

Hopkins, Debbie

From: Al Simon <asimon@scag.gov>
Sent: Tuesday, May 19, 2015 5:33 PM
To: Hopkins, Debbie
Cc: 'Emily Paavola'; Lindsey S. Vann (lindsey@deathpenaltyresource.org)
Subject: Alkebulanyahh v. Byars et al, C/A No. 6:13-cv-00918-TLW
Attachments: Summary Judgment (00639412xD2C78).pdf; Order Ruling on Report and Recommendation (00639386xD2C78).pdf; Supplemental Report and Recommendation (00576440xD2C78).pdf; Report and Recommendation (00482037xD2C78).pdf

This email is in regards to Abdiyyah Ben Alkebulanyahh vs. William Byars, Jr., Commissioner South Carolina Department of Corrections; Wayne C. McCabe, Warden of Lieber Correctional Institution, C/A No. 6:13-cv-00918-TLW, a federal habeas action in a capital case. Alkebulanyahh, formerly known as Tyree Roberts, was convicted and received two death sentences for the murders of two Beaufort County Sheriff Deputies, Deputy Dyke Coursen and Deputy Dana Tate.

This morning, the Honorable Terry L. Wooten, Chief United States District Judge for the United States District Court for the District of South Carolina, issued an Order accepting both Reports and Recommendation and overruling Alkebulanyahh's objections to the Reports and Recommendations. Judge Wooten also denied a Motion for a Stay that had been filed after the first Report and Recommendation was issued. Judge Wooten subsequently entered Summary Judgment in favor of Respondents and dismissed Alkebulanyahh's federal habeas action.

On November 5, 2014, the Honorable Kevin F. McDonald, United States Magistrate Judge, filed a Report and Recommendation recommending that the Respondents' Motion for Summary Judgment be granted and Alkebulanyahh's federal habeas petition be denied. An evidentiary hearing was held on January 29, 2015 before Judge McDonald in regards to one claim in the federal habeas petition. After post-trial briefing, Judge McDonald issued a Supplemental Report and Recommendation on March 3, 2015. In the Supplemental Report and Recommendation, Judge McDonald recommended that summary judgment be granted on that last claim in the federal habeas petition.

Please find attached the Order accepting the Reports and Recommendations; the original and supplemental reports and recommendations; and the summary judgment order. At this time, Alkebulanyahh may seek to alter or amend the judgment by the District Court, and he may seek further review of the District Court's Order in the Fourth Circuit Court of Appeals.

Please let me know if you have any questions.

Sincerely,

Al Simon

Alphonso Simon Jr.
Assistant Attorney General
South Carolina Attorney General's Office
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MAY 20 2015

S.C. Supreme Court

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Abdiyyah Ben Alkebulanyahh

Petitioner

v.

William Byars, Jr., Commissioner South Carolina

Department of Corrections; Wayne C. McCabe,

Warden of Lieber Correctional Institution,

Respondent

)

)

)

)

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Civil Action No. 6:13-cv-918-TLW

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the petitioner *(name)* _____ recover from the respondent *(name)* _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the petitioner recover nothing, the action be dismissed on the merits, and the respondent *(name)* _____ recover costs from the petitioner *(name)* _____.

☒ other: The Respondents' motion for summary judgment is granted.

This action was *(check one)*:

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

☒ decided by the Honorable Terry L. Wooten on the record.

Date: May 19, 2015

CLERK OF COURT

s/Kathy Rich, deputy clerk

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Abdiyyah Ben Alkebulanyahh	)	
(<i>fka</i> Tyree Alphonso Roberts),	)	C/A No. 6:13-cv-00918-TLW-KFM
	)	
Petitioner,	)	
	)	SUPPLEMENTAL REPORT
vs.	)	AND RECOMMENDATION
	)	
William R. Byars, Jr., <i>Commissioner, South</i>	)	
<i>Carolina Department of Corrections; Wayne</i>	)	
<i>C. McCabe, Warden of Lieber Correctional</i>	)	
<i>Institution,</i>	)	
	)	
Respondents.	)	
	)	
	)	

This is a capital habeas corpus action brought pursuant to 28 U.S.C. § 2254. Petitioner filed his petition for writ of habeas corpus on February 13, 2014 (ECF No. 31), and Respondents moved for summary judgment on April 17, 2014 (ECF No. 45). On November 5, 2014, in accordance with 28 U.S.C. § 636(b)(1)(A)(B) and Local Civ. Rule 73.02(B)(2)(c) (D.S.C.), the undersigned issued a Report and Recommendation (“Report”) on Respondents’ motion. (ECF No. 75).

That Report recommends the court dismiss the petition as procedurally barred. However, the Report also reviews the merits of Petitioner’s claims and recommends that, should the court not find the petition procedurally defaulted, it should grant Respondents’ motion for summary judgment as to all of Petitioner’s habeas grounds, except for one portion of Ground Ten.

The relevant portion of Ground Ten alleges that Petitioner was deprived of his Sixth and Fourteenth Amendment rights to a fair trial because one juror consulted with her minister during the trial. To support this claim, Petitioner provided the court with an affidavit from a law student

who, along with three other students, interviewed several jurors from Petitioner's case as part of a law school clinic. (ECF No. 44-40 at 89-90). The affidavit did not identify the juror, but provided that "one juror stated that in addition to praying, she asked a minister for guidance on how to make a decision during the sentencing phase." (*Id.*).

The Report found that, in light of the affidavit, Petitioner's claim may warrant additional evidentiary development under *Remmer v. U.S.*, 347 U.S. 227 (1954). *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014), and *Hurst v. Joyner*, 757 F.3d 389 (4th Cir. 2014). Respondents specifically objected to this portion of the Report, asserting that the affidavit did not provide enough information to warrant an evidentiary hearing. (ECF No. 79). On December 8, 2014, the court allowed Petitioner twenty days to submit an affidavit from the relevant juror further detailing her contact with her minister during Petitioner's trial. (ECF No. 81).

In response, on December 19, 2014, Petitioner filed an affidavit from Cynthia Milanesi, stating that she was a juror in Petitioner's trial and that, "[b]etween being selected as a juror and returning to the court for the beginning of the trial and sequestration," she met with an Episcopalian priest, Father Law, "about making the decision on the death penalty." (ECF No. 87).¹ Ms. Milanesi states that she contacted Father Law because she "knew it would be difficult for [her] to make the sentencing decision in a death penalty case and wanted to know what [her] faith would say about voting in favor of the death penalty." (*Id.*). According to the affidavit, Father Law told Ms. Milanesi that she "had a duty to follow the law and [her] faith would allow [her] to vote for the death penalty. He said that God would not hold it against [her] if [she] had to vote for the death penalty." (*Id.*).

¹ The undersigned notes that this contact occurred despite the trial judge's numerous instructions that the potential jurors were not to talk to anyone about the case. (See App. 129, 220, 586, 1329).

Based on this affidavit and relevant case law, the court found that Petitioner was entitled to an evidentiary hearing limited to the issue of whether the communication between Ms. Milanesi and Father Law had a substantial and injurious effect or influence in determining the jury's verdict in Petitioner's trial. (ECF No. 89). Accordingly, on January 29, 2015, the undersigned held an evidentiary hearing for the parties' and the court to hear Ms. Milanesi's testimony and further explore this issue. The undersigned took the matter under advisement and allowed the parties to submit post-hearing briefs after the filing of the official transcript of the hearing. (ECF No. 101). Both parties have submitted their briefs (ECF Nos. 106, 107), and this matter is now before the court for a Supplemental Report and Recommendation, limited to whether Petitioner is entitled to relief on this one claim.

Legal Standard²

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to trial by an impartial jury. *See* U.S. Const. amend VI. An impartial jury is one that arrives at its verdict "based on the evidence developed at trial" and without external influences. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "No right touches more the heart of fairness in a trial," *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988), "and this right applies equally to sentencing proceedings that are tried to a jury." *Barnes v. Joyner*, 751 F.3d 229, 240 (4th Cir. 2014).

However, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Rather, a court must determine whether the contact had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). "Under

² The undersigned incorporates by reference the legal standard for summary judgment, the habeas corpus standard of review, and the law applicable to exhaustion and procedural default in habeas matters as stated in the Report. (*See* ECF No. 75 at 12-16).

this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in ‘actual prejudice.’” *Id.* at 637. In this context, *Remmer*’s presumption of prejudice does not apply. *Barnes*, 751 F.3d at 252-53. Rather, to succeed on his claim, the petitioner must “affirmatively prove actual prejudice by demonstrating that the jury’s verdict was tainted by the extraneous communication.” *Id.* at 253.

Should the court find itself “in ‘grave doubt’ as to the harmlessness of an error, the habeas petitioner must prevail.” *Fullwood v. Lee*, 290 F.3d 663, 679 (4th Cir. 2002). “‘Grave doubt’ exists when, in light of the entire record, the matter is so evenly balanced that the court feels itself in ‘virtual equipoise’ regarding the error’s harmlessness.” *Id.*

Discussion

At the evidentiary hearing, the juror, Ms. Milanesi, testified that she ran a cleaning service before, during, and after Petitioner’s trial. After Ms. Milanesi filled out the juror questionnaire and participated in individual *voir dire*, but before she was selected as a juror on Petitioner’s case, she contacted one of her clients, Father Law, an Episcopalian Priest. Ms. Milanesi was not a member of Father Law’s church and only attended services there on occasion. Ms. Milanesi stated that, in general, Father Law did not counsel her religiously, but that they did have religious conversations and that religion plays a very important role in her life.

Ms. Milanesi testified that, on this occasion, she wanted Father Law to pray with her for strength to find the truth and that she was concerned that God might not forgive her if she had to vote for the death penalty. Father Law told Ms. Milanesi to follow the law and that God would forgive her. According to Ms. Milanesi, she and Father Law did not discuss the case at all. She

did not know the facts of the case at the time of their conversation, only that it was a big case and that she was going to be sequestered.

While the undersigned agrees with Petitioner that Ms. Milanesi's contact with Father Law constitutes an impermissible external influence, the record does not establish that this contact had a substantial and injurious effect or influence in determining the jury's verdict or that Petitioner was actually prejudiced in any way. Ms. Milanesi did not indicate that her discussion with Father Law influenced her decisions or that she shared details of her discussion with other jurors. Further, it does not appear that Father Law voiced any opinion regarding the actual case, how Ms. Milanesi should vote, or how Ms. Milanesi should go about reaching her decisions. The record shows only that Father Law advised Ms. Milanesi to follow the law—the same instruction she would receive from the court throughout the trial—without further explanation, elaboration, or direction. There is no indication that Father Law even pointed Ms. Milanesi to specific Bible passages or referenced the Bible at all.

Petitioner asserts that without Father Law's advice, Ms. Milanesi may not have been willing to serve as a juror, resulting in a different juror taking her place, or that Ms. Milanesi may have been more hesitant to vote for the death penalty. However, these assertions are speculative, are not supported by the record, and do not demonstrate that Ms. Milanesi's conversation with Father Law tainted the jury verdict and actually prejudiced Petitioner. To the extent Father Law may have been an influence on Ms. Milanesi, the record does not show that his limited advice to Ms. Milanesi – which consisted of advising her to follow the law - was prejudicial to Petitioner. *See, e.g., Frye v. Warden, San Quentin State Prison*, No. 2:99-cv-0628 LKK CKD, 2013 WL 6271928, at *74-75 (E.D. Cal. Dec. 4, 2013) (finding external contact not objectively prejudicial and no substantial and injurious effect or influence in determining jury's

verdict where juror contacted minister and minister told juror to follow the law). Nothing in the record suggests that Ms. Milanesi did anything other than dutifully follow the law as the trial court instructed. Accordingly, as Ms. Milanesi's contact with Father Law did not have a substantial and injurious effect or influence in determining the jury's verdict, Petitioner is not entitled to habeas relief.

Recommendation

For the foregoing reasons, the undersigned recommends that, should the court reach the merits of Ground Ten, it grant Respondents' motion for summary judgment as to this claim.

s/Kevin F. McDonald
United States Magistrate Judge

March 3, 2015
Greenville, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Abdiyyah Ben Alkebulanyahh	)	
(<i>fka</i> Tyree Alphonso Roberts),	)	C/A No. 6:13-cv-00918-TLW
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
William Byars, Jr., <i>Commissioner South</i>	)	
<i>Carolina Department of Corrections</i> ; Wayne	)	
C. McCabe, <i>Warden of Lieber Correctional</i>	)	
<i>Institution</i> ,	)	
	)	
Respondents.	)	
	)	
	)	

ORDER

This is a capital habeas corpus action brought pursuant to 28 U.S.C. § 2254. Petitioner Abdiyyah Ben Alkebulanyahh (“Petitioner”) filed this petition for writ of habeas corpus on February 13, 2014, (ECF No. 31) and Respondents moved for summary judgment on April 17, 2014, (ECF No. 45). On November 5, 2014, in accordance with 28 U.S.C. § 636(b)(1)(A)(B) and Local Rule 73.02(B)(2)(c), DSC, United States Magistrate Judge Kevin McDonald issued a Report and Recommendation (“Report”) on Respondents’ motion. (ECF No. 75).

The Report recommends dismissing the petition as procedurally barred. However, to aid the court, the Report also reviews the merits of Petitioner’s claims. Based on that merits review, the Report recommends that, should the Court not find the petition procedurally defaulted, the Court should grant Respondents’ motion for summary judgment as to all of Petitioner’s habeas grounds, except one portion of Ground Ten, in which Petitioner alleges that he was denied his Sixth and Fourteenth Amendment right to a fair and impartial jury because one juror consulted

with a minister regarding the case. Both parties filed objections to the Report (ECF Nos. 76, 79), and Petitioner responded to Respondents' objections (ECF No. 85).

As to Ground Ten, specifically, Respondents objected to the Magistrate Judge's finding that Petitioner made a sufficient showing to warrant additional evidentiary development regarding a juror's alleged contact with a minister. To further its review of Ground Ten, the District Court allowed Petitioner to submit an affidavit from the juror providing more detail as to the alleged contact. (ECF No. 81). Petitioner supplied an affidavit on December 19, 2014. (ECF No. 87). Based on that affidavit, filings by the parties, and the relevant case law, the Magistrate Judge then conducted an evidentiary hearing on January 29, 2015. (ECF No. 95). Following the hearing, counsel briefed the issue. (ECF Nos. 106, 107). On March 3, 2015, the Magistrate Judge issued a Supplemental Report and Recommendation (ECF No. 110), recommending summary judgment also be granted on Ground Ten. Petitioner timely objected to the Supplemental Report and Recommendation. (ECF No. 112).

On November 21, 2014, Petitioner mailed a second application for post-conviction relief ("PCR") to the Beaufort County Court of Common Pleas¹ and moved to stay these federal proceedings. (ECF No. 77). The motion to stay has been fully briefed and is ripe for the Court's review. (See ECF Nos. 83, 86, 88).²

I. Factual and Procedural Background

Petitioner was indicted in March 2002 for two counts of murder. The State timely served notice of intent to seek the death penalty and notice of evidence in aggravation pursuant to South Carolina Code §§ 16-3-20(B) and 16-3-26(A). Initially, Gerald Kelly and Sean Thornton of the

¹ Petitioner's application for PCR was filed on November 24, 2014. On December 17, 2014, the South Carolina Supreme Court assigned Judge R. Knox McMahon to maintain jurisdiction over and hear any matters regarding the application. See State v. Alkebulanyahh, No. 2014-CP-07-02994.

² See analysis at III.B, p. 8.

Beaufort County Public Defender's Office represented Petitioner. However, Petitioner moved to represent himself and the trial court granted his motion. Kelly and Thornton stayed on as standby counsel. Solicitor Randolph Murdaugh and Assistant Solicitors Duffy Stone and Angela Tanner – all of the Solicitor's Office for the Fourteenth Judicial Circuit – represented the State.

The Honorable Daniel F. Pieper, Circuit Court Judge, presided over the trial, which began on October 10, 2003. On October 20, 2003, the jury convicted Petitioner of two counts of murder, and on October 22, 2003, the jury recommended a sentence of death. Judge Pieper adopted the jury's recommendation.

Petitioner – then represented by Acting Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Robert M. Dudeck – timely filed a notice of appeal with the Supreme Court of South Carolina. On July 24, 2006, after considering full briefing and oral argument, the Supreme Court of South Carolina affirmed Petitioner's convictions and sentence. See State v. Roberts, 632 S.E.2d 871 (S.C. 2006). Petitioner, through counsel, filed a Petition for Rehearing, which the South Carolina Supreme Court denied on August 11, 2006. Remittitur issued the same day.

On November 9, 2006, Petitioner filed a Petition for Writ of Certiorari in the Supreme Court of the United States, which the Court denied by letter order on March 19, 2007.

On March 12, 2007, Petitioner filed a *pro se* PCR application. The Honorable Roger M. Young, Circuit Court Judge, was assigned to Petitioner's PCR action on May 4, 2007. Judge Young appointed Carl B. Grant and Glenn Walters to represent Petitioner on PCR. On February 8, 2008, PCR counsel filed an amended PCR application. On October 12-13, 2008, after the application was fully briefed, Judge Young held an evidentiary hearing. On December 17, 2008, the Supreme Court of South Carolina rescinded its order assigning Judge Young and transferred

the PCR action to the Honorable Carmen T. Mullen, Circuit Court Judge. Judge Mullen dismissed the PCR action with prejudice on September 7, 2009.

