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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI FROM HORRY COUNTY
The Honorable Carmen T. Mullen
Court of Common Pleas

TYREE ROBERTS AKA,
ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. Supreme Court

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PETITIONER'S ISSUES PRESENTED

1. Whether the trial court erred in dEnying petitioner's motion under Batson v. Kentucky, 106 U.S. 1712 (1986).

2. 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.

3. 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 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.

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.

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[1] Respondent would note that some of the depositions that were submitted after the evidentiary hearing are not included in the Appendix.

(App. 5230-60). This Court denied the Motion on October 20, 2010. (App. 5297). Petitioner subsequently filed this Petition for Writ of Certiorari and a Petition for Writ of Habeas Corpus on February 18, 2011.

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

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[2] State v. Roberts, 369 S.C. 580, 581-83, 632 S.E.2d 871, 872-73 (2006)

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 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.

REASONS WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. THE PCR COURT CORRECTLY DENIED RELIEF UPON PETITIONER'S FREESTANDING CLAIM THERE WAS A BATSON VIOLATION

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). At the PCR hearing, Petitioner argued he was entitled to relief upon his Batson motion. (App. 4685-86, 4726-33)

The PCR Court denied relief upon this claim. Specifically, the PCR Court found Batson claims are not viable claims for relief in PCR as freestanding claims. The issues could have been raised at trial and in Petitioner's direct appeal. (App. 5216-17).

A. This Claim Was Not Proper for Consideration in Post-Conviction Relief

The PCR Court correctly 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 was properly denied and dismissed.

As properly noted by the PCR Court, post-conviction relief is not a substitute for remedies available at trial or on direct appeal. S.C. Code Ann. § 17-27-20(b). This Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (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); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). Altogether, this claim was properly denied by the PCR Court. Thus, a writ of certiorari should not be granted to review this argument for relief.

B. The issue as raised in this appeal is not preserved for review.

Even if this Court finds Petitioner's first argument is appropriate for post-conviction relief, 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 petition for writ of certiorari as part of his argument at trial. Since these arguments were not preserved for appellate review, these claims 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).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS BY NOT SUA SPONTE ORDERING A NEW COMPETENCY HEARING PRIOR TO THE SENTENCING PHASE. FURTHER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT TERMINATING PETITIONER'S PRO SE STATUS. FINALLY, PETITIONER DID NOT ESTABLISH HE WAS INCOMPETENT DURING HIS TRIAL PROCEEDINGS.

The Trial Court did not abuse its discretion in not ordering a new competency hearing prior to the sentencing phase.

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).

At 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 an opening statement that 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).

Petitioner then engaged in lengthy arguments and examinations of witnesses in an emotionally charged case. 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).

An issue arose 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. These issues are not preserved for appellate review.

Petitioner never directly raised a claim 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. Thus, to the extent Petitioner raises this claim in this petition, it should be denied. Plyler v. State, 309 S.C. 408, 424 S.E.2d 777 (1992) (issue must be both raised and ruled upon by the PCR Court to be preserved for appellate review); Rule 59(e), SCRCP (providing avenue for any party to move to alter or amend judgment); see Bostick v. Stevenson, 589 F.3d 160, 164 (4th Cir. 2009) (acknowledging same applied consistently and regularly in South Carolina after Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)). Thus, these arguments in the petition for writ of certiorari should be dismissed because they are not preserved for appellate review.

3. Petitioner's claims that he was incompetent are not appropriate for post-conviction relief.

The PCR Court did not directly rule upon a claim that Petitioner was incompetent in the sentencing phase. This claim was not directly raised to the PCR Court. In addressing Petitioner's claim that the trial court failed to make the proper inquiry and failed to ensure Petitioner knowingly, intelligently, and competently waived his right to counsel, the PCR Court did find Petitioner's challenge to his competence to stand trial was procedurally barred. (App. 5212). Petitioner failed to present any new evidence of incompetency at the PCR hearing. Id. Further, the PCR Court noted that a freestanding claim regarding competency can be raised on direct appeal, citing State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2003), and Sims v. State, 313 S.C. 420, 438 S.E.2d 253 (1993). (App. 5212-13). The PCR Court found there was no basis

upon which to overrule the trial court's determination on competency. (App. 5214-15). In light of the fact that no new evidence regarding Petitioner's competency was presented at the evidentiary hearing, any claim regarding Petitioner's competence would have been inappropriate for post-conviction relief because it could have been raised in the direct appeal. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (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); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). Altogether, this claim was properly denied by the PCR Court. Thus, a writ of certiorari should not be granted to review this argument for relief.

4. Petitioner's claims that the trial court abused its discretion in by failing to order a new competency hearing prior to sentencing and/or terminate petitioner's pro se status are without merit.

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.

Petitioner's claim that the trial court abused its discretion in not terminating Petitioner's pro se status is also without merit. 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. Altogether, Respondent submits that Petitioner's allegations about his demeanor in the courtroom are not supported by the record. The record clearly reflects that Petitioner was able to present a logical and coherent defense in the guilt phase. This was not an abuse of discretion.

5. 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 claim, Petitioner relies upon an affidavit from Dr. Rikki Lynn Halavonich, who claims

> [i] 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.

(App. 5258-59).

First, Respondent submits this 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. <u>See generally Drope</u>, 420 U.S. at 181, n. 17, 95 S. Ct. at 908, n. 17; <u>Pate v. Robinson</u>, 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). Furthermore, this affidavit was not presented to the PCR Court

Second, Dr. Halavonich's opinion is based upon her belief that there was some agreement that Petitioner suffered from a serious mental illness. (App. 5258, #4). 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. Furthermore, Halavonich indicates in both the letter and her affidavit that she did not review Petitioner's trial transcript in its entirety. It appears from her affidavit that she may not have even reviewed the testimony of Dr. Musick and Dr. Frierson that was presented at the Blair hearing, 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, this claim should be denied and dismissed with prejudice.

III. PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION UNDER THE LAW IN HIS POST-CONVICTION RELIEF ACTION.

1. Petitioner's allegations are not preserved for appellate review.

In his third set of arguments for relief in the petition, Petitioner contends that his due process rights and his rights to equal protection were violated by three actions taken in the post-conviction relief action. First, he submits his PCR counsel were not qualified under S.C. Code § 17-27-160(b). Second, he contends PCR counsel were ineffective in their representation during the post-conviction relief action in circuit court. Third, he argues there was a due process violation because Judge Mullen was assigned to rule upon the case after Judge Young heard the testimony at the evidentiary hearing. None of these claims were raised to the lower court. None of these claims were ruled upon by the lower court. Thus, these claims are not preserved for appellate review. Plyler v. State, 309 S.C. 408, 424 S.E.2d 777 (1992) (issue must be both raised and ruled upon by the PCR Court to be preserved for appellate review); Rule 59(e), SCRCP (providing avenue for any party to move to alter or amend judgment); see Bostick v. Stevenson, 589 F.3d 160, 164 (4th Cir. 2009) (acknowledging same applied consistently and regularly in South Carolina after Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)). These arguments in the petition for writ of certiorari should be dismissed because they are not preserved for appellate review.

2. PCR Counsel was qualified.

S.C. Code Ann. § 17-27-160(B) outlines the qualifications for appointed counsel in a capital post-conviction relief proceeding:

> If the applicant is indigent and desires representation by counsel, two 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 Supreme Court may promulgate additional standards for qualifications of counsel in capital post-conviction proceedings.

In her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 15th, 2003, Chief Justice Toal 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. (App. 5270-72). Mr. 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, Mr. 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.

3. Petitioner's Due Process and Equal Protection Rights Were Not Violated, Even If Counsel Was Not Qualified Under S.C. Code Ann. § 17-27-160(B).

Even if it is assumed that PCR trial counsel in this case were not qualified under the statute, Petitioner would not be entitled to relief upon his due process and equal protection claims. There is 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).

> In Finley [the United States Supreme Court] ruled that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" required the State to appoint counsel for indigent prisoners seeking state postconviction relief. The Sixth and Fourteenth Amendments to the Constitution assure the right of an indigent defendant to counsel at the trial stage of a criminal proceeding, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and an indigent defendant is similarly entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court. Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). But [the Court] held in Ross v. Moffitt, supra, 417 U.S., at 610, 94 S.Ct., at 2443, that the right to counsel at these earlier stages of a criminal procedure did not carry over to a discretionary appeal. . .

Murray v. Giarratano, 492 U.S. 1, 7, 109 S. Ct. 2765, 2768-69, 106 L. Ed. 2d 1 (1989). Further, in analyzing whether a violation of S.C. Code Ann. § 17-27-160 constituted a constitutional violation that could serve as cause for a procedural default for federal habeas purposes, the United States District Court held "the State's failure to follow § 17-27-160 is not a violation of Petitioner's constitutional rights because the rights granted to the Petitioner under that statute, if not given, do not penalize the Petitioner." Tucker v. Moore, 56 F. Supp. 2d 611, 615 (D.S.C. 1999) aff'd sub nom. Tucker v. Catoe, 221 F.3d 600 (4th Cir. 2000).

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)). Altogether, Petitioner has not established he is entitled to relief upon this allegation.

4. Petitioner has not established there were any due process violations.

First, Petitioner has not established that a due process violation resulted from this Court appointing Judge Mullen to handle this action after Judge Young heard the testimony. Respondent would note that Petitioner has not pointed to any legal support for this contention. Petitioner has not established how the change deprived him of due process.

Second, Petitioner has not established that PCR counsel was ineffective in this case. All Petitioner has done is assert a list of claims that he claims should have been raised instead of the claims raised at the evidentiary hearing. Petitioner has not established that he was prejudiced by PCR counsel not raising these claims. Further, since these claims have not been presented to a court for review prior to this filing, it has not been established that PCR counsel did not have strategic reasons for approaching the post-conviction relief action in the manner they did.[3] In light of the fact that these claims were not raised or addressed on the merits by

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[3] Respondent would note that in light of ineffective assistance of collateral counsel not being a normally recognized claim for post-conviction relief, it is not clear from this Court's

any court prior to this Petition, Respondent submits these claims should be dismissed because Petitioner has neither established he is entitled to relief upon these claims or that these claims are preserved for review.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny this petition for writ of certiorari. Respondent further requests any other relief this Court deems appropriate.

Respectfully submitted,

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June 6, 2011

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jurisprudence what standard would be applied to a claim of ineffective assistance of PCR counsel.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUN - 9 2011
S.C. Supreme Court

Certiorari from Beaufort County
Court of Common Pleas
Honorable Carmen T. Mullen, Circuit Court Judge

Case No. 2007-CP-07-715

TYREE ROBERTS, SK 6012
AKA ABDIYYAH BEN ALKEBULANYAHH,

Petitioner,

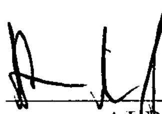
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of June, 2011, two copies of the Respondent's Return to Petition for Writ of Certiorari were served on counsel for the Petitioner, John H. Blume, Esq., Blume, Weyble & Norris, LLC, P.O. Box 11744, Columbia, SC 29211.



ALPHONSO SIMON, JR.

June 6, 2011