Id.* at 144. (citing *Edwards*, 554 U.S. 164 (2008)). Although *Edwards* specifically focused on a mentally ill *pro se* defendant, "the risk to the fairness and the accuracy of the trial is even greater when a *pro se* defendant is *physically absent* from the proceedings." *Id.* (emphasis in original). Third, the court found that the judiciary's interest in the appearance of fairness strongly favors the appointment of replacement counsel:

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[10]The court pointed out that "the Supreme Court has neither directly considered the question of law at issue nor ruled on a case with materially indistinguishable facts, the question here is reduced to whether the state court's failure to appoint standby counsel to represent Davis when he was involuntarily removed from the courtroom for disruptive conduct was an objectively unreasonable application of, or failure to extend, a legal principle clearly established by the Supreme Court." *Id.* at 141. The court further lamented that "[f]rankly, more guidance from the Supreme Court would be helpful." *Id.* at 140.

> We are hard-pressed to think of a circumstance more likely to make an observer question the fairness of a trial than the sight of an empty defense table.

Id.

C. THE TRIAL COURT HAD REASON TO BELIEVE PETITIONER WAS NO LONGER COMPETENT AND ABLE TO REPRESENT HIMSELF IN THE PENALTY PHASE.

Here, the trial court abused its discretion when it failed to order another competency hearing after petitioner refused to participate in the sentencing phase. Petitioner had already demonstrated throughout the trial that although he may have been able to ask some marginally relevant questions, he was also often forgetful, disoriented, unable to formulate coherent questions, and unable to understand and follow the court's instructions. Petitioner moved to dismiss two sets of court-appointed attorneys based on his continued belief that they were conspiring to harm him, sabotaging his case, and colluding with others to deny him a fair trial. As in *Rushton*, petitioner also questioned witnesses at trial about his belief that the state was engaged in a plot to kill him and that members of law enforcement had planted evidence and tampered with witnesses.

Petitioner's behavior and demeanor became increasingly bizarre prior to and at the start of the sentencing phase. He was disruptive in the courtroom in front of the jury, he refused to comply with the trial court's instructions, and he insisted on repeatedly chanting: "Blessed by Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." *See App. p.3550, ll.14-19; p.3550, l.22 – p.3551, l.4; p.3556, ll.3-5.* Both Dr. Schwartz-Watts and Dr. McKee had previously advised the trial court that competency is unfixed, particularly with petitioner's specific mental illness, and that the court should be alert to any changes in petitioner's behavior. *See, e.g., App. p.3988, ll.2-10 and p.4023, ll.13-17.* The State's experts did not disagree with this point. Thus, all of the factors relevant to the "reason to

believe" inquiry (irrational behavior, demeanor in the courtroom, and prior medical opinions) established that the trial court should have ordered a new competency examination.

Moreover, even if petitioner had been competent at the penalty phase of his capital trial, the trial court should nonetheless have terminated petitioner's *pro se* status and appointed standby counsel to represent him once it became clear that petitioner would not be present in the courtroom. All of the reasons discussed in *Davis* as favoring this result apply in petitioner's case. In fact, petitioner's situation weighs even more heavily in favor of a termination of *pro se* status because although Davis was removed from the courtroom because of his unwillingness to comply with courtroom rules, there was no evidence that Davis suffered from a mental illness. Petitioner, however, was *both* absent from the courtroom *and* suffering from a mental illness. Thus, the trial court further abused its discretion by ordering that petitioner be absent from the courtroom but failing to terminate petitioner's *pro se* status and appoint standby counsel to represent him in his absence.

D. PETITIONER WAS INCOMPETENT DURING HIS CAPITAL TRIAL.

Finally, petitioner's "right not to be tried or convicted while incompetent to stand trial," *Drope v. Missouri*, 420 U.S. 162, 172 (1975), was violated because petitioner was in fact incompetent during the proceedings. Dr. Rikki Lynn Halavonich, a forensic psychiatrist, met with petitioner on two occasions this year and reviewed a number of records related to petitioner, including relevant portions of the transcript from his capital trial. *See App. p.5258, ¶¶ 2-3.* Dr. Halavonich concluded, 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, 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 to assist in his defense were significantly impaired.

App. p.5258-5259, ¶ 5. Thus, petitioner's due process rights were violated because he was mentally incompetent during the trial proceedings.

III. PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW AND IS THEREFORE ENTITLED TO A NEW POST-CONVICTION RELIEF PROCEEDING.

A. PETITIONER'S PCR COUNSEL WERE NOT QUALIFIED UNDER S.C. CODE ANN. § 17-27-160(B).

The South Carolina Legislature enacted S.C. Code Ann. § 17-27-160 Capital Case Post-Conviction Procedures in 1996 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).[11] To qualify as an "opt-in" jurisdiction, a state is required to, *inter alia*, establish a mechanism to provide qualified and adequately compensated counsel in post-conviction proceedings and appoint counsel pursuant to that mechanism, per 28 U.S.C. § 2261(b), and offer counsel to all state prisoners under capital sentence, per 28 U.S.C. § 2261(c). The statute enacted by the legislature in response to this mandate 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

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[11] 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) meet 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 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.

> 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) (emphasis added).

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 proceedings; or, (2) 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. The statutory language is clear and unambiguous. Therefore, because petitioner's court-appointed counsel did not meet the clear standard for appointment 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.

B. PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

The United States Supreme Court has determined that indigent defendants have a constitutional right to counsel under the Sixth and Fourteenth Amendments at both the trial, *see Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963), and the initial appellate phases of a criminal prosecution. *See Douglas v. California*, 372 U.S. 353, 357-58 (1963). Failure to provide counsel at these stages reduces the proceedings to "a meaningless ritual" in violation of the Due Process Clause and the Equal Protection Clause. *Id.* at 357 ("where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor"). There is no currently recognized

constitutional right to counsel in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("[w]e have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions. . . . [T]he right to appointed counsel extends to the first appeal of right and no further").[12]

States are free, however, to enact legislation granting their citizens more rights than the federal Constitution provides. South Carolina has done so by granting death-sentenced inmates a statutory right to two appointed PCR attorneys, at least one of whom must be qualified through specialized training or experience. S.C. Code Ann. § 17-27-160(B). Once a state chooses to act in this regard, it must do so in a way that comports with the Due Process Clause and Equal Protection Clause guarantees of fundamental fairness and meaningful access to the courts. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (noting that although the Constitution does not require States to grant appeals as of right to criminal defendants, nonetheless if a State has created a criminal appellate process, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protections Clauses of the Constitution").

In *Evitts*, the Court held that a State could not penalize a criminal defendant by dismissing his direct appeal because his appointed counsel failed to follow mandatory appellate procedures. *Id.* at 397. In so ruling, the Court rejected the State's argument that since it need not provide an appeal in the first place, it could cut off a defendant's appeal without running afoul of the Due Process Clause. Noting that "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms," the Court

[12] But note that in South Carolina, PCR is the first place where a criminal defendant may raise a number of specific claims, such as ineffective assistance of trial counsel, since "off the record" claims are generally barred on direct review. Thus, PCR is the first "adequate opportunity to present [these] claims fairly in the context of the State's appellate process." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). As the Supreme Court intimated in *Coleman v. Thompson*, 501 U.S. 722 (1991), in these particular circumstances, inadequate PCR representation may constitute an "independent constitutional violation." *Id.* at 755.

reasoned that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Id.* at 400-401. The Court explained that its decision in *Evitts* was supported by the Equal Protection Clause as well as the Due Process Clause and that "each Clause triggers a distinct inquiry":

> Due Process emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. Equal Protection, on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

Id. at 405.

Evitts is consistent with a long line of precedent establishing that once the State creates a right designed to protect or enhance the reliability of a criminal trial or the individual liberty of criminal defendants, the voluntarily-created state right must be *meaningful*; it must be more than a "futile gesture." *Id.* at 397; *see, e.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that even though a state is not constitutionally required to provide direct review, once a state chooses to do so, it must provide indigent defendants with a free copy of the trial transcript in order to give them a fair opportunity to obtain an adjudication on the merits of the appeal); *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that a procedure whereby indigent defendants must demonstrate merit of their case before obtaining counsel on appeal "does not comport with fair procedure"); *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977) (asserting that it is "beyond doubt that prisoners have a constitutional right of access to the courts" which must be "adequate, effective, and meaningful").[13]

[13] *See also, Steele v. Kehoe*, 724 So.2d 1192, 1194 n.4 (Fla. App. 1998) ("Even if a defendant is not necessarily entitled to appointed counsel [in post-conviction proceedings], still if one is appointed for him or if he is able to obtain his own, he should be able to rely on such counsel's at least filing within the time period. . . . It is the

Here, petitioner's rights under the Due Process Clause were violated in three ways. First, neither of petitioner's PCR counsel was qualified under the state statutory requirements. South Carolina's legislature has chosen to provide death-sentenced inmates with a mandatory right to two appointed attorneys, at least one of whom must be qualified. S.C. Code Ann. § 17-27-160(B). Because the PCR court failed to comply with this statutory mandate, the appointment of petitioner's PCR counsel was nothing more than a "futile gesture." *Evitts*, 469 U.S. at 397.