Thereafter, Petitioner – represented by John Blume³ – timely appealed and filed a motion to remand the case for additional post-conviction proceedings. The South Carolina Supreme Court denied the motion on October 20, 2010. In response, Petitioner filed a Petition for Writ of Certiorari and a state habeas petition on February 18, 2011. The Supreme Court of South Carolina denied both petitions in one-sentence orders on February 22, 2013. Petitioner’s state petitions for certiorari and habeas corpus raised the same grounds Petitioner raises in his federal habeas petition.

II. Standard of Review

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. At the summary judgment stage, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. Id. at 255. However, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” Id. at 248.

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere

³ John Blume, along with Emily Paavola and Lindsey Sterling Vann, also represents Petitioner in this matter.

allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(e).

In addition, in accordance with the Antiterrorism and Effective Death Penalty Act (“AEDPA”), claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was “contrary to, or involved an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d)(1), (2). When reviewing a state court's application of federal law, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Williams v. Taylor, 529 U.S. 362, 411 (2000); see also Harrington v. Richter, 562 U.S. 86, 100 (2011). Accordingly, a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. Richter, 562 U.S. at 102.

Further, under the AEDPA, a state court's decision “must be granted a deference and latitude that are not in operation” when the case is being considered on direct review. Id. at 785. Thus, state court factual determinations are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). “If this standard is difficult to meet, that is because it was meant to be.” Richter, 562 U.S. at 102. Section 2254(d) codifies the view that habeas corpus is a “guard against extreme malfunctions

in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Id. (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

III. Discussion

In conducting this review, the Court applies the following standard:

The magistrate judge makes only a recommendation to the Court, to which any party may file written objections The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992) (citations omitted).

In light of the standard set forth in Wallace, the Court has reviewed, de novo, the Report and Supplemental Report, the objections, and the record. The Report sets forth in detail the relevant facts and standards of law on this matter, and those facts and standards are incorporated by reference here. Below, the Court first considers the procedural posture of the case, followed by an analysis of Petitioner's claims.

A. Exhaustion and Procedural Bar

The Report recommends dismissing the petition as procedurally barred because, while the Petitioner has *technically* exhausted his available state court remedies, he failed to *properly* exhaust them as to the claims he now raises in his federal petition. (ECF No. 75, pp. 17-21). Furthermore, his attempts to show cause and prejudice for this failure are unavailing, as

discussed by the Magistrate Judge. (See id. at 18-20). Petitioner objects to the Report's findings on several grounds. The Court has reviewed those objections and the relevant case law and agrees with the Report.

Petitioner argues that his case is virtually indistinguishable from Harrington v. Richter, 562 U.S. 86 (2011), where the United States Supreme Court found that the California Supreme Court's summary dismissal of a habeas petition constituted a merits dismissal. This Court disagrees. The Richter Court specifically stated that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits *in the absence of any indication or state-law procedural principles to the contrary.*" 562 U.S. at 99 (emphasis added). Such state law procedural principals apply to Petitioner's case, distinguishing it from Richter. Specifically, in South Carolina, in the absence of extraordinary reason for the Court to exercise original jurisdiction stated in the filing(s) and supported by affidavits, the state supreme court will not entertain matters in its original jurisdiction where the matter can be entertained in the state trial courts. Rule 245 SCACR (renumbered from Rule 229 effective April 29, 2009); Simpson v. State, 329 S.C. 43 (1998); Key v. Currie, 305 S.C. 115, 116 (1991). Thus, as this Court has found, a state habeas petition filed in the South Carolina Supreme Court's original jurisdiction that does not provide the court with a well-supported extraordinary reason for the exercise of original jurisdiction "is an insufficient mechanism for review on the merits [to] properly present the issue to the state's highest court." McFarland v. Warden, Lieber Correctional Inst., C.A. No. 6:07-588-TLW-WMC, 2008 WL 697152, at *6 (D.S.C. March 11, 2008). The United States Supreme Court's ruling in Richter does not alter the existence or effect of this state-law procedural principle.

In this case, Petitioner's state habeas petition does not provide an extraordinary reason or supporting affidavits, nor does it reference Rule 245 or either of the primary cases discussing the rule. (See ECF No. 44-40). Thus, the state habeas petition did not comply with a state-law procedural principle and the Court does not presume that the South Carolina Supreme Court's summary dismissal of that petition was on the merits.

In addition, Petitioner asserts that his case should not be procedurally barred because this type of procedural bar is not based on independent state law grounds, nor is it consistently applied. However, Petitioner's argument assumes that the procedural bar derives from the state court's standard for granting a writ of habeas corpus, rather than from the procedural rule discussed above. Petitioner contends that, to grant or deny the writ, the state court must decide whether the petitioner has made a *prima facie* showing of the denial of a constitutional right, thus deciding a matter of federal law. Yet, if South Carolina Appellate Rule 245 applies, the state court would not reach this question.

Regarding consistency, Petitioner argues that the South Carolina Supreme Court has inconsistently resolved state habeas petitions filed in its original jurisdiction involving capital punishment. (See ECF No. 64 at 13-14). Petitioner does not, however, note whether the petitions filed in those cases complied with Rule 245, nor does Petitioner mention the rule in his brief discussion of this issue. Thus, the Petitioner has not made a showing that the state law rule is inconsistently followed.

Thus, for the reasons stated above and in the Report, the Court finds that all of Petitioner's claims are procedurally barred. However, for the sake of a thorough review in such an important matter, the Court has also analyzed the merits of Petitioner's claims.

B. Motion to Stay

Under Rhines v. Weber, 544 U.S. 269 (2005), a district court has discretion to stay a mixed petition to allow a petitioner to present his unexhausted claims to the state court and then return to federal court for review of his perfected petition. However, because staying a petition “frustrates AEDPA’s objective of encouraging finality” and “decreas[es] a petitioner’s incentive to exhaust all his claims in state court prior to filing his federal petition,” stay is only appropriate when: (1) “the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court”; (2) the petitioner’s unexhausted claims are not plainly meritless; and (3) the petitioner demonstrates that he has not engaged in abusive litigation tactics or intentional delay. Id. at 277-79.

In his motion to stay, Petitioner asserts that, if the South Carolina Supreme Court did not adjudicate his claims on the merits, then his claims are not exhausted because, based on other recent cases, Petitioner may still have the opportunity to pursue his recently filed successive PCR application. To support his assertion, Petitioner points to five stayed capital habeas actions in this district—Robertson v. Ozmint, C/A No. 2:11-63-TMC-MGB; Terry v. Byars, C/A No. 4:12-1798-SB-TER; Wood v. Byars, C/A No. 0:12-3532-DCN-PJG; Bryant v. Byars, C/A No. 1:13-2665-BHH-SVH; and Sigmon v. Byars, C/A No. 8:13-1399-RBH-JDA. In each of these matters, the petitioner filed a successive PCR application in state court containing previously unexhausted claims. As well, in each case, the Court found good cause under Rhines to stay the matter and hold the petition in abeyance until the petitioner had an opportunity to exhaust all of his claims in state court.

However, in relying on these cases, Petitioner overlooks a critical distinction—each of the five stayed cases involves a mixed petition.⁴ In this case, for the reasons stated above and in the Report, all of Petitioner’s claims are technically exhausted. Accordingly, Rhines does not apply here. Further, under these circumstances, staying this federal action would not comport with AEDPA’s goal “to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases.” Rhines, 544 U.S. at 276 (internal citation omitted).

In addition, the Court agrees with the Report that Petitioner has failed to show good cause for or actual prejudice by the procedural default. For these reasons, the Court DENIES Petitioner’s Motion to Stay. (ECF No. 77).

C. Grounds One – Three

In Grounds One through Three, Petitioner raises procedural and substantive competency claims, including that the trial judge had an affirmative duty to inquire further into Petitioner’s competency prior to the start of his capital sentencing proceeding (Ground One), that Petitioner was, in fact, incompetent throughout the guilt-or-innocence phase of his trial (Ground Two), and that the trial judge failed to secure a knowing, voluntary, and intelligent waiver of Petitioner’s right to present mitigating evidence (Ground Three).

⁴ See Petition, ECF No. 20 at 18-26, Robertson v. Ozmint, C/A No. 2:11-63-TMC-MGB (specifically identifying grounds V-XI as unexhausted claims and as pending in the petitioner’s second PCR application); Petition, ECF No. 16 at 17-34, Terry v. Byars, C/A No. 4:12-1798-SB-TER (specifically identifying grounds II-V as unexhausted claims and as pending in the petitioner’s second PCR application); Petition, ECF No. 85 at 14-40, Wood v. Byars, C/A No. 0:12-3532-DCN-PJG (stating that portions of grounds IV-VI had not been exhausted and that grounds VII-X were not exhausted – all of these claims were raised in a second PCR application filed the day before the federal habeas petition); Petition, ECF No. 14 at 15-18, 22-25, 27-29, Bryant v. Byars, C/A No. 1:13-2665-BHH-SVH (stating that grounds V, VI, VIII, IX, and XI were not exhausted – those claims were the subject of a second PCR application filed two days before the federal petition); Amended Petition, ECF No. 131 at 18-48, Sigmon v. Byars, C/A No. 8:13-1399-RBH-JDA (grounds VII-XI were the result of an independent Martinez investigation and had not been exhausted in state court – those claims were the subject of a second PCR application filed less than a month after the amended federal petition).

Regarding the Report's analysis of Petitioner's procedural competency claim, Petitioner objects to the Report's finding that the circumstances surrounding Petitioner's trial at no point raised a bona fide doubt as to Petitioner's competency. Petitioner asserts that the Report: (1) mischaracterizes his claim, (2) bases its findings on cherry-picked portions of the record and erroneous conclusions, and (3) improperly relies on Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000), and Wise v. Bowersox, 136 F.3d 1197 (8th Cir. 1998).

In his objections, Petitioner states his assertion in Ground One as a claim that, "prior to the start of his capital sentencing proceeding, the totality of the circumstances raised a *bona fide* doubt about [Petitioner's] competency and triggered the trial court's affirmative duty to inquire further." (ECF No. 76, p. 15). Petitioner suggests that the Report misunderstood this claim, as evidenced by its conclusion that the trial court's initial finding of competency, after the Blair hearing and before the trial proceeded, was not unreasonable. However, after making this conclusion, the Report goes on to discuss verbal exchanges and events that took place during the trial and sentencing phase, and finds that the Supreme Court of South Carolina could have reasonably found that these circumstances did not create an affirmative duty for the trial court to inquire further into Petitioner's competency. Thus, the Court finds that the Report fully and correctly analyzed Petitioner's claim.

Petitioner also objects to the Report's findings on this ground as lacking explanation and relying on: "(1) [the Magistrate Judge's] effort to slice up the relevant evidence into narrow, rigid pieces; and, (2) his erroneous conclusion that all of Petitioner's actions were based on 'calculated, rational decisions.'" (ECF No. 76, p.15). According to Petitioner, the Report fails to address or even acknowledge relevant evidence of Petitioner's incompetency, including: (1) trial counsel's consistent position that Petitioner's competency was in question; (2) prior psychiatric

opinion evidence that Petitioner was incompetent; (3) Petitioner's behavior throughout the pre-trial and trial proceedings; (4) Petitioner's sudden decision to waive the twenty-four hour "cooling off" period; (5) Petitioner's refusal to participate in the sentencing phase; and (6) Petitioner's verbal disruption of the proceedings with a repeated religious chant. However, the Report explicitly mentions each of these pieces of evidence and bases its findings on all of them, "taken individually *or together*." (ECF No. 75, pp. 27-29 (emphasis added)).

Further, after conducting its own analysis of this claim, the Court agrees with the Report's findings and analysis. The issue over the Petitioner's competency claim "concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial." Drope v. Missouri, 420 U.S. 162, 174-75 (1975). To prevail on this type of procedural competency claim, Petitioner "must establish that the state trial court ignored facts raising a 'bona fide doubt' regarding the petitioner's competency to stand trial." Burket v. Angelone, 208 F.3d 172, 192 (4th Cir. 2000) (citing Pate v. Robinson, 383 U.S. 375, 384-86 (1966)). In analyzing this claim, "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant." Drope, 420 U.S. at 180.

The evidence relevant to Petitioner's competency and known to Judge Pieper between the guilt phase and sentencing phase and shortly after the beginning of the sentencing phase, when Petitioner asserts his competency was most in question, included: (1) the evidence presented at the Blair hearing, including the prior medical opinions of four expert witnesses; (2) Petitioner's behavior at that time, including his statements that he did not want to be present for the sentencing phase and did not want to present mitigating evidence, his attempt to waive the

cooling off period, his threats to disrupt the proceeding, and his actual outburst; and (3) Petitioner's demeanor up to that point.

At the Blair hearing, Judge Pieper heard from four experts. Dr. Schwartz-Watts, a defense expert in forensic psychiatry, met with Petitioner on three occasions, interviewed Petitioner's mother, and reviewed Petitioner's Department of Corrections records, school records, and some of his own writings. Based on her review, Dr. Schwartz-Watts diagnosed Petitioner with a bipolar disorder. (App. 3983, 5131). Dr. Schwartz-Watts also emphasized the fluid nature of competency and the need for continued monitoring. (App. 3988-89).

In her written report and at the hearing, Dr. Schwartz-Watts based her evaluation that Petitioner did not have present sufficient capacity to assist his attorney in his defense, in part, on Petitioner's paranoia and refusal to work with his defense team. She recognized that Petitioner had strong ideas about how his case should be presented and explained that her concern was not about the decisions Petitioner would make in representing himself, but the reasoning behind those decisions. (See App. 4000 ("I have no problem with Mr. Alkebulanyahh wanting to represent himself. I have no problem with Mr. Alkebulanyahh wanting to represent himself because he thinks he can do a better job than his attorneys. I have a problem with him wanting to represent himself when he thinks his attorneys are part of the Masons, they work with Mr. Murdaugh, they collude with Mr. Murdaugh to make sure that he doesn't get a fair trial so that he's persecuted because of his religious belief.")). She testified that Petitioner told her about some of the experts he wanted to present in the guilt phase and stated that some of them were "incredibly brilliant," that they were "pertinent," and "well thought of," (app. 4008), and that "[i]ntellectually . . . Mr. Alkebulanyahh has very good ideas about his case," (app. 4012). Dr. Schwartz-Watts's primary concern regarding Petitioner's ability to assist in his defense centered

on Petitioner's refusal to acknowledge his own mental illness. Dr. Schwartz-Watts expressed her concern that this refusal prevented him from effectively weighing available options for a defense, which could become an issue should the trial proceed to the sentencing phase. (App. 3987 ("he would not even consider in any way, shape, or form any forms of mitigation that have to do with possible mental illness . . . he won't even consider those kinds of issues and to me that's what renders him unable to assist himself"); App. 4008-09 ("the concern I have is that if you go to the area of capacity where he has to weigh options, weigh defenses that are available to him, specifically in the sentencing phase if this trial were to proceed to that point, it's my opinion his mental illness prevents him from even exploring those options"))).

Because Petitioner refused to meet with her the morning of the hearing, Dr. Schwartz-Watts would not testify as to a definite opinion regarding Petitioner's competency. (App. 3990). However, in her written evaluation, Dr. Schwartz-Watts stated her opinion that Petitioner did "not have present sufficient capacity to assist his attorney in his defense due to his mental illness." (App. 5132).

Dr. McKee, a defense forensic psychology expert, did not meet with Petitioner. Rather, his opinions were based on his review of the tests conducted by the State's experts. (App. 4019-20). Dr. McKee testified that Petitioner's elevated score on one scale made him question the validity of a diagnosis associated with that test, (app. 4022), and testified to the fluid nature of competency, (app. 4023). However, Dr. McKee offered no opinion regarding Petitioner's ability to assist in his own defense or represent himself. (App. 4025).

Dr. Frierson, the State's psychiatry expert, met with Petitioner four times. Based on his evaluation and interviews, Dr. Frierson diagnosed Petitioner with a personality disorder with narcissistic and antisocial traits, which Dr. Frierson stated is "not considered a major mental

illness” and would not prevent Petitioner from conforming his actions to the law. (App. 4031). Dr. Frierson addressed Dr. McKee’s concerns about Petitioner’s elevated test scores, (app. 4031-32), and expressed his opinion that Petitioner did not suffer from paranoid delusions (app. 4034-36). Ultimately, Dr. Frierson opined that Petitioner had “a factual understanding of the legal system, a rational understanding of court process and the capacity to assist an attorney in the preparation of a defense.” (App. 4030).

Finally, Dr. Musick, a State expert in forensic psychology, who was involved in the same interviews and evaluations as Dr. Frierson, also opined that Petitioner was capable of representing himself or aiding and assisting counsel at trial. (App. 4044). This opinion was based, in part, on Petitioner’s ability to correctly answer questions about how the court works, the roles of the people involved in the legal process, appropriate behavior in the courtroom, what he was charged with, and what the possible penalties were. (App. 4044-45).

Regarding Petitioner’s behavior throughout the guilt phase of the trial, the record does not reveal a basis for relief. The record reflects that Petitioner worked with his standby counsel and Judge Pieper stated on the record that he “handle[d] all the proceedings fairly well.” (App. 3541). After the jury returned the guilty verdict, Petitioner consulted with his standby counsel and made appropriate post-trial motions. (App. 3480). And, just before the sentencing phase, Petitioner took up the issue of preparing transcripts for his appeal. (App. 3543).

In addition, Petitioner’s decisions regarding the sentencing phase were consistent with Petitioner’s stated intentions and were not without reason. While the Petitioner could have pursued different options, the issue is whether he was competent to make the decisions he chose to make, which are relevant to his competency to represent himself. The Petitioner’s consistency and ability to follow through with his intentions is illustrated by his consistent decisions not to

offer mitigation evidence. (App. 3491 (“I told my investigators . . . adamantly that there will be no mitigating witnesses for me in reference to anything if it came down to this point.”); App. 3495 (after counsel confers with Petitioner, standby counsel states that Petitioner “reaffirms his decision to stop all mitigation preparation as of August 1 when he was appointed counsel of record”); App. 3515 (regarding mitigation evidence, standby counsel states that “[s]ince [Petitioner] took over the case, he didn’t wish - - stated repeatedly that he did not want that done, and that’s been shut down”)).

Judge Pieper questioned Petitioner’s reasoning:

The Court: Is there a reason that you are now after this point indicating that you’re not going to comply with the court’s instructions and the procedures of this court?

Mr. Alkebulanyahh: Yes.

The Court: What is that?

Mr. Alkebulanyahh: 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.

The Court: Well, this proceeding is all about you.

Mr. Alkebulanyahh: well - - -

The Court: Well, it’s an opportunity - - -

Mr. Alkebulanyahh: - - - It has nothing to do - - -

The Court: - - - If you desire to let the jury know about you.

Mr. Alkebulanyahh: I don’t want the jury to know nothing about me. They don’t know nothing about me. I’m not concerned about a jury. I’m not concerned about their verdict. I’m not concerned whether they’re going to say death, you know, or life sentence. That has no relevance in my mind.

The Court: But do you understand you have a right to present to them information about yourself?

Mr. Alkebulanyahh: I have presented all that I want to present. I understand that from the beginning before we even got to this point. Everything I have want to present, exercise the right. I have done that. No disrespect toward the court or anyone else.

(App. 3486-87). Again, while Petitioner's reasoning may not be conventional or wise, the record reflects it is thought out and rational. Furthermore, the Court notes that Petitioner's actions and decisions were consistent with his decision early on not to present mitigating evidence and his desire to waive the twenty-four hour cooling off period—Petitioner made the decision that he presented all he wanted to present during the guilt phase.

Furthermore, Petitioner's disruptive behavior⁵ reflects his professed desire to be absent from the relevant sentencing proceedings. On the record, the outbursts appear to be a calculated, non-violent means of disrupting proceedings and testimony he did not wish to witness.

In addition, Petitioner's exchanges with Judge Pieper regarding his decisions and his plans to disrupt the sentencing proceedings if forced to attend are clear and goal-oriented and do not demonstrate any lack of understanding of court processes or the upcoming proceeding.

The record shows that Petitioner's behavior raised issues that Judge Pieper addressed in detail with him:

The Court: Mr. Alkebulanyahh, I have a few more things I just wanted to make sure that I had straight in my mind, just for purposes of the record, because pretty much I've been trying to honor your requests throughout. Some time ago when I went through with you all the - - went through with you the advantages and disadvantages of representing yourself. I can't remember if we were in Florence or Charleston. And you indicated to me that you understood all those things at the time when I made the decision to allow you to represent yourself; is that correct?

⁵ During sentencing, as soon as the first witness began to respond to questions, Petitioner stood up and stated, "Blessed be Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." (App. 3550-51).

Mr. Alkebulanyahh: That's correct.

The Court: Now, and I also advised you that I did not think that was a wise thing to do. But you have a constitutional right to do so.

At the time I told you - - if I recall correctly - - that even though I was granting your request to waive the assistance of counsel and allow yourself to represent yourself, that if for some reason you changed your mind, to let me know during the sentencing phase of the case.

And if my recollection is correct, you indicated that you would think about that.

I'm sure we've been over this before. But I need to make sure for the record that you understood everything I indicated about the advantages and disadvantages - - that would all apply equally to this phase of the trial.

I mean, the solicitor may try to present evidence that may not be admissible, I don't know. There may be certain evidence that you don't know to present that your attorneys could advise you about, witness information, there may be certain evidentiary matters that you're not aware of. There may be certain rulings that need legal argument or legal argument could affect those rulings that you would not know to make. And, especially in the sentencing phase of the trial, when you can have such a severe impact because they're talking about life and death.

Do you remember when we went over those advantages and disadvantages?

Mr. Alkebulanyahh: Yes, sir. I think I recall.

The Court: Now, everything you have told me is that you do not want counsel to represent you in any way whatsoever; is that correct?

Mr. Alkebulanyahh: Yes.

The Court: Now, just so I know to satisfy myself, you waive counsel as to this phase also?

Mr. Alkebulanyahh: Yes, sir.

The Court: And you do remember everything that I've indicated about how that could be very detrimental to you?

Mr. Alkebulanyahh: Yes, sir.

The Court: And I can't emphasize enough that I would not do that, that we are talking about a life or death sentence. And, actually, not just life or death. Theoretically, if a jury were successfully convinced that there were no aggravating circumstances or they did not return a finding that there are

any aggravating circumstances, the possibility of a 30 year sentence is available. Do you understand that?

Mr. Alkebulanyahh: Yes, sir.

The Court: And knowing all these things that we've previous - - I think we've been over those Foretta (phonetic) factors or the advantages and disadvantages in two separate hearings, knowing all that, do you still wish to proceed without counsel?

Mr. Alkebulanyahh: Yes, sir.

The Court: Are you sure?

Mr. Alkebulanyahh: Yes, sir.

The Court: All right. As I indicated before in the prior proceedings, that I don't think it's a wise decision, but the defendant has that constitutional right notwithstanding the verdicts in the first phase of the trial. The defendant did handle all the proceedings fairly well. And I don't see a reason to change my decision at this point, although the defendant has indicated to me that this part of the trial is not something he wants to engage in.

I think the defendant has the constitutional right to make a decision when he does not wish to present certain information or no information at all, even though that may not be a wise decision.

(App. 3538-41). The circumstances warranted the significant and focused attention Judge Pieper afforded them. Judge Pieper carefully considered the self-representation question at trial. The Court agrees with the conclusion of fact in the Report that the state court could have reasonably found that Judge Pieper was not constitutionally required to further inquire into Petitioner's competency, after having done so, during a later stage in the trial. The preceding portion of the record reflects that Judge Pieper was discussing and evaluating Petitioner's position and concomitant competency during the exchange. There was sufficient, timely, and continuing review of Petitioner's desire to represent himself.

In addition, Petitioner objects to the Report's reliance on Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000), and Wise v. Bowersox, 136 F.3d 1197 (8th Cir. 1998).⁶ The Court has carefully reviewed the Report's application of these two cases to the facts of this case and finds no error. While both cases are factually distinguishable from this case, the Report relies on them, not for their factual similarities, but for their recitations of the standards applicable to procedural and substantive competency claims and their analytical frameworks. The Report's reliance on Burket is especially appropriate as Burket is one of this Circuit's most recent cases addressing procedural and substantive competency claims in a capital habeas matter and, thus, guides this Court's analysis of those issues.

Regarding the Report's analysis of Ground Two, Petitioner's substantive competency claim, Petitioner objects to the Report's findings that (1) the record contains contradictory evidence regarding Petitioner's claim that he was incompetent-in-fact during the sentencing phase and subsequent appeals and (2) the record is replete with evidence of Petitioner's competency.⁷ The Court has thoroughly reviewed the record and accepts the Report's analysis and recommendation on this ground. (See ECF No. 75, p. 29).

A petitioner raising a substantive competency claim must demonstrate his incompetency by a preponderance of the evidence. Burket, 208 F.3d at 192. "Not every manifestation of mental

⁶ Petitioner specifically objects to the "dispositive weight" the Report places on Wise. (See Objections, ECF No. 76, p.16). The Report cites to Wise one time, stating: "While the undersigned would not promote Petitioner's decisions as sound trial strategy, 'bad trial tactics do not prove a defendant incompetent.'" (Report, ECF No. 75, p. 28 (quoting Wise, 136 F.3d at 1204)). The Court does not read this section of the Report as turning on the Eighth Circuit's decision in Wise. Rather, the Report uses another court's language to express a widely-held sentiment associated with the right to *pro se* representation—a defendant may conduct his own defense to his detriment. See, e.g., Faretta v. California, 422 U.S. 806, 834 (1975).

⁷ Petitioner also objects to the Report's recitation of the facts relevant to Grounds One through Three as a regurgitation of Respondents' version of the facts, adopted by the PCR court in its order. Petitioner asserts that, "[t]o date, no court – not the PCR court, nor the South Carolina Supreme Court, nor the Magistrate Judge – has engaged in an objective assessment of the record and reached conclusions based on the exercise of sound, independent judgment." (ECF No. 76, p. 14). The Court acknowledges this objection, but does not find it persuasive. After conducting its own thorough, independent review of the record, the Court agrees with the facts as stated in the Report.

illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.” United States ex rel. Foster v. DeRobertis, 741 F.2d 1007, 1012 (7th Cir. 1984). “Likewise, neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial.” Burket, 208 F.3d at 192.

As discussed above and in the Report, Petitioner has failed to meet this standard. Petitioner’s behavior and decisions were rationally made by a rationally thinking defendant. The record reflects this conclusion, by a preponderance of the evidence, and does not amount to a showing of incompetence or even clear decompensation. Further, the record shows that both Judge Pieper and Petitioner’s standby counsel remained cognizant of Petitioner’s mental status throughout the trial and the sentencing phase. On this record, the Court cannot find or conclude that Petitioner is entitled to relief on Ground Two.

In Ground Three, Petitioner asserts that the trial judge failed to secure a knowing, voluntary, and intelligent waiver of Petitioner’s right to present mitigating evidence. The Report finds that, based on Schriro v. Landrigan, 550 U.S. 465, 479 (2007), this claim lacks merit. (ECF No. 75, p. 30). Petitioner does not object to the Report’s analysis of this ground and the Court agrees with the Report’s finding.

D. Ground Four

In Ground Four, Petitioner asserts that the trial judge erred by failing to terminate Petitioner’s *pro se* status after Petitioner’s disruptive behavior and unwillingness to participate in the penalty phase of his trial. Petitioner objects to all of the Report’s findings regarding this ground, but specifically points to the Report’s conclusion that no constitutional error occurred because “[b]y removing Petitioner from the courtroom, but placing him in an area where he

could see and hear the proceedings and communicate with his standby counsel, the trial judge allowed Petitioner to maintain control of his own defense while also discontinuing disruptions.” (See Report, ECF No. 75, pp. 32-33). Petitioner objects to this statement as “offer[ing] no explanation for how or why the trial judge’s decision comports with the requirements of the Constitution.” (ECF No. 76, p. 20).

A criminal defendant has a Sixth Amendment right to self-representation. See Faretta v. California, 422 U.S. 806, 809 (1975). However, that right is not absolute and a trial court may “terminate self-representation or appoint ‘standby counsel’—even over the defendant’s objection—if necessary.” Martinez v. Court of Appeal of California, 528 U.S. 152, 161-62 (2000). Thus, state trial courts may limit a defendant’s right to self-representation when “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., such as when the court is “confronted with disruptive, contumacious, stubbornly defiant defendants,” Illinois v. Allen, 397 U.S. 337, 343 (1970).

Petitioner asserts that, under this standard, Petitioner’s outbursts and unwillingness to participate in the penalty phase of his trial provided the trial court with reason and justification to revoke his *pro se* status and that, by not revoking Petitioner’s *pro se* status and appointing standby counsel, the trial court failed to ensure the integrity of the adversarial process.

In this case, the trial court faced a number of decisions based on the conduct and request of Petitioner. Judge Pieper had to consider Petitioner’s right to self-representation, the requirement that capital defendants attend their trials, Petitioner’s right to choose not to present mitigation evidence or testify during the sentencing phase, the integrity of the trial, and standby counsel’s own ethical concerns regarding their duty to their client and complying with the rules

of professional responsibility. The record shows that Judge Pieper understood the significance of his decision to allow Petitioner to continue to proceed *pro se* and gave it abundant consideration. The record reflects he did not take or make that decision lightly.⁸

After Petitioner informed the judge that he would be unruly if required to attend his sentencing proceedings, the judge recognized that he was in a “peculiar position.” (App. 3487). Judge Pieper consulted with counsel for the State and Petitioner’s standby counsel and began to prepare for the possibility of appointing standby counsel. (App. 3487-90). He adjourned court so that he and counsel could research the issue and standby counsel could further consult with Petitioner about his decision. (App. 3490-3511). Judge Pieper specifically considered whether Petitioner’s statements that he did not intend to participate in the sentencing phase were an effective withdrawal of his motion to represent himself so that he could appoint counsel. (App. 3509-10). After much discussion and significant review,⁹ Judge Pieper decided that the proper course would be to wait and see if Petitioner did in fact disrupt the proceedings before considering officially appointing standby counsel as counsel of record and depriving Petitioner of his right to self-representation.

In making that decision, the judge recognized that “the dilemma would be in the event that [Petitioner] is removed” from the courtroom. (App. 3513). As a result, much of Judge Pieper’s exhaustive discussion with counsel revolved around how to handle that situation, should it arise. After Petitioner’s second outburst, when it became necessary to act on those discussions,

⁸ See, e.g., App. 3507 (Judge Pieper recognized that “society has a strong and compelling interest in a full and fair capital sentencing proceeding,” but also that “you have to be very careful about trumping the right to represent yourself”); App. 3524 (“See, we’ve been reading about 20 different cases . . . and it kind of goes different ways”); App. 3529 (Judge Pieper remarks that “[t]his is definitely not an easy decision”).

⁹ Judge Pieper’s discussions with the attorneys and deliberations on this issue constitute over fifty pages of the record. (See App. 3487-3543). The judge researched the relevant issues, the attorneys for the State and Petitioner’s standby counsel researched the issues and presented their findings and opinions to the judge, Petitioner voiced his own opinions and concerns, and counsel for the State even contacted the Attorney General’s office and requested additional review. (App. 3533).

Judge Pieper placed Petitioner in a room at the back of the courtroom where he could hear and see all of the proceedings. (App. 3556). Thus, Petitioner was not removed from the courtroom. Notably, Petitioner and the judge authorized standby counsel, who remained at the counsel table, to interject objections, handle the exhibits, and make the closing statement if necessary. (App. 3556-57). The record reflects that, once placed in the back room, Petitioner did not disrupt the court in any way and the proceedings continued. Again, standby counsel remained in place.

After a thorough review of the record and relevant legal standards, the Court finds that, in this case, Judge Pieper was not constitutionally obligated to revoke Petitioner's *pro se* status. As noted in the Report, while trial courts have the authority to revoke a defendant's *pro se* status when he disrupts the trial proceedings, they are not constitutionally required to do so. See Davis v. Grant, 532 F.3d 132, 149 (2d Cir. 2008) (finding state court's failure to appoint standby counsel when defendant removed from courtroom not objectively unreasonable application of Supreme Court precedent); Clark v. Perez, 510 F.3d 382, 395-96 (2d Cir. 2008) (no Sixth Amendment violation where court did not revoke *pro se* status of defendant removed from courtroom because of conduct). Rather, the Supreme Court has recognized that "[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations," and, thus, "[t]rial judges . . . must be given sufficient discretion to meet the circumstances of each case." Allen, 397 U.S. at 343.

In his objections, Petitioner also points to an asserted discrepancy in the Report's findings that Judge Pieper maintained the adversarial process by instructing standby counsel to object where necessary and that standby counsel is not subject to Petitioner's ineffective assistance of counsel claims. (ECF No. 76, p. 20). This Court finds no basis for relief. "Although a criminal defendant has both a right to counsel and a right to represent himself, those rights are 'mutually

exclusive.” United States v. Beckton, 740 F.3d 303, 307 (4th Cir. 2014) (quoting United States v. Singleton, 107 F.3d 1091, 1100 (4th Cir. 1997)). Thus, if a criminal defendant chooses to represent himself, he has no right to standby counsel. See McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) (rejecting a Sixth Amendment guaranteed right to “hybrid” representation); Singleton, 107 F.3d at 1100. And a trial court, “in keeping with its broad supervisory powers, has equally broad discretion to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense.” United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998). Further, “[p]articipation by counsel with a *pro se* defendant’s express approval is, of course, constitutionally unobjectionable.” McKaskle, 465 U.S. at 182.