Second, PCR counsel rendered wholly inadequate and completely ineffective assistance during petitioner's PCR proceedings. As explained above, counsel filed an amended application raising only a single claim for relief – whether the trial judge failed to make the proper findings to determine if the applicant knowingly and intelligently understood the implications of proceeding *pro se* – and failed to include a number of potentially meritorious claims evidenced from the record.[14] An adequate post-conviction investigation would likely uncover other viable

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defendant's right to have meaningful access to the judicial process that we urge is a due process right. If the defendant is denied the right to attack a presumptively valid criminal judgment because of counsel error . . . he has been denied due process"). Other courts have extended this principle to conclude that when a state statute grants a *mandatory* right to the assistance of capital post-conviction counsel, the Due Process Clause requires the full protections of the Sixth Amendment right to effective assistance from that counsel. *McKague v. Warden*, 912 P.2d 255, 258 n.5 (Nev. 1996) ("where a state law *entitles* one to the appointment of counsel to assist with an initial collateral attack after judgment and sentence, it is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel") (citation omitted).

[14] As explained in petitioner's Motion to Remand For Additional Post-Conviction Proceedings, undersigned counsel has not conducted a new post-conviction investigation. However, a 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).

(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 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 defendant's mental condition had deteriorated).

claims for post-conviction relief. However, PCR counsel failed to conduct *any* independent investigation at all. They did not interview trial counsel or obtain a copy of trial counsel's files. They did not secure any expert or investigative assistance or request available funds to do so. They did not request that petitioner be evaluated by a forensic psychiatrist or psychologist to investigate past or present competency issues. Essentially, PCR counsel simply called petitioner

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(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; and, b) the admission of evidence and argument regarding the conditions of confinement in general population. *See Payne 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's failure to conduct a competency hearing at sentencing; b) the trial judge's failure 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 petitioner was obtained in violation of *Miranda*.[10] *See Southerland v. State*, 524 S.E.2d 833 (S.C. 2002) (Appellate counsel found ineffective for failing to raise meritorious issues on appeal.

to the stand and let him ramble incoherently about his dissatisfaction with trial counsel. Thus, not only were PCR counsel unqualified under the state statutory requirements, they failed to do anything to protect petitioner's basic rights to a fundamentally fair post-conviction relief proceeding.

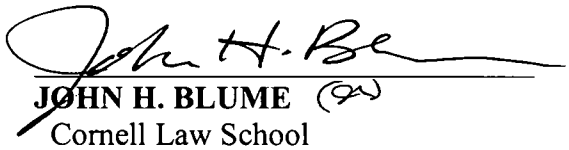
Third, this Court reassigned the case to Judge Carmen Mullen on December 17, 2008, after the PCR hearing had already occurred. Judge Mullen signed verbatim the state's order denying post-conviction relief. Despite the fact that Judge Mullen did not preside over the post-conviction relief hearing, the order contains a number of credibility findings. Petitioner's PCR counsel did not move for reconsideration or file a motion under Rule 59(e), S.C. R. Civ. Pro.

These three factors worked together to deprive petitioner of the basic fundamental fairness required by the Due Process Clause. Moreover, petitioner was deprived of a meaningful post-conviction review process because of his status as an indigent applicant, since non-indigent applicants could retain counsel who are both qualified and able to play the role necessary to ensure that the proceedings are fair. As such, petitioner's rights under the Equal Protection Clause were also violated.

CONCLUSION

For these reasons stated above, this Court should grant certiorari and allow full briefing of these issues.

Respectfully submitted,



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February 17, 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 Certiorari and a copy of the Appendix have been served upon Respondent's counsel by first class mail, postage prepaid, this 17th day of February, 2011, upon the following:

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