Thus, standby counsel may assume a limited role in the trial proceedings without infringing upon a defendant’s right to represent himself. See id. at 184 (“A defendant’s Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant’s objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant’s achievement of his own clearly indicated goals.”). As long as the defendant continues to represent himself, he has no right to any relief if standby counsel is appointed. And, because he has no right to standby counsel, counsel’s assistance cannot be constitutionally ineffective.¹⁰

Here, Petitioner expressly consented to allow standby counsel to assume a limited role during the sentencing phase while also reaffirming his desire to continue to represent himself. Notably, standby counsel acted in accordance with Petitioner’s desires and the trial court’s instructions. Those actions did not infringe on Petitioner’s Sixth Amendment rights so as to

¹⁰ More discussion on Petitioner’s ineffective assistance of counsel claims continues in the Court’s analysis of Grounds Six through Eight below, which relate to the penalty phase and closing argument.

effectively withdraw his waiver of counsel. The trial court was not required to revoke Petitioner's *pro se* status. Again, there is no basis for relief on this claim.

Accordingly, the Court cannot find that the state court's dismissal of this claim would have been an objectively unreasonable application of clearly established Supreme Court precedent.

E. Ground Five

In Ground Five, Petitioner asserts that his death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without an individualized determination by the trial judge. Petitioner objects to the Report's finding that summary judgment is appropriate on this ground because the South Carolina Supreme Court expressly found that Petitioner's restraints were not visible to the jury.

The Supreme Court has made clear that "the Constitution forbids the use of visible shackles during the penalty phase" of a capital trial, "*unless* that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." Deck v. Missouri, 544 U.S. 622, 624 (2005) (emphasis in original) (citing Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986)). This rule is meant to combat the prejudicial effect visible restraints could have on a jury, see id. at 632, and, thus, does not apply in the same determinative way when a jury is unaware of the restraints.

In its order denying Petitioner's direct appeal, the Supreme Court of South Carolina stated in its recitation of the facts that 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." (Order, State v. Roberts, 632 S.E.2d 871, 873 (S.C. 2006), ECF No. 44-15 at 4).

Based on the state court's account of the facts, the Report recommends granting summary judgment on this claim. Petitioner objects, asserting that the state court's account is not an express finding that the restraints were not visible to the jury. In support, Petitioner argues that the South Carolina Supreme Court was not considering a shackling claim and that the record does not show clearly that the jurors did not see the restraints. According to Petitioner, the lack of record evidence is typical of this type of claim and the Court should hold an evidentiary hearing to give Petitioner an opportunity to prove his allegations.

The Court disagrees. Under the AEDPA, a state court's decision "must be granted a deference and latitude that are not in operation" when the case is being considered on direct review. Harrington, 131 S. Ct. at 785. Accordingly, state court factual determinations are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Thus, the South Carolina Supreme Court's recitation of the facts is entitled to deference. While the state court was not considering the shackling claim currently before this Court, the state court's order makes a clear finding that Petitioner's shackles were not visible to the jury. This fact entitles Petitioner to no relief on this claim. For this Court to find otherwise would require it to disregard the applicable standard of review and essentially find that the South Carolina Supreme Court's order included an erroneous factual determination.

After a full review of the record and Petitioner's submissions, the Court finds no reason to deviate from the Report's recommendation. According to the record, after Petitioner's second outburst, at 11:55 a.m., the jury left the courtroom. (App. 3556). At that point, the judge moved Petitioner to the room at the back of the courtroom. (App. 3560). Then, an officer asked the judge if Petitioner was to "remain unrestrained" while in the back room. (App. 3561). The judge

replied that Petitioner should be restrained but agreed to leave Petitioner's hands unrestrained so he could cover his ears if he wanted. (App. 3561-63). Again, the evidence supports the state court's conclusion that the restraint was not visible to the jury.

The jury did not return to the courtroom until 12:20 p.m., when Petitioner was in the back room and all other court personnel were back in place. (App. 3563-65). The judge then gave the jury a curative instruction regarding the outburst and Petitioner's absence from the defense table, and the State proceeded to present several of its witnesses. At 1:00 p.m., the jury exited for lunch and the judge cleared the courtroom before taking up matters with the attorneys. (App. 3594-95). After speaking briefly with the attorneys, the judge cleared everyone else from the courtroom and then instructed an officer to move Petitioner for lunch. (App. 3595-96).

During the lunch recess, Petitioner indicated to the judge that he wished to remain in the back room, but without the restraints, and that he would not be disruptive. (App. 3596). The judge agreed to remove the restraints and instructed an officer to take off the restraints once Petitioner was in the back room in the courtroom. (App. 3597). Petitioner returned to the back room, the judge ensured that Petitioner could hear and see the front of the courtroom, and, after the judge let everyone else back into the courtroom, the jury returned at 2:14 p.m. (App. 3597-98). Thus, the record reflects that the jury never saw Petitioner in shackles.

To support his claim, Petitioner has provided the court with the affidavit of Kara Noel, a law student who, along with three other students, interviewed eight of the jurors from Petitioner's case. In that affidavit, Ms. Noel states that "[o]ne or more jurors recalled Mr. Roberts being removed from the courtroom during sentencing and that Mr. Roberts was shackled 'right at the desk' and then taken to the back room where he remained in shackles." (ECF No. 31-2, p. 2).

The Court has considered this affidavit and finds that it does not constitute clear and convincing evidence to overcome the state court's finding and the record. Further, even if the Court assumes the affidavit accurately recalls the facts of Petitioner's shackling, Petitioner has still failed to show a constitutional violation. Under Deck, a court may not use visible shackles during the penalty phase of a capital case, "*unless* that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." 544 U.S. at 624 (quoting Holbrook, 475 U.S. at 568-69). Here, the record shows that Petitioner clearly undermined courtroom decorum and order. While Judge Pieper did not make specific formal findings on the record regarding shackling Petitioner, the record supports any finding that Judge Pieper's decision to shackle Petitioner comported with the Constitution.

For these reasons and those stated in the Report, the Court cannot find that the state court's dismissal of this claim would have been an objectively unreasonable application of clearly established Supreme Court precedent or based on an unreasonable determination of the facts.

F. Grounds Six – Eight

In Grounds Six through Eight of his Petition, Petitioner argues that his standby counsel were ineffective for failing to object to (1) prison condition evidence presented during the penalty phase of the trial (Ground Six); (2) the "extensive amount of victim impact evidence" introduced during the penalty phase (Ground Seven); and (3) inflammatory and improper statements made during the prosecution's closing arguments, which statements rendered the sentencing phase fundamentally unfair (Ground Eight). (ECF No. 31, pp. 36-49). The Report found that Petitioner had no right to effective assistance, and that even if he did, his standby

counsel's activity did not rise to the level of ineffective assistance. Because each of these claims involves ineffective assistance of counsel, they are addressed here together.

Petitioner specifically objects to the Report's findings regarding Grounds Six, Seven, and Eight. His first objection goes to all three grounds: he argues that his right to effective assistance of counsel was triggered when the trial judge terminated Petitioner's *pro se* status and assigned representation, in full, to Petitioner's stand-by counsel. Petitioner also individually objects to the Report's findings regarding Grounds Six and Eight, as more fully discussed below. As noted above, Ground Six alleges that trial counsel failed to object to evidence of prison conditions, and Ground Eight alleges that trial counsel failed to object to statements made by the Prosecutor in closing arguments. For the reasons described below, the Court finds that Petitioner's right to effective assistance of trial counsel was never triggered at trial, and so his claims of ineffective assistance must fail.

As previously discussed,¹¹ the Constitution permits a defendant to waive his constitutional right to counsel and choose to represent himself during criminal proceedings, provided the defendant waived his rights willingly and intelligently. See Faretta v. California, 422 U.S. 806, 835-36 (1975). Other circuits have found that once a defendant waives the right to representation, he is responsible for his own defense, and even if standby counsel is appointed to assist, there is no right to effective assistance of standby counsel. See, e.g., United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998) (noting that "without a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel"). See also United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1992) (stating that it "knows of no constitutional right to effective assistance of standby counsel"). Both the Second and Seventh Circuits contemplated that standby counsel may, in limited circumstances, begin functioning as

¹¹ See supra p. 22.

Sixth Amendment counsel; however, this occurs only when the defendant no longer controls his own defense or can no longer represent himself. See Morrison, 153 F.3d at 55; Windsor, 981 F.2d at 947. In such a case, standby counsel ceases to serve in a standby capacity and becomes counsel of record. See Morrison, 153 F.3d at 55; Windsor, 981 F.2d at 947.

It is reasonable to conclude that the Fourth Circuit would follow the reasoning of the Second and Seventh Circuits in finding that there is no right to effective assistance of standby counsel. Like the Second and Seventh Circuits, the Fourth Circuit has held that “a pro se defendant has no right to standby counsel when he chooses to proceed pro se.” United States v. Beckton, 740 F.3d 303, 307 (4th Cir. 2014). Furthermore, in United States v. Singleton, 107 F.3d 1091, 1101 (4th Cir. 1997), the Fourth Circuit found, implied in the Faretta decision, that an assertion of the right to self-representation amounts to a “waiver of the right to ‘effective assistance’....” This line of reasoning is nearly identical that used in the Second and Seventh Circuits to conclude that a defendant who waives his right to self-representation has no right to the effective assistance of standby counsel. Thus, it follows that without a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel.

The questions in this case, therefore, are (1) whether Petitioner asserted his right to self-representation, thereby waiving his right to effective assistance of standby counsel, and (2) if so, whether Petitioner’s *pro se* status was ever revoked so that standby counsel began functioning as Sixth Amendment counsel. Petitioner does not dispute that he asserted his right to represent himself. Thus, in answer to the first question, Petitioner asserted his right to self-representation and waived his right to effective assistance of standby counsel.

The answer to the second question, however, is disputed. Petitioner argues that his *pro se* status was revoked when “the trial judge – with Petitioner’s consent – ordered standby counsel to

make objections and a closing argument.” (ECF No. 76, p. 22). This position has no merit. The record clearly reflects that Petitioner’s *pro se* status was *not* revoked.¹² For example, immediately prior to the sentencing phase, the trial judge re-evaluated Petitioner’s competency to proceed *pro se* and saw no reason to change his decision regarding Petitioner’s *pro se* representation. (App. 3541). Specifically, he noted that Petitioner had handled the prior proceedings “fairly well.” (*Id.*). Moreover, the trial judge’s comments to counsel indicate that while standby counsel were permitted to assist, their assistance was limited to actions specified by Petitioner. (*Id.* at 3541-42). Thus, Petitioner was still in control of his case and of standby counsel’s involvement. Had the trial judge intended to terminate the Defendant’s right to self-representation, it would be inconsistent to then limit standby counsel’s involvement in this manner. Thus, the record clearly indicates that the trial judge did not terminate Petitioner’s *pro se* representation. Therefore, Petitioner had no right to effective assistance of counsel.

In summary, having reviewed the relevant case law and the record, the Court finds that the state court’s decision on this matter was neither an unreasonable application of – nor contrary to – established federal law, nor did it involve an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. Thus, the Report’s findings as to Grounds Six, Seven, and Eight are accepted.

G. Ground Nine

In Ground Nine, Petitioner asserts that the prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Petitioner’s Sixth and Fourteenth Amendment rights. Specifically, Petitioner argues that the State improperly struck four of five

¹² See discussion *supra* Part III.D.

potential African-American¹³ jurors: Edith Owens, Matthew Young, Antwoine Crosson, and Kerry Brown. (ECF No. 31, p. 49). The state trial court held a Batson¹⁴ hearing on this issue following jury selection; however, the trial judge found no basis for relief. In the Report, the Magistrate Judge recommends that the trial court's decision be upheld.

Petitioner specifically objects to the Report's "failure to address Petitioner's evidence and argument that the reasons provided by the State for striking four African-American jurors were pretextual." (ECF No. 76, p. 32). Petitioner then discusses each of these four jurors individually and asserts – primarily based on comparative juror analysis – that the Prosecutor's strikes were racially motivated. (*Id.* at 32-45). In conducting this analysis, Petitioner offers new arguments and juror comparisons that he did not make at trial. As an initial matter, the Court finds that these new arguments and comparisons were not preserved for review. However, even assuming that these new arguments and comparisons are properly before this Court,¹⁵ the Court finds no clear error in the state court's decision and no basis for relief now. This Court will further discuss the Batson issue below.

a. Procedural Bar

Procedural bypass applies when a petitioner failed to raise a claim at the appropriate time in state court and has no further means of bringing that issue before the state courts. If this occurs, the person is procedurally barred from raising the issue in his federal habeas petition. The United States Supreme Court has clearly stated that the procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. Smith v. Murray,

¹³ The Court notes for the record that one of the victims in this case – Lance Cpl. Dana Lyle Tate – was African-American.

¹⁴ See Batson v. Kentucky, 476 U.S. 79 (1986).

¹⁵ In their motion for summary judgment, the Respondents argued that these additional arguments were not preserved for appellate review. (ECF No. 43, p. 76). The Report did not address this issue and instead addressed Petitioner's additional arguments on the merits. This Court has reviewed the preservation issue and the arguments on the merits.

477 U.S. 527, 533 (1986). In South Carolina, a defendant's failure to raise an objection at trial constitutes a procedural default of his claim. State v. Grovenstein, 530 S.E.2d 406, 413 (S.C. 2000); State v. Pauling, 470 S.E.2d 106, 109 (S.C. 1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object..., Appellant is procedurally barred from raising these issues for the first time on appeal."); State v. Burton, 486 S.E.2d 762, 764 (S.C. Ct. App. 1997); see also Jackson v. Speed, 486 S.E.2d 750, 761 (S.C. 1997). Further, if procedurally defaulted, federal habeas review of this claim is barred unless Petitioner can demonstrate cause and prejudice, or actual innocence. Coleman v. Thompson, 501 U.S. 722 (1991); Wainwright v. Sykes, 433 U.S. 72 (1977); Waye v. Murray, 884 F.2d 765, 766 (4th Cir. 1989), cert. denied, 492 U.S. 936 (1989). Petitioner has not asserted any specific cause for a procedural default as to this claim, nor has he alleged actual innocence. See 28 U.S.C. § 2254; Rodriguez v. Young, 906 F.2d 1153, 1159 (7th Cir. 1990), cert. denied, 498 U.S. 1035 (1991) ("Neither cause without prejudice nor prejudice without cause gets a defaulted claim into Federal Court.").

The bulk of Petitioner's arguments for relief in Ground Nine are procedurally defaulted because they were not preserved for review. As noted above, Petitioner raises new arguments and additional jurors for comparative analysis in his habeas petition. Indeed, even the Batson rulings made by the trial court were not challenged until Petitioner's application for Post-Conviction Relief. (See App. 5216). Nonetheless, the Court will also consider Petitioner's challenges – old and new alike – on the merits, as outlined below.

b. Batson Challenge

The United States Supreme Court held in Batson that a "State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal

Protection Clause.” Batson, 476 U.S. at 89. Courts are to follow a three-step process in analyzing an asserted Batson violation.

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008). “[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.” Miller-El v. Cockrell, 537 U.S. 322, 324 (2003). “[T]he issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.” Id. at 339. “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson’s third step.” United States v. Barnette, 644 F.3d 192, 216 (4th Cir. 2011) (citing Miller-El, 537 U.S. at 241). Due to the trial court’s superior position to determine credibility, “a state court’s finding of the absence of discriminatory intent is ‘a pure issue of fact’ accorded significant deference.” Miller-El, 537 U.S. at 339 (quoting Hernandez v. New York, 500 U.S. 352, 364 (1991)). Moreover, reflecting the need for deference, under § 2254 review, “[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary.” Id. at 340.

Edith Owens

The first African-American juror struck by the prosecution at jury selection was Edith Owens. The Prosecutor offered three facially race-neutral reasons for this strike: (1) that on observing Owens during *voir dire*, he had the impression that she was afraid of Petitioner; (2) that she was weak on the death penalty; and (3) that she knew nothing about the case. (App. 1340). The trial court found this explanation facially neutral. (*Id.*). In response, the Petitioner offered one juror for comparison whom he believed was intimidated by the prosecution. (*Id.* at 1341). However, the court denied the Batson challenge, finding the proffered juror not similarly situated. (*Id.* at 1340-41). Petitioner offers several additional arguments in his petition – including new juror comparisons – each of which are addressed below. However, he does not reassert for this Court’s consideration the comparative analysis he made at the original Batson hearing. Based on his new arguments, Petitioner asks the Court to find the Government’s reasons for striking Owens not credible.

First, as to the Prosecutor’s impression that Owens was afraid of Petitioner (which Petitioner characterizes as a “demeanor-based explanation”), Petitioner argues that the record offers nothing to support this basis. (ECF No. 31, p. 50). Absent some support from the record, Petitioner argues, the Court cannot credit the Prosecutor’s demeanor-based explanation unless the trial court made a finding on the matter. (*Id.*). However, there is support in the record for the Prosecutor’s demeanor-based explanation. Also, this Court finds that Petitioner’s legal basis for his challenge is not fully applicable to this case, as addressed below.

Petitioner relies heavily on Snyder v. Louisiana, 552 U.S. 472 (2008), for the proposition that a court cannot rely on a prosecutor’s demeanor-based explanation absent either (1) support from the record or (2) a credibility finding by the trial judge on the demeanor explanation.

However, the Court notes that Petitioner's reliance on Snyder is misplaced. As an initial matter, the Supreme Court recently addressed the necessity of a credibility finding by the trial judge on a prosecutor's demeanor-based explanation in Thaler v. Haynes, 559 U.S. 43 (2010). In Thaler, the Supreme Court stated "neither [Batson nor Snyder] held that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor." United States v. Barnette, 644 F.3d 192, 214-15 (4th Cir. 2011) (quoting Thaler, 559 U.S. at 47). Thus, even had Judge Pieper failed to indicate his observance and recollection of Owens' demeanor, this fact would not be totally dispositive in this case. Furthermore, Judge Pieper did in fact comment on Owens' demeanor near the beginning of jury selection, as further discussed below.

Even absent Thaler's holding, the Court finds that Snyder is clearly distinguishable from the present case. First, contrary to Petitioner's arguments, the record does offer support for the Prosecutor's explanation that he believed Owens was afraid of Petitioner. For example, near the beginning of Owens' *voir dire*, Judge Pieper told Owens to "[j]ust relax." (App. 259). This indicates that Owens exhibited nervousness and tension. Second, at the Batson hearing, Petitioner did not challenge the Prosecutor's characterization of Owens as fearful; rather, he offered for comparison another juror he believed had also exhibited fear. (App. 1342). While not dispositive, these examples from the record provide sufficient support for this Court to find credible the Prosecutor's race-neutral explanation.

Moreover, even if not distinguishable, Snyder is a 2008 case and thus "could not have constituted clearly established Federal law as determined by [the Supreme Court] for purposes of [Petitioner's] habeas petition because [the Supreme Court] decided Snyder" more than four years after the state trial court's decision on this issue. Thaler, 559 U.S. at 49 (internal citation

omitted). Thus, the state court could reasonably have upheld the Prosecutor's strike based on the state of the law pre-Snyder. As such, this Court cannot find that the state court's decision was contrary to or an unreasonable application of clearly established federal law as decided by the Supreme Court.

Petitioner also argues that comparative analysis undermines the Prosecutor's "fear" explanation.¹⁶ (ECF No. 31, p. 50). Petitioner argues that a white juror – Joy Smith – stated at *voir dire* that her "heart was about to jump out of [her] skin"; yet, she was not struck from the jury. (*Id.*). While the Court acknowledges that Smith's statement – like the trial court's statement to Owens to "relax" – could indicate fear of Petitioner, such a determination is impossible from the cold record alone. Smith's statement may have indicated that she was nervous to be in Court, nervous to be around Petitioner, or something else entirely. Given the variety of possible explanations, the Court concludes that Petitioner has not shown by clear and convincing evidence that the Government's decision to strike Owens, but not Smith, was racially motivated. Also, Judge Pieper did not direct Smith to relax, which suggests that any tension felt by Smith was significantly less than that felt by Owens.

Petitioner next addresses the Prosecutor's second basis for striking Owens from the jury – that she was weak on the death penalty. (ECF No. 31, p. 50). Petitioner argues that Owens' responses at *voir dire* did not indicate any such weakness; rather, Owens indicated she could give

¹⁶ A prosecutor may base his strike on one factor or on a combination of factors. See United States v. Grandison, 885 F.2d 143, 145 (4th Cir. 1989) (affirming trial court's ruling on Batson challenge where trial court "concluded that the combination of facts and circumstances reveal[ed] an inference opposite to that of racial discrimination") (internal citation omitted); United States v. Stephens, 514 F.3d 703, 711 (7th Cir. 2008) ("[P]icking jurors is a complex and multifaceted process. Individual factors or characteristics often do not provide the 'silver bullet' that will mean acceptance or rejection of any potential juror... it is a combination of factors that will determine whether a party believes a juror will be favorable to their side.") (internal citation omitted). Thus, it is relevant to this case that the Prosecutor below offered a variety reasons for striking Owens and it is directly relevant to the comparative juror analysis. Specifically, it is important to note that while Petitioner offers several jurors for comparison, he does not offer a single juror who shares the combination of characteristics upon which the Prosecutor based his strike of Owens.

the death penalty if appropriate. (App. 279-80). The Court agrees that as transcribed, Owens' responses confirmed that she was willing to impose the death penalty if she believed the facts supported it. Furthermore, as Petitioner notes, the Prosecutor did not strike several white jurors who provided similar responses to Owens on this issue. (See ECF No. 31, p. 50). The Court has considered these factors in weighing the credibility of the Prosecutor's race-neutral explanation; nonetheless, for the reasons described previously and below, the Court finds that Petitioner's evidence has not established by clear and convincing evidence that the strike was racially motivated.

As an initial matter, the record does not reveal whether some factor, not apparent from the face of the cold transcript alone, convinced the Prosecutor that Owens was weak on the death penalty. It is also important that the trial court accepted the Prosecutor's explanations as race-neutral and that Petitioner did not challenge this basis for striking Owens. Had the Petitioner challenged this basis for striking Owens at trial, there may have been other valid reasons the Prosecutor could have asserted for exercising the strike. Thus, the Court finds this explanation credible, especially when viewed in light of (1) the significant deference accorded to the state court's finding of the absence of discriminatory intent; (2) Petitioner's failure to challenge the explanation at trial; and (3) the two additional explanations for the strike (the first of which, related to fear, this Court finds sufficient on its own as discussed above). Thus, the Court continues to find that Petitioner has simply not shown by clear and convincing evidence that the strike was racially motivated. It would be speculation to find the strike racially motivated on these facts.

Finally, the Court addresses the Prosecutor's third basis for striking Owens – that Owens knew nothing about the case. As Petitioner notes, at least two white jurors also indicated that

they knew nothing about the case, and yet they were not struck. (See App. 564, 987). However, Petitioner did not bring these jurors to the trial judge's attention, and as a result, this matter was not explored further at the Batson hearing. The Prosecutor was not given the opportunity to address this basis for a Batson challenge because these two jurors were neither challenged nor raised for comparison in connection with Owens. Furthermore, while those two jurors may have arguably been similarly situated as far as their knowledge about the case, they were not similarly situated as to the combination of explanations the Prosecutor gave for striking Owens. In particular, there is no evidence that they were afraid of Petitioner, and Petitioner has not argued otherwise. Again, this explanation, in combination with the additional explanations from the Prosecutor, is sufficient to uphold the strike as race-neutral. By having failed to raise these jurors for comparison at trial, the Petitioner again asks the Court to speculate as to the Prosecution's reasons for striking Owens. The Court finds that Petitioner has not shown that the strike was racially motivated. The clear and convincing standard has not been met.

In summary, the Court finds that Petitioner has not shown by clear and convincing evidence that the Prosecutor's proffered race-neutral reasons for striking Owens from the jury were not credible. As a result, Petitioner has not established purposeful discriminatory intent, and he is not entitled to relief on this ground.

Matthew Young

Next, the Prosecutor offered three reasons for striking Matthew Young: (1) that Young stated in his *voir dire* that he knew a defense witness named Jabari; (2) that he stated that he heard about the incident on the street; and (3) that he was weak on the death penalty. (App. 1342). The trial court found that the Prosecutor's explanation was facially race-neutral, and in response Petitioner offered a juror for comparative analysis. (Id. at 1342). However, the trial

court found that the comparative juror was not similarly situated because the comparative juror knew a witness for the prosecution rather than for the defense. (*Id.* at 1347-48). In his petition, Petitioner raises Batson claims regarding this juror that were not raised at trial. In particular, Petitioner now argues that the Prosecutor was mistaken regarding Young's familiarity with a defense witness. (ECF No. 76, p. 39). In addition, the Petitioner offers additional jurors for comparative analysis. (*Id.* at 40-41).

Petitioner challenges the Prosecutor's first basis for striking Young because it appears from the record that Young was mistaken about whether Jabari was a defense witness. However, while the record indicates that Jabari may have been a witness on the prosecution's list rather than on the defense's list, the record also indicates that this mistake did not come to light until the Batson hearing. As a result, there is nothing in the record that indicates the challenge was pretext for a discriminatory strike. Furthermore, as Judge Pieper noted at the hearing, even a mistaken belief by the Government can be a facially neutral reason. (*See* App. 1345, 1348). There is no indication that the Prosecutor's basis for the strike was asserted in bad faith. Thus, Petitioner has failed to show clear and convincing evidence that the Prosecutor struck Young based on his race.

Petitioner's challenge to the Prosecutor's second explanation also fails. Petitioner characterizes the Prosecutor's statement that Young had heard of the incident on the street as a "gross mischaracterization." (*See* ECF No. 76, p. 39). Yet as Petitioner himself notes, Young stated at *voir dire* that he had heard – not from the newspaper but from *personal input* – that the case involved "a struggle situation, like a bust or something." (*Id.* at 40). Furthermore, Petitioner mischaracterizes the Prosecutor's explanation as based on Young's knowing "too much about the case," (*id.* at 33), when in fact it appears that the Prosecutor's challenge was based on the source

of Young's information (see app. 1342 ("[H]e heard about this incident on the street.")). The Prosecutor never indicated that he believed Young knew "too much." Again, this is simply not a basis to find purposeful discrimination.

In addition, while Petitioner offers another white juror – Michelle Wilson – as a similarly situated juror who knew even more about the case than Young, these jurors differ based on the sources and extent of their knowledge and thus are not similarly situated. Young, for example, said he heard about the case from personal input and that he'd heard the case involved "[a] struggle situation, like a bust or something." (ECF No. #76, p. 40). Wilson, on the other hand, had heard television and newspaper coverage indicating two police officers were killed and that they had families and children. (App. 543). Young's knowledge – which was based on personal input that apparently mischaracterized the situation as a "bust" rather than a police response to a CDV incident – is markedly different than Wilson's knowledge – which came from news coverage and which appeared to accurately represent the facts of the case. It is not a reflection of purposeful discrimination to strike a juror whose preconceived view is that the case involved a "bust or something," not intentional homicide.

Finally, Petitioner's challenge to the Prosecutor's third explanation – that Young was weak on the death penalty – fails as well. Petitioner argues that a white juror, Murray, was similarly situated to Young in that she "stated that she was a category three individual and that she would have to listen to all the evidence before imposing the death penalty." (ECF No. 76, p. 41). However, Murray's responses were markedly different than those of Young, who initially indicated that returning a sentence of death "would probably not be within me," and that "[i]t would be hard for me." (App. 445). Young did not indicate that he could sign a recommendation of death until the Prosecutor began questioning him. These reasons to strike are not based on

race. As a result, the Court finds that Murray was not a similarly situated juror. Petitioner has failed to establish by clear and convincing evidence that the Prosecutor's strike was discriminatory.

Antwoine Crosson

Next, regarding Antwoine Crosson, the Prosecutor offered several reasons for his strike: (1) that Crosson is from the town where he lived; (2) that his wife taught Crosson's brother; and (3) that he knew Crosson's brother and had prosecuted him for criminal sexual conduct. The trial court found that the Prosecutor's explanation was facially race-neutral. Indeed, these reasons strongly indicate that the Prosecutor's basis for striking Crosson were race-neutral. Petitioner did not offer comparative jurors at trial, but he now challenges the Prosecutor's strike of Crosson on the grounds that two similarly situated white jurors were not struck.¹⁷ However, even Petitioner notes that neither of the white jurors had a relative who "was prosecuted by the solicitors involved in the [Petitioner's] trial..." (ECF No.76, p. 42). Again, the fact that Crosson had a relative prosecuted by the solicitors involved in the Petitioner's trial is a strong, race-neutral basis for exercising a strike.

This Court finds, as the trial court found, that the Prosecutor offered three facially race-neutral reasons for striking Crosson. Furthermore, the jurors now offered for comparative analysis are clearly not similarly situated. While both jurors offered for comparison had relatives who had been prosecuted for DUIs, neither relative had been prosecuted by the solicitors involved in Petitioner's trial. As well, there is no indication that the jurors who were not struck knew the solicitors or the solicitors' families. As a result, the Court finds that neither juror was

¹⁷ The Court notes that Petitioner also challenges the Prosecution's statement that Crosson "just isn't a good juror." (ECF No.76, p. 41). However, this statement was plainly not offered by the Prosecutor as sufficient justification in and of itself.

similarly situated and that Petitioner has failed to establish by clear and convincing evidence that the Prosecutor's strike was discriminatory.

Kerry Brown

Finally, the Prosecutor indicated that he struck a fourth juror, Kerry Brown, because she "has a pending criminal domestic violence [sic], and this entire case started from a criminal domestic violence [sic]...." (App. 1351). The Prosecutor also noted, as another reason for striking Brown, that she had indicated that she had not heard about Petitioner's case. (*Id.* at 1351-52). In response, the trial court found that both explanations were facially neutral reasons, and Petitioner offered no jurors for comparative analysis.

With regards to the criminal domestic violence matter, Petitioner challenges the Prosecutor's strike of Brown because "it is difficult – if not impossible – to imagine how being a victim of domestic violence would render Ms. Brown a poor juror in the case at bar. ...If anything, [her] status as a victim would have made her more likely to favor the prosecution." (ECF No. 76, pp. 42-43). As an initial matter, while the record reflects that Brown had a pending criminal domestic violence matter, it is not clear whether she faced a criminal domestic violence charge or whether she was a victim. (*See* App. 1351). Either way, however, the charge is relevant because this case stemmed from a domestic violence incident. Whether the juror was a victim or a defendant is not controlling. The Prosecutor's reason for the strike is race-neutral. The Court finds that the state court did not act unreasonably in upholding the Prosecutor's strike of Brown on this basis.

With regard to the Prosecutor's second basis for striking Brown – that she did not know anything about the case – Petitioner offers two white jurors for comparative analysis. Like Brown, these jurors indicated that they did not know anything about the case. However, unlike

Brown, they were not involved in a pending criminal domestic violence matter. As a result, they are not similarly situated, and as noted above, the prosecution is entitled to consider race-neutral factors in combination when deciding to exercise its strikes. Because the Prosecutor offered a race-neutral explanation, the Court finds that Petitioner has failed to establish by clear and convincing evidence that the Prosecutor's strike was discriminatory.

In summary, the Court has reviewed each of the specific issues raised in Ground Nine. The Court has also carefully reviewed the Reports and Objections, the record – which reflects what the Petitioner raised at the time of trial and what he now raises related to jury selection – and the relevant authority – including Fourth Circuit and Supreme Court case law. Having completed this review, the Court finds that the Magistrate Judge's recommendations regarding Ground Nine should be accepted and that Petitioner is not entitled to habeas relief.

H. Ground Ten

In Ground Ten, Petitioner argues that he was deprived of his Sixth and Fourteenth Amendment rights to a fair trial because the jury was subject to several improper, extraneous influences. Specifically, Petitioner alleges that (1) there was an “injection of religion into the juror's [sic] deliberative process”; (2) following an issue involving a bomb-sniffing dog, some of the jurors were led to believe that the jury had been sequestered as a result of threats made by Petitioner's “followers”; and (3) a juror engaged in impermissible, prejudicial contact by asking a minister for guidance regarding the death penalty. (ECF No. 31, p. 54). The Court notes that these issues were not raised to the trial court, on direct appeal, or through a post-conviction motion or habeas petition in a state trial court; they were first raised through a petition for a writ of habeas corpus filed within the original jurisdiction of the South Carolina Supreme Court. (*Id.* at 56). The South Carolina Supreme Court denied relief. In its discussion of these issues, the

Magistrate Judge's Report finds that the state court could reasonably have concluded that, with the exception of the one juror who approached her minister, the jurors' reliance on religion did not amount to a prejudicial extraneous influence. In addition, the Magistrate Judge finds that the information regarding the bomb-sniffing dog did not warrant a hearing because it did not concern a matter before the jury. In response, Petitioner specifically objects to these findings except as to the juror's contact with a minister, which is further discussed below.

Regarding the juror's contact with a minister, the Report recommends that, should the Court not find the claim procedurally defaulted, it should permit limited evidentiary development. Pursuant to this recommendation, the District Court permitted the Defendant to first file an affidavit from the juror on the issue. (ECF Nos. 81, 87). Upon the filing of the juror's affidavit, the Magistrate Judge then conducted an evidentiary hearing on the issue. (ECF No. 95). Briefing followed and the Magistrate Judge entered a Supplemental Report and Recommendation ("Supplemental Report"). (ECF Nos. 106, 107, 110). In the Supplemental Report, the Magistrate Judge finds that while the juror's contact with a minister constituted an impermissible external influence, the contact did not prejudice Petitioner and did not have "a substantial and injurious effect on the verdict." (ECF No. 110, p. 5). Accordingly, the Supplemental Report recommends that the Court grant Respondent's motion for summary judgment as to this claim. (*Id.* at 6). Petitioner filed objections to the Supplemental Report on March 20, 2014. (ECF No. 112). The Court will now discuss each of the three issues raised in Ground Ten.

a. Injection of Religion

The first issue raised by Petitioner in Ground Ten is that there was an "injection of religion into the juror's [sic] deliberative process." (ECF No. 31, p. 54). Specifically, Petitioner

asserts that jurors held hands and prayed during deliberations, brought Bibles and copies of scripture to the jury room, and relied on specific Bible passages to aid in their decision. However, as the Report finds, the state court could reasonably have concluded that the jurors' reliance on the Bible and prayer did not amount to a prejudicial extraneous influence triggering the need for a hearing or meriting habeas relief. The Fourth Circuit has found that "the Bible is not an 'external' influence." Robinson v. Polk, 438 F.3d 350, 364 (4th Cir. 2006). Rather, "the reading of Bible passages invites the listener to examine his or her own conscience from within." Id. at 363. Regarding the prayer, Petitioner fails to indicate how the jurors, without any indication of third party involvement, were extrinsically influenced by praying during deliberations. Furthermore, prayers offered by jurors with no external involvement would seem – perhaps even more so than the Bible – to invite inner examination of oneself. See Robinson, 438 F.3d. 363.

Furthermore, in regards to Bible review and prayer, Petitioner's reliance on Barnes v. Joyner, 751 F.3d 229 (4th Cir. 2014), and Hurst v. Joyner, 757 F.3d 389 (4th Cir. 2014), is misplaced. The District Court has carefully reviewed these decisions. Barnes and Hurst involved more than a juror reading from the Bible; in both cases, a third party met with a juror and directed or was asked to direct the juror to certain passages in the Bible. See Barnes, 751 F.3d at 251; Hurst, 757 F.3d at 398. Petitioner has provided no evidence that any jurors in this case contacted a third party with regard to prayer or Bible review.

In sum, the Court concludes that the state court could reasonably have concluded that Petitioner's Sixth and Fourteenth Amendment rights were not violated by the jurors' involvement of prayer and scripture review during deliberations. As a result, the Court finds that the Magistrate Judge's recommendations as to this issue should be accepted.

b. Threats

The second issue involves allegations that some jurors were led to believe that, “[d]uring trial, there had been threats from Petitioner’s ‘associates,’ and that [manure found in the jury box] came from a bomb sniffing dog that was being used daily to inspect the courtroom for bombs.” (ECF No. 31, p. 54). One juror reported similar information in her affidavit. (ECF No. 87). A law student’s affidavit, in recounting juror interviews, reported “[s]ome of the jurors stated that this was frightening and that they were, and continue to be, quite scared of [Petitioner], his ‘followers,’ friends, and family.” (ECF No. 32-1, p. 2). The law students’ affidavit was not specific, and there are no affidavits from individual jurors confirming the law students’ statement regarding jurors’ fear.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors. Estelle v. Williams, 425 U.S. 501 (1976). “An impartial jury is one that arrives at its verdict ‘based upon the evidence developed at trial’ and without external influence.” Barnes, 751 F.3d at 240 (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)). As a result of these constitutional concerns, a rebuttable presumption of prejudice applies to communications or contact between a third party and a juror concerning the matter pending before the jury. Id. at 241 (citing Remmer v. United States, 347 U.S. 227, 228 (1954)). “Given a jury’s role during the sentencing phase of a capital case, ‘the matter pending before the jury’ is to determine whether or not the defendant ought to receive the death penalty.” Id. at 249 (citing Caldwell v. Mississippi, 472 U.S. at 320, 329 (1985)). The Eighth Amendment “requires consideration of aspects of the character of the individual offender... as a constitutionally indispensable part of the process of imposing the ultimate punishment of death.” Woodson v. N. Carolina, 428 U.S. 280, 281 (1976). However, “not every

allegation of an unauthorized communication between a juror and a third party will trigger the Remmer presumption and its corresponding hearing requirement.” Barnes, 751 F.3d at 244. Rather, “the Remmer presumption and hearing requirement are triggered after the party attacking the verdict satisfies the ‘minimal standard’ of showing that ‘extrajudicial communications or contacts [between a juror and a third party] were more than innocuous interventions.’” Id. at 245 (quoting United States v. Cheek, 94 F.3d 136, 141 (4th Cir. 1996)).

As the Magistrate Judge indicated in the Report, the information jurors reportedly received from a third party related to Petitioner’s “associates” was innocuous, not prejudicial, and did not concern a matter before the jury. Thus, the Court finds that the Remmer presumption does not apply and that a hearing on this issue is not required. Here, the matter before the jury was to determine whether Petitioner should have received the death penalty. See Remmer, 347 U.S. at 249. To make this determination, the jurors were required to consider *Petitioner’s* character. Because the information allegedly provided to certain jurors at best implicated the character of individuals not before the court, the Magistrate Judge correctly concludes that the information did not concern a matter before the jury. This issue does not rise to the level of contact discussed in Barnes, Hurst, or Remmer. The record reflects that this contact had no influence on jury deliberations. As a result, the Court finds that the Magistrate Judge’s recommendations as to this issue should be accepted and that no relief is warranted.

c. Juror Contact with Minister

The third issue in Ground Ten relates to a juror who allegedly engaged in impermissible, prejudicial contact by asking a minister for guidance regarding the death penalty. Before being seated, a juror did make contact with an Episcopalian priest – Father Law – whom she described as a friend; however, she was not a member of his church. (See ECF No. 101, pp. 8-9). In his

Supplemental Report addressing this issue, the Magistrate Judge found that because the juror's "contact with Father Law did not have a substantial and injurious effect or influence in determining the jury's verdict, Petitioner is not entitled to habeas relief" on this ground. (ECF No. 110, p. 6). In response, Petitioner objects that "[t]he totality of the circumstances, including the content of [the juror's] conversation, the circumstances surrounding the conversation, and the instructions of the trial court, demonstrate that [the juror's] communication with [the minister] likely affected her decisions as a juror." (ECF No. 112, p. 8).

The District Court reviewed numerous cases in its evaluation, including prominent Fourth Circuit cases that address this issue. As discussed above, two recent cases – Barnes and Hurst – address the issue of juror contact with a third party. In both cases, a juror contacted a third party for advice: in Barnes, a juror contacted a minister to ask a question about the death penalty, and in Hurst, a juror sought advice from her father about "where she could look in the Bible" for guidance on deciding whether to impose the death penalty. See Barnes, 751 F.3d at 236, Hurst, 757 F.3d at 392. Barnes held that "when the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury," a presumption of prejudice "*must* be applied, and ... a hearing *must* be held." Hurst, 757 F.3d at 397 (citing Barnes, 751 F.3d at 242, 246). The Fourth Circuit thus found, in cases with facts similar to those before this Court, that a hearing was appropriate and, indeed, required. The Court notes, however, that a hearing does not result in automatic relief; rather, the hearing simply allows the Court the opportunity to determine whether the third party contact was harmless. See id. at 399. If the hearing reveals that any communication to the juror was harmless and did not have a substantial and injurious effect or influence in determining the jury's verdict, there is no basis for federal habeas relief. See id. at 398-99. In light of these cases, the District Court referred the

present case to the Magistrate Judge to conduct a hearing. The member of the jury who made contact with Father Law testified at the hearing.

The affidavits and testimony in this case reveal that the juror contacted Father Law because she “knew it would be difficult for [her] to make the sentencing decision in a death penalty case and wanted to know what [her] faith would say about voting in favor of the death penalty.” (ECF No. 87). At the evidentiary hearing, the juror explained that she contacted Father Law after she had filled out the juror questionnaire and participated in individual *voir dire*, but before she was selected as a juror on Petitioner’s case. (ECF No. 101, pp. 16-17). As indicated above, Father Law was Episcopalian Priest, but the juror was not a member of Father Law’s church. (*Id.* at 17). Rather, the juror knew Father Law because she cleaned his house and because he was occasionally a guest at the restaurant where she worked as a server. (*Id.* at 9). The juror stated that religion plays a very important role in her life and that while Father Law did not give her formal religious counsel, they did have religious conversations. (*Id.* at 9-10). On the occasion in question, she contacted Father Law to pray with her for strength; she was also concerned that God might not forgive her if she had to vote for the death penalty. (*Id.*). Father Law indicated that she should follow the law and that God would forgive her; they did not discuss the case at all. (*Id.* at 18, 20). Furthermore, she did not know the facts of the case at the time of her conversation, only that it was a big case and that she was going to be sequestered. (*Id.*). She did not recall for sure whether, at the time of the conversation, she knew she was being considered as a juror for a death penalty case. (*Id.* at 21-22). As already noted, the contact occurred before the juror was seated, not during the sentencing phase.

Having reviewed the record, including the transcript of the hearing, subsequent briefing, the Supplemental Report, and the objections, the Court agrees with the Magistrate Judge that the

juror's contact constitutes an impermissible external influence; however, as the Magistrate Judge notes, the contact did not have substantial and injurious influence on the jury's verdict. The minister stated that the juror should "follow the law"; these instructions are no different from those the juror would have received from the trial court. The juror did not indicate that the minister influenced her decisions or directed her to any religious text, nor did she indicate that she shared her discussion with other jurors. Finally, the juror stated that she and the minister did not discuss the actual case, including details of how the juror or jury should vote or reach a decision regarding innocence or guilt or regarding whether to impose a life or death sentence. Thus, the Court concludes that the juror's contact did not prejudice Petitioner in this case.

Petitioner asserts that without the minister's advice, the juror might not have been willing or qualified to serve as a juror, resulting in a different juror taking her place. He further asserts that had she served without the minister contact, she might have been more hesitant to vote for the death penalty. These arguments have no merit. As noted above, the juror had already completed *voir dire* and had been qualified as a juror *before* she contacted the minister. She had already indicated that she was able to impose the death penalty if the facts supported this decision. (App. 578-79). The juror did not indicate that her contact influenced her service as a juror. Thus, the Court finds that the contact did not have a "substantial and injurious effect or influence in determining the jury's verdict," which is required before relief is warranted.

In summary, the Court has reviewed the relevant legal authority and the factual record – including the petition, hearing transcript, Supplemental Report, and objections. Having completed this review, the Court again notes that Petitioner failed to raise this matter until he filed his state habeas petition; as a result, the issue is procedurally barred. Nonetheless, the Court concludes that the claim also fails on the merits. As noted, the juror's contact with Father Law had no

impact in connection with her role as a juror. Further, there is no evidence that the contact had “a substantial and injurious effect or influence” in determining the jury’s verdict. In conclusion, the Magistrate Judge’s recommendations regarding Ground Ten should be accepted and Petitioner is not entitled to habeas relief.

Conclusion

In light of the standard set forth in Wallace, the Court has reviewed, de novo, the Report, the Supplemental Report, and the objections. After careful review of the Reports and objections thereto, the Court hereby **ACCEPTS** the Report and the Supplemental Report. (ECF Nos. 75, 110). Petitioner’s objections (ECF Nos. 76, 112) are **OVERRULED**. Respondents’ motion for summary judgment (ECF No. 45) is **GRANTED** and Petitioner’s § 2254 Petition (ECF No. 31) is **DISMISSED**. In addition, as addressed *supra* pp. 8-10, the Petitioner’s motion to stay (ECF No. 77) is **DENIED**.

The Court has reviewed Petitioner’s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in accordance with Rule 11 of the Rules Governing Section 2255 Proceedings. The Court concludes that it is not appropriate to issue a certificate of appealability as to the issues raised in this petition. However, realizing that this is a death penalty case, the Court advises Petitioner that he may seek a certificate from the Fourth Circuit Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

s/Terry L. Wooten
Chief United States District Judge

May 18, 2015
Columbia, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Abdiyyah Ben Alkebulanyahh
(*fka* Tyree Alphonso Roberts),

Petitioner,

vs.

William R. Byars, Jr., *Commissioner, South
Carolina Department of Corrections*; Wayne
C. McCabe, *Warden of Lieber Correctional
Institution*,

Respondents.

C/A No. 6:13-cv-00918-TLW-KFM

REPORT AND RECOMMENDATION

Petitioner is an inmate at the Lieber Correctional Institution of the South Carolina Department of Corrections under a sentence of death for the murders of Dyke Coursen and Dana Tate. Petitioner has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civ. Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on Respondents' Motion for Summary Judgment. (Doc. # 45). Petitioner has responded to Respondents' motion, and Respondents have filed a reply. (Docs. # 64, 72). Having carefully considered the parties' submissions and the record in this case, the undersigned recommends that the court grant Respondents' motion for summary judgment.

BACKGROUND

Underlying Case Facts¹

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, Kimberly Blake, with whom Petitioner had an infant daughter, was also staying there. On January 8, 2002, Blake asked her friend, Strawberry Washington, to call the 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 Blake, when police arrived, Petitioner hid in the bedroom closet with his rifle. He gave Blake 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, who came 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 Coursen and Tate dead; Coursen had suffered six gunshot wounds, and Tate had seven. Petitioner was subsequently found hiding under a bridge with a shoulder and hip wound and was arrested. At the time, he had a black fanny pack carrying ammunition for an M-14 assault rifle, a cell phone, and a knife. Police subsequently found a rifle magazine and an SKS assault rifle in the area in which Petitioner had fled. The bullets and casings recovered from the victims and the scene of the crime were conclusively matched to the assault rifle. (Doc. # 44-15 at 2).

¹ The factual background of this case is taken from the facts recited by the South Carolina Supreme Court in its published opinion in Petitioner's direct appeal, *State v. Roberts*, 632 S.E.2d 871, 872-73 (S.C. 2006). (Doc. # 44-15).

Trial

Petitioner was indicted by the Beaufort County Grand Jury during the March 2002 term of the Beaufort County Court of General Sessions for two counts of murder (2002-GS-07-0369, 0370). (App. 4532-33; Doc. # 44-4). The State filed a Notice of Intent to Seek the Death Penalty on January 22, 2002, and also served its Notice of Evidence of Aggravation on March 19, 2002. (App. 4524-25).

Initially, Petitioner was represented by Gerald Kelly and Sean Thornton of the Beaufort County Public Defender's Office. Petitioner moved to represent himself during the proceedings. (*See* App. 3892-3968). His motion was granted, but Mr. Kelly and Mr. Thornton were to remain as standby counsel. (*Id.*). The State was represented by Solicitor Randolph Murdaugh and Assistant Solicitors Duffy Stone and Angela Tanner, all of the Solicitor's Office for the Fourteenth Judicial Circuit. (App. 1).

On October 6, 2003, *voir dire* in the case began before the Honorable Daniel F. Pieper, Circuit Court Judge. (App. 63-1196). On October 10, 2003, the jury was selected, and the guilt phase of the trial began. (App. 1316, 1320-39).

On October 20, 2003, the jury convicted Petitioner of two counts of murder. (App. 3472-73). Petitioner advised the court he did not intend to offer any mitigating evidence and expressed his desire to absent himself from the proceeding; he indicated he would probably be unruly if required to be present. (App. 3481-83). 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. (App. 3487-3535). Petitioner indicated his desire that counsel not represent him in any way, but ultimately decided counsel could remain as standby counsel to object to the introduction of improper evidence. (App. 3519-20, 3541-42).

After the statutory twenty-four hour waiting period, the sentencing phase of the trial began on October 21, 2003. (App. 3538). The sentencing phase proceeded with Petitioner seated at counsel table. (*Id.*). However, after multiple outbursts, the jury was removed, and Petitioner was placed in a conference room at the back of the courtroom. (App. 3556-60).

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. (App. 3765, 3795). Petitioner ultimately returned to the courtroom to make a closing statement to the jury. (App. 3828-39). 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 one 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. And whether for any reason you can think of or for no reason at all, including an act of mercy, the defendant should be sentenced to life imprisonment without parole." (App. 3851).

On October 22, 2003, the 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).

Direct Appeal

A timely Notice of Appeal was filed with the South Carolina Supreme Court. (Doc. # 44-5). Petitioner was represented on direct appeal by Acting Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Robert M. Dudek, both of the South Carolina Office of Appellate Defense.² (See Doc. # 44-13). 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.

(Doc. # 44-15 at 3). The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent on February 17, 2006. (Doc. # 44-14). Oral argument was held before the South Carolina Supreme Court on May 24, 2006. The South Carolina Supreme Court issued an opinion, *State v. Roberts*, 632 S.E.2d 871 (S.C. 2006), on July 24, 2006, affirming the convictions and sentences. (Doc. # 44-15).

Subsequently, Petitioner, through counsel, filed a Petition for Rehearing. (Doc. # 44-16). In the petition, Petitioner argued the Supreme Court of South Carolina had misapprehended the nature of the constitutional rights involved and had employed an unconstitutional harmless error analysis to assess the impact of the underlying error at sentencing. By order filed August 11, 2006, the Supreme Court of South Carolina denied the Petition for Rehearing. (Doc. # 44-17). The Remittitur was issued on August 11, 2006. (Doc. # 44-18).

² After appellant's initial brief was filed in the direct appeal, Petitioner moved to proceed *pro se*. (Doc. # 44-6). Both the State and the Office of Appellate Defense opposed the motion. (Docs. # 44-7, 44-8). Petitioner filed a response to the return to the motion. (Doc. # 44-9). By order filed June 3, 2005, Petitioner's Motion to Proceed *Pro Se* was denied. (App. 4973-81; Doc. # 44-10, *State v. Roberts*, 614 S.E.2d 626 (S.C. 2005)). Petitioner filed a *pro se* Motion for Reconsideration, which was denied by letter order filed July 8, 2005. (Docs. # 44-11, 44-12).

On August 17, 2006, Petitioner filed a Motion for Stay of Execution in order for him to seek certiorari from the Supreme Court of the United States. (Doc. # 44-19). The State served its return on August 23, 2006. (Doc. # 44-20). The Supreme Court of South Carolina granted the motion on September 7, 2006. (Doc. # 44-21).

On November 9, 2006, Petitioner filed a Petition for Writ of Certiorari in the Supreme Court of the United States. (Doc. # 44-22). In the petition, Petitioner argued that a capital defendant may waive his right to be present at the sentencing phase of his trial where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reason for requiring him to be present. The State filed its Brief in Opposition on February 5, 2007. (Doc. # 44-23). On March 19, 2007, the Supreme Court of the United States denied the Petition for a Writ of Certiorari by letter order. (Doc. # 44-24).

PCR Action

On March 12, 2007, Petitioner filed a *pro se* Application for Post-Conviction Relief (“PCR”) (2007-CP-07-715). (App. 4535-44). In the application, Petitioner asserted several claims. First, he contended the verdict was contrary to the law of reasonable doubt and was based upon a false prosecution. (App. 4537). Second, he argued the evidence proved that he committed no unlawful act because Officer Tate killed Officer Coursen. (*Id.*). Third, Petitioner alleged his Sixth Amendment rights were violated when his petition for speedy trial was denied and ignored and when bail was not granted. (App. 4541). Within that claim, Petitioner also alleged he was denied a fair trial because the alleged victims were honored as South Carolina heroes and inducted into the South Carolina Law Enforcement Hall of Fame as well as being honored on nationwide television by then President George Bush, who inducted them into the National Memorial for Police Officers on May 15, 2003. (*Id.*). Fourth, Petitioner argued that, in violation of the Eighth Amendment, he was sentenced to death when evidence showed

someone else killed the alleged victims. (*Id.*). Fifth, Petitioner asserted that his constitutional rights were “abridged and the privileges and immunities afforded all citizens, his life, his liberty without due process of law nor equal protection under the law.” (*Id.*). Sixth, he averred that appellate counsel was ineffective for not asserting that he was denied due process of law, he was denied a fair trial, he was denied equal protection of the law, a Fourth Amendment issue, and an after-discovered evidence claim. (App. 4542).

On March 30, 2007, counsel for Petitioner in the direct appeal filed a Petition for Stay of Execution so that Petitioner could seek his available remedies in PCR. (Doc. # 44-25). On April 9, 2007, the State served its Return to Petition for Stay of Execution. (Doc. # 44-26). On April 12, 2007, Petitioner served a reply to the State’s return. (Doc. # 44-27). On May 4, 2007, the Supreme Court of South Carolina granted the stay and assigned the Honorable Roger M. Young, Circuit Court Judge, to the PCR action. (Doc. # 44-28).

On August 8, 2007, Carl B. Grant and Glenn Walters were appointed to represent Petitioner in the PCR action. (Doc. # 44-29). On October 9, 2007, the State served its Return, Motion to Dismiss, and/or Motion for Summary Judgment. (App. 4569-98; Doc. # 44-30).³

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

Under the Sixth Amendment, an accused may waive the right to counsel and proceed *pro se*. *Faretta v. California*, 422 US 806, (1975); *State v. Reed*, 503 S.E. 2d 747 (1998). The trial judge has the responsibility to ensure that the accused [sic] is informed of the dangers and disadvantages of self representation and makes a knowing and intelligent waiver of the right to counsel. The ultimate test of whether a Defendant has made a

³ As pages were missing from the copy of the return in the appendix, Respondents attached a full copy as Doc. # 44-30.

knowing and intelligent waiver of the right to counsel is the Defendant's understanding. *Graves v. State*, 422 S.E. 2d 125 (1992).

In the present case, the trial Court failed to impress upon the Applicant the dangers and disadvantages of self representation. In addition, the trial Court failed to determine if the Applicant knowingly and intelligently waived his right to counsel. Further, the trial Court failed to determine that the Applicant understood what it meant to represent himself.

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

(App. 4564). On March 21, 2008, the State served its Amended Return, Motion to Dismiss, and/or Motion for Summary Judgment. (App. 4545-57; Doc. # 44-31).⁴

On October 12-13, 2008, an evidentiary hearing was held before Judge Young in the PCR action.⁵ (App. 4599-4920). Petitioner was present and was represented by Mr. Grant and Mr. Walters. (*Id.*). The State was represented by Assistant Attorneys General S. Creighton Waters and Alphonso Simon, Jr. (*Id.*).

By order filed by the Supreme Court of South Carolina on December 17, 2008, the Honorable Carmen T. Mullen, Circuit Court Judge, was assigned jurisdiction over the PCR action, and the order assigning Judge Young was rescinded. (Doc. # 44-32). The parties provided Judge Mullen with proposed orders. (Docs. # 44-33, 44-34). On September 17, 2009, the PCR Court filed its Order of Dismissal with Prejudice. (App. 5176-5229).

⁴ As there were pages missing from the copy of the amended return in the appendix, the respondents attached a full copy of the amended return as Doc. # 44-31.

⁵ The depositions of Robert Dudek, Joseph L. Savitz, III, and Dr. Donna Schwartz-Watts were introduced into evidence at the hearing.

PCR Appeal

On November 2, 2009, Petitioner timely served and filed a Notice of Appeal. (Doc. # 44-35). Petitioner was represented by John Blume⁶ on appeal. (See Doc. # 44-36). On July 21, 2010, Petitioner filed a Motion to Remand for Additional Post-Conviction Proceedings.⁷ (App. 5230-60). On August 2, 2010, the State filed its response (App. 5261-81), and on August 9, 2010, Petitioner filed a reply. (App. 5282-92). On August 16, 2010, Petitioner filed a Motion for Recusal requesting that Chief Justice Toal recuse herself from considering the Motion to Remand. (App. 5299-5302). On August 30, 2010, Chief Justice Toal issued an order denying the Motion for Recusal. (App. 5303-08). On October 20, 2010, the Motion to Remand was denied. (App. 5297-98).

On February 18, 2011, Petitioner appealed the PCR Court's order denying remand with the filing of a Petition for Writ of Certiorari. (Doc. # 44-36). Petitioner raised three grounds: (1) the trial court erred in denying his motion under *Batson v. Kentucky*, 106 U.S. 1712 (1986); (2) 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 Petitioner was in fact incompetent during his trial proceedings; and (3) Petitioner was denied due process and equal protection of the law and is thus entitled to a new PCR proceeding where: (a) Petitioner's PCR counsel were not qualified under S.C. Code Ann. § 17-27-160(B); (b) PCR counsel were ineffective; and (c) Judge Carmen Mullen signed the order denying PCR, 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. (Doc. #44-36). On June 6, 2011, the State served its Return to Petition for Writ of Certiorari. (Doc. # 44-37).

⁶ Mr. Blume also represents Petitioner in this case.

⁷ The motion asserted the same claims asserted here in the federal petition.

On February 22, 2013, the Supreme Court of South Carolina denied the Petition for Writ of Certiorari. (Doc. # 44-38). The Remittitur was issued on March 28, 2013. (Doc. # 44-39).

State Habeas Petition

On February 18, 2011, Petitioner also filed a Petition for Writ of Habeas Corpus with the Supreme Court of South Carolina, raising five issues. (Doc. # 44-40). First, Petitioner contended he was deprived of a fair and reliable determination of the appropriate sentence guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law at the penalty phase of his capital trial because (a) the trial judge failed to inquire into Petitioner's competency; (b) Petitioner was incompetent in fact; (c) the trial judge failed to secure a knowing and intelligent waiver of Petitioner's right to present mitigating evidence; and (d) the trial judge failed to terminate Petitioner's *pro se* status. Second, Petitioner argued his death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without individualized determination by the trial judge. Third, Petitioner alleged he was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel during the penalty phase of the proceedings. Fourth, Petitioner averred the prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of his rights guaranteed by the Sixth and Fourteenth Amendments. Fifth, Petitioner asserted he was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences. (*Id.*).

The State filed its Return to Petition for Writ of Habeas Corpus on March 21, 2011. (Doc. # 44-41). Petitioner filed a reply on May 18, 2011. (Doc. # 44-42). On February 22, 2013, the Supreme Court of South Carolina denied the petition. (Doc. # 44-43).

FEDERAL PETITION

On February 13, 2014, Petitioner filed his federal habeas petition in the instant case.

(Doc. # 31). He raises the following grounds for relief:

Ground One: Petitioner was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial judge failed to inquire into Petitioner's competency.

Ground Two: Petitioner was incompetent throughout the guilt-or-innocence phase of trial violating the Due Process Clause.

Ground Three: Petitioner's death sentence violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as a result of the trial judge's failure to secure a knowing, voluntary, and intelligent waiver of the right to present mitigating evidence.

Ground Four: The trial judge erred in failing to terminate Petitioner's *pro se* status.

Ground Five: Petitioner's death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without an individualized determination by the trial judge.

Ground Six: Petitioner was deprived of his Sixth and Fourteenth Amendment rights to effective assistance of counsel when trial counsel failed to object to evidence of general prison conditions during the penalty phase.

Ground Seven: Petitioner was deprived of his Sixth and Fourteenth Amendment rights to effective assistance of counsel when trial counsel failed to object to the extensive amount of victim-impact evidence introduced at the penalty phase.

Ground Eight: Petitioner was deprived of his Sixth and Fourteenth Amendment rights to effective assistance of counsel when trial counsel failed to object to inflammatory and improper statements made during the prosecution's closing argument, rendering the sentencing phase fundamentally unfair.

Ground Nine: The prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Petitioner's rights guaranteed by the Sixth and Fourteenth Amendments.

Ground Ten: Petitioner was deprived of his Sixth and Fourteenth Amendment rights to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.

(Doc. # 31 at 18-56).

APPLICABLE LAW

Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* At the summary judgment stage, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.* at 255. However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e).

Habeas Corpus Standard of Review

Because Petitioner filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. §

2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). In accordance with the AEDPA, claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was “contrary to, or involved an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States,” or the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d)(1), (2). When reviewing a state court’s application of federal law, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Williams v. Taylor*, 529 U.S. 362, 411 (2000); *see also Harrington v. Richter*, 562 U.S. 86, --, 131 S. Ct. 770, 785 (2011). Moreover, state court factual determinations are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

“A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington*, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Under the AEDPA, a state court’s decision “must be granted a deference and latitude that are not in operation” when the case is being considered on direct review. *Id.* at 785. Moreover, review of a state court decision under the AEDPA standard does not require an opinion from the state court explaining its reasoning. *See id.* at 784 (finding that “[t]here is no text in [§ 2254] requiring a statement of reasons” by the state court). If no explanation accompanies the state court’s decision, a federal habeas petitioner must show that there was no reasonable basis for the state court to deny relief. *Id.* Pursuant to § 2254(d), a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court’s decision; and then (2) ask whether it is possible that fair minded jurists could disagree that those

arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. *Id.* at 786. “If this standard is difficult to meet, that is because it was meant to be.” *Id.* Section 2254(d) codifies the view that habeas corpus is a “‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

Exhaustion and Procedural Default

Federal law establishes this court's jurisdiction over habeas corpus petitions. 28 U.S.C. § 2254. This statute permits relief when a person “is in custody in violation of the Constitution or laws or treaties of the United States” and requires that a petitioner present his claim to the state's highest court with authority to decide the issue before the federal court will consider the claim. *Id.* The separate but related theories of exhaustion and procedural bypass operate in a similar manner to require a habeas petitioner to first submit his claims for relief to the state courts. A habeas corpus petition filed in this court before a petitioner has appropriately exhausted available state court remedies or has otherwise bypassed seeking relief in the state courts will be dismissed absent unusual circumstances detailed below.

The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A). In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds be stated in the direct appeal or PCR application. Rule 203, SCACR; S.C. Code Ann. § 17-27-10, *et seq.*; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767, 770 (S.C. 1976). If the PCR court fails to address a claim as is required by S.C. Code Ann. § 17-27-80, counsel for the applicant must make a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP to preserve the issue for appellate review. *Marlar v. State*,

653 S.E.2d 266, 267 (S.C. 2007).⁸ The Supreme Court of South Carolina has held that the presentation of claims to the state court of appeals without more is sufficient to exhaust state remedies for federal habeas corpus review. *State v. McKennedy*, 559 S.E.2d 850, 853 (S.C. 2002); *see also In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 471 S.E.2d 454 (S.C. 1990). In *McKennedy*, the Supreme Court of South Carolina specifically held that *In re Exhaustion* had placed discretionary review by the Supreme Court of South Carolina "outside of South Carolina's ordinary appellate review procedure pursuant to *O'Sullivan [v. Boerckel]*, 526 U.S. 838 (1999)]." 559 S.E.2d at 854. Accordingly, a claim would not be procedurally barred from review in this court for failure to pursue review in the Supreme Court of South Carolina after an adverse decision in the South Carolina Court of Appeals, either after a direct appeal or after pursuing relief in a PCR petition.

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner seeks habeas corpus relief on an issue after he failed to raise that issue at the appropriate time in state court and has no further means of bringing that issue before the state courts. In such a situation, the person has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. Procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. *See Smith v. Murray*, 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings if the state has procedural rules that bar its courts from considering claims not raised in a timely fashion.

⁸ In *Bostick v. Stevenson*, 589 F.3d 160, 162–65 (4th Cir. 2009), the Fourth Circuit Court of Appeals found that, prior to the Supreme Court of South Carolina's November 5, 2007, decision in *Marlar*, South Carolina courts had not been uniformly and strictly enforcing the failure to file a motion pursuant to Rule 59(e), SCRPC, as a procedural bar. Accordingly, for matters in which there was a PCR ruling prior to November 5, 2007, the court will not consider any failure to raise issues pursuant to Rule 59(e) to effect a procedural bar.

If a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed, he is barred from proceeding in state court. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. As the Supreme Court has explained: "[State procedural rules promote] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." *Reed v. Ross*, 468 U.S. 1, 10–11 (1984).

Cause and Actual Prejudice

"[A] federal court ordinarily may not consider claims that a petitioner failed to raise at the time and in the manner required under state law unless 'the prisoner demonstrates cause for the default and prejudice from the asserted error.'" *Teleguz v. Pearson*, 689 F.3d 322, 327 (4th Cir. 2012) (quoting *House v. Bell*, 547 U.S. 518, 536 (2006)). To show cause, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," *Murray v. Carrier*, 477 U.S. 478, 488 (1986), or that "the factual or legal basis for the claim was not reasonably available to the claimant at the time of the state proceeding." *Roach v. Angelone*, 176 F.3d 210, 222 (4th Cir. 1999). To show actual prejudice, the petitioner must demonstrate more than plain error. *Engle v. Isaac*, 456 U.S. 107, 134–35 (1982). Alternatively, Petitioner may "prove that failure to consider the claims will result in a fundamental miscarriage of justice." *McCarver v. Lee*, 221 F.3d 583, 588 (4th Cir. 2000) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). A fundamental miscarriage of justice equates to the conviction of someone who is actually innocent. However, "actual innocence" requires "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998).

DISCUSSION

Procedural Default

Respondents assert that all of Petitioner's claims are procedurally defaulted and barred from federal habeas review. As noted above, Petitioner raised substantively identical claims to those before the court in his PCR appeal and in his state habeas petition. The Supreme Court of South Carolina denied both the PCR appeal and the habeas petition in summary orders.⁹ (Docs. # 44-38, 44-43). Petitioner asserts that, under *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770 (2011), and *Johnson v. Williams*, — U.S. —, 133 S. Ct. 1088 (2013), the Supreme Court of South Carolina's summary dismissals constitute decisions on the merits.

In *Harrington*, the Supreme Court found that “[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” 131 S. Ct. at 784-85. In *Johnson*, the Court clarified that this presumption applies equally when a state court order addresses some, but not all, of a petitioner's claims. *See* 133 S. Ct. at 1094. *Johnson*, however, did not alter the Court's directive that the presumption arises only in the absence of state law procedural principles barring merits review.

Here, Petitioner did not raise Grounds One through Eight or Ground Ten in his original or amended PCR applications.¹⁰ In addition, Petitioner did not raise Grounds Five, Nine, or Ten – all freestanding claims – on direct appeal. Thus, pursuant to South Carolina procedural principles, none of

⁹ The order denying Petitioner's PCR appeal states, in its entirety: “Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief. We deny the petition.” (Doc. # 44-38). The order denying Petitioner's state habeas petition states: “Petitioner seeks a writ of habeas corpus. We deny the petition.” (Doc. # 44-43).

¹⁰ Petitioner did raise a version of Ground Nine in his PCR application. However, the PCR court found that those *Batson* claims were not viable claims for relief in PCR and expressly dismissed them on procedural grounds. (App. 5216-17).

Petitioner's claims were properly before the state supreme court on a petition for writ of certiorari or petition for writ of habeas corpus. *See Hyman v. State*, 299 S.E.2d 330, 331 (S.C. 1983); *Drayton v. Evatt*, 430 S.E.2d 517, 519-20 (S.C. 1993); *Pruitt v. State*, 423 S.E.2d 127, 128 (S.C. 1992) (issue must be raised to and ruled on by the PCR judge in order to be preserved for review); *Key v. Currie*, 406 S.E.2d 356, 357 (1991) (the Supreme Court of South Carolina "will not entertain actions filed in its original jurisdiction where the matter can be entertained in the trial courts of this State"); *Cummings v. State*, 260 S.E.2d 187, 188 (S.C. 1979); *Simmons v. State*, 215 S.E.2d 883, 885 (S.C. 1975) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); S.C. Code Ann. § 17-27-20(B) ("This remedy [PCR] is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."). Accordingly, the undersigned does not presume that the Supreme Court of South Carolina's summary dismissals of those petitions reached the claims' merits. Rather, all of Petitioner's claims are procedurally barred from federal habeas review absent a showing of cause and actual prejudice.¹¹ *See Wainwright v. Sykes*, 433 U.S. 72, 84-87 (1977); *Fowler v. Joyner*, 753 F.3d 446, 460-62 (4th Cir. 2014).

Cause & Actual Prejudice

Petitioner argues cause on two grounds: inadequate assistance of PCR counsel and Petitioner's incompetency during the state PCR proceedings.

Ineffective Assistance of PCR Counsel

Petitioner asserts that under the Supreme Court's ruling in *Martinez v. Ryan*, — U.S. —, 132 S. Ct. 1309 (2012), he can establish cause for his procedural default by showing that his PCR counsel was ineffective under the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984).

¹¹ Petitioner has not asserted actual innocence, so the court will not address that portion of the *Wainwright v. Sykes* analysis.

In *Martinez*, the Court found that a petitioner could show cause for his failure to comply with an adequate and independent state procedural rule where his post-conviction counsel did not provide adequate assistance. 132 S. Ct. at 1318. However, to overcome the default, the petitioner “must also demonstrate that the underlying [procedurally barred] claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit.” *Id.*

As discussed more fully under the “Merits” heading in this Report and Recommendation, the undersigned finds that Petitioner’s habeas grounds lack merit. Accordingly, Petitioner cannot satisfy the requirements for overcoming procedural default outlined in *Martinez*.

Petitioner’s Competency During PCR Proceedings

Petitioner asserts that he was incompetent in fact throughout the state appellate and post-conviction proceedings and that his incompetence impaired his ability to consult with his counsel and raise all potentially meritorious claims, thus causing his procedural default.

The Fourth Circuit has recognized that “profound mental illness may constitute cause to excuse a procedural default in certain circumstances.” *Farabee v. Johnson*, 129 F. App’x 799, 802 (4th Cir. 2005) (citing *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004); *Thomas v. Cunningham*, 313 F.2d 934, 937 (4th Cir. 1963)). To overcome the procedural hurdle, the petitioner must show that his mental illness actually caused the procedural defaults. *Id.* at 804. In evaluating similar claims, courts have found cause where a petitioner has shown “that his mental illness interfered with his ability to appreciate his litigation position or to make rational decisions concerning the litigation during the entirety of the relevant time periods, see *Holt v. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999), so that he was unable to consult with counsel, file pleadings, or otherwise comply with state procedural requirements, see *Malone v. Vasquez*, 138 F.3d 711, 719 (8th Cir. 1998).” *Id.* (some citations omitted).

Here, Petitioner asserts that he was incompetent-in-fact during the penalty phase of his trial, his incompetence persisted throughout his appellate and post-conviction proceedings, and his mental illness remains unabated, impairing his ability to rationally consult with counsel. Petitioner rests this assertion on the same evidence and arguments supporting Ground Two. As discussed more fully in analyzing Ground Two, the undersigned does not find that the record supports a finding that Petitioner was incompetent-in-fact during his trial. Petitioner has not offered any additional evidence or pointed to evidence in the record relating specifically to his competence during his appellate and post-conviction proceedings. In the absence of such evidence, the undersigned finds that Petitioner has not shown that any mental illness actually caused his procedural defaults.

Because Petitioner's assertions of cause fail, the undersigned need not reach the question of prejudice.

Exhaustion

In the alternative, Petitioner asserts that his claims are not exhausted and that he is entitled to stay this action so he can return to state court and properly exhaust his claims. As noted above, Petitioner has utilized both of South Carolina's avenues for judicial relief — direct appeal and PCR proceedings. However, Petitioner asserts that, if the Supreme Court of South Carolina creates a state law equivalent to *Martinez v. Ryan*, and Petitioner successfully shows that his first PCR counsel provided inadequate assistance, then Petitioner may be able to file a second PCR application asserting the claims currently before this court.

At this time, however, the Supreme Court of South Carolina has not created a state law equivalent to *Martinez*. On the contrary, the Supreme Court of South Carolina has expressly stated that “the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” *Kelly v. State*, 745 S.E.2d 377, 377 (S.C. 2013). Thus, under current South

Carolina state law, “the contention that prior PCR counsel was ineffective is not per se a ‘sufficient reason’ allowing for a successive PCR application under [South Carolina Code Ann.] § 17-27-90.” *Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991). Accordingly, Petitioner has technically exhausted all available avenues of redress in state court.

Merits

In accordance with the procedural analysis above, the undersigned recommends dismissing the petition as procedurally barred. However, should the court conclude that the Supreme Court of South Carolina reached the merits of Petitioner’s claims in its summary dismissal orders, for the following reasons, the undersigned would recommend granting Respondents’ motion for summary judgment on all of Petitioner’s claims, except for a portion of Ground Ten.

Claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the state court’s decision was “contrary to, or involved an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States,” or the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d)(1), (2).

Grounds One – Three: Competency

Relevant Facts¹²

At a pre-trial hearing before Judge Pieper on July 23, 2003, there was an extensive colloquy on Petitioner’s motion to represent himself. (*See App. 3900-3945*). 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

¹² These facts are adopted from the PCR court’s order dismissing Petitioner’s amended PCR application. (*See App. 5180-5196*).

noted that he had done PCR work for other inmates and filed numerous motions in his own case. Petitioner stated that his lawyers had given him a document on the dangers of self-representation. At this hearing, the trial court discussed with Petitioner that by waiving counsel, he was waiving it for the entire case and that he might find himself shocked and dazed if faced with proceeding to the penalty phase. Despite the court's warnings, Petitioner remained adamant in his desire to represent himself. The court specifically observed that Petitioner was very coherent and indicated that it would allow him to proceed *pro se*, pending a *Blair*¹³ hearing.

The *Blair* hearing took place on August 1, 2003. At the hearing, Dr. Donna Schwartz-Watts, the defense psychiatrist, testified that she felt Petitioner was not competent to represent himself based on her assessment of his paranoia, psychosis, and the reasons he provided 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 he had since refused to see her. She felt that Petitioner did not have the capacity to assist his attorneys because he thought they were conspiring with the solicitor. She also felt that 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.

On cross-examination by the solicitor and in response to questions from Judge Pieper, Dr. Schwartz-Watts stated that Petitioner's intelligence was sufficient, but that she was concerned with the reasoning behind some of his decisions – especially given Petitioner's belief that he could do a better job than his attorneys, and that his attorneys were Masons who were conspiring with the solicitor to deny him a fair trial because of his religious beliefs. Dr. Schwartz-Watts also testified to her belief that Petitioner's mental illness would preclude him from considering issues in mitigation. However, she also

¹³ *State v. Blair*, 273 S.E.2d 536 (S.C. 1981).

stated that some of Petitioner's decisions about experts were "brilliant" and that he had some good and strong ideas about how to defend his case.

The defense psychologist, Dr. Jeffrey R. McKee, testified that Petitioner refused to see him, but that he had elevated scores on a portion of a psychological test, indicating defensiveness and underreporting of symptoms. On cross-examination by Petitioner, Dr. McKee agreed that Petitioner had average intelligence, no neuropsychological deficits, and no indications of malingering.

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, but noted that was not a major mental illness.

The court's psychologist, Dr. Jeffrey Musick, examined Petitioner four times and also agreed that he was competent to stand trial. On cross-examination by Petitioner, Dr. Musick stated that none of Petitioner's tests indicated that he was mentally retarded and agreed that while Petitioner exhibited some suspiciousness and distrustfulness, those traits were not altogether abnormal. Dr. Musick also noted that Petitioner was well aware of his rights.

Based on this expert testimony and his own observations of and interactions with Petitioner, the court found Petitioner competent. Specifically, the court stated:

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 rational understanding of these proceedings and does have the ability to present his defense, that I find that he is competent to proceed.

(App. 4054-55). After making this finding, the court again discussed the dangers of self-representation, particularly in a capital case.

For the remainder of that pre-trial proceeding, Petitioner was able to make and logically discuss a number of motions. All of those motions were at least somewhat appropriately related to valid principles of law, and none were rambling or nonsensical. Then, in *ex parte* proceedings, Petitioner cogently discussed his requests for experts, some of which the court granted.

The court held another pre-trial hearing on October 1, 2003, at which Petitioner raised a number of other appropriate motions and conducted an evidentiary hearing on his Fourth Amendment claims.

When the trial commenced on October 6, 2003, Petitioner successfully conducted extensive capital *voir dire*, engaged in jury selection, made a motion for a *Batson* hearing, and discussed parameters of the opening statement with Judge Pieper. Petitioner gave a long but coherent opening statement and proceeded to engage in lengthy examinations of witnesses in an appropriate manner. As the PCR court found, "A reading of the guilt phase shows that while [Petitioner] may have occasionally had trouble with Rules of Evidence and Rules of Civil Procedure, 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." (App. 5189).

The only significant issue arose after closing arguments in the guilt phase. While the jury was still deliberating, Petitioner's standby counsel informed the judge that Petitioner wished to continue to represent himself, but did not intend to participate in or even appear for the sentencing phase. Petitioner stated that he did not intend to present anything in mitigation and did not see how his presence would make a difference. Specifically, Petitioner stated that he did not wish 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 [a life sentence] as a easy or something positive or good in my situation. Death would be more preferable than life until I die in - - in prison.

(App. 3455-56). The court told Petitioner that he would have to be present for sentencing and explained the importance of presenting mitigating evidence.

Several more conversations regarding Petitioner's decision took place between Petitioner, the court, and Petitioner's standby counsel after the jury returned its guilty verdict. During these conversations, Petitioner explained that he presented everything about himself he wanted the jury to know during the guilt phase, and he did not wish to add anything. In addition, standby counsel noted that Petitioner decided to stop all mitigation investigation on August 1st, when he was appointed counsel of record. (App. 3495). Petitioner re-asserted his desire to remain counsel of record, but not to be present in the courtroom for the sentencing phase, stating that if the judge required him to remain in the courtroom, he would be verbally disruptive. Petitioner stated that he did not wish to see any of the witnesses and that he was "respectfully" ready to accept the jury's sentence. (App. 3516-18).

After much deliberation, the court decided that Petitioner had to be present in the courtroom, and the sentencing phase began. After the solicitor asked the first question of his first witness, 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 his question again. Petitioner stood up a second time and recited the same phrase. The court ordered the jury to step out, and Petitioner told the court that he intended to continue to disrupt the proceedings. The court warned Petitioner that if he disrupted the proceedings again, he would be removed from the courtroom. The court brought the jury back in, the solicitor started his questioning, and Petitioner stood up and recited the same phrase. The court sent the jury out

again and ordered the Petitioner confined to a room at the back of the courtroom where he could see and hear the proceedings.

Although given the opportunity to return to the front of the courtroom, Petitioner chose to remain in the glass room until his own closing argument. During the State's closing argument, Petitioner objected twice through standby counsel. Then, Petitioner gave a fairly lengthy closing statement to the jury, in which he apologized to the victim's families. Much like his arguments during the guilt phase, Petitioner's closing statement was logical, appropriate, and relevant to the issues. After finishing his closing statement, Petitioner returned to counsel table for the rest of the case. (App. 3829-40). Petitioner remained calm and coherent after the sentencing phase verdict, renewing his motions, apologizing again to the families, and thanking the trial judge. (App. 3871-73).

Legal Standard

In Grounds One through Three, Petitioner raises both procedural and substantive competency claims. The Fourteenth Amendment's Due Process Clause prohibits states from trying and convicting mentally incompetent defendants. *See Pate v. Robinson*, 383 U.S. 375, 384-86 (1966). A defendant is competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

To prevail on a procedural competency claim, "the petitioner must establish that the state trial court ignored facts raising a 'bona fide doubt' regarding the petitioner's competency to stand trial." *Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000) (citing *Pate*, 383 U.S. at 384-86). "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." *Id.* (citing *Drope v. Missouri*, 420 U.S. 162, 180 (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.” *Drope*, 420 U.S. at 180.

On the other hand, a petitioner raising a substantive competency claim must demonstrate his incompetency by a preponderance of the evidence. *Burket*, 208 F.3d at 192. “Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.” *United States ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1012 (7th Cir. 1984). “Likewise, neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial.” *Burket*, 208 F.3d at 192.

Ground One

In Ground One, Petitioner asserts that he was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial because the trial judge failed to inquire into his competency. In support of this procedural competency claim, Petitioner primarily relies on the following evidence: (1) Dr. Schwartz-Watts and Petitioner’s counsel disputed Petitioner’s competency prior to the trial; (2) the trial judge himself acknowledged that the stress of a capital trial could affect Petitioner’s competence; and (3) Petitioner’s behavior and demeanor became increasingly irrational and less coherent as the trial progressed. (Doc. # 31 at 19-20). Petitioner argues that the combined effect of these circumstances was to raise a bona fide doubt as to his competence so that the trial judge’s failure to re-evaluate Petitioner’s competence violated due process. The undersigned does not agree.

While Petitioner’s counsel did initially question his competence, the trial judge responded appropriately by holding a thorough *Blair* hearing. Only after considering extensive expert testimony

and his own observations of Petitioner did the trial judge find Petitioner competent to stand trial and to proceed *pro se*. In addition, the record does not suggest that Judge Pieper did not afford Dr. Schwartz-Watts's testimony and opinion appropriate weight, only that he considered her opinion in combination with three other expert opinions and came to a different conclusion. Based on the undersigned's review of the record, Judge Pieper's initial finding that Petitioner was competent was not unreasonable.

In addition, the undersigned does not find Judge Pieper's warnings to Petitioner regarding the dangers of self-representation indicative of Petitioner's actual competency or the judge's view of Petitioner's competency. These exchanges show that Judge Pieper was acutely aware of his responsibility as a trial judge to ensure that Petitioner made a fully informed decision and serve only to add credibility to Judge Pieper's findings of competence.

Finally, the court does not agree that Petitioner's demeanor at the end of the guilt phase raised a bona fide doubt as to his competence. In support of his assertion to the contrary, Petitioner points to three events that he argues should have triggered the trial court's duty to inquire into Petitioner's competency: (1) waiver of the twenty-four hour cooling off period; (2) refusal to participate in the sentence phase; and (3) Petitioner's religious chant. From the record, it appears that Petitioner made calculated, rational decisions about each of these events. In addition, all three events appear consistent with Petitioner's decision, apparently made as early as August 1, 2003, over two months earlier, to not engage in a mitigation investigation and his strong desire to control his own case. While the undersigned would not promote Petitioner's decisions as sound trial strategy, "bad trial tactics do not prove a defendant incompetent." *Wise v. Bowersox*, 136 F.3d 1197, 1204 (8th Cir. 1998).

In sum, taken individually or together, the circumstances surrounding Petitioner's trial at no point raised a bona fide doubt as to Petitioner's competency. Thus, the Supreme Court of South

Carolina could have reasonably found that the trial judge had no duty to inquire further into Petitioner's competency.

Ground Two

In Ground Two, Petitioner asserts that he was actually incompetent throughout the guilt phase of his trial and, thus, suffered a violation of his right not to be tried or convicted while incompetent. Petitioner's assertion rests on an evaluation from Dr. Rikki Lynn Halavonich, a forensic psychiatrist. (Doc. # 31-1, Halavonich Ltr). Dr. Halavonich evaluated Petitioner on March 31, 2010, and again on May 24, 2010. Her opinion, expressed in a letter to Petitioner's counsel, is based on these evaluations and her review of the trial transcripts and a number of other records. Petitioner originally filed Dr. Halavonich's evaluation with his petition for a writ of certiorari and his state habeas petition.

Dr. Halavonich's evaluation expresses her opinion that Petitioner's symptoms are consistent with Temporal Lobe Epilepsy and that "[a]lthough determined to be competent prior to the initiation of the trial, [Petitioner's] documented behaviors, particularly just prior to and during the penalty phase of the trial, indicate his mental status had then declined to an extent consistent with a lack of capacity to rationally understand the proceedings or participate in his defense at that point in time." (Doc. # 31-1, Halavonich Ltr at 4). Petitioner asserts that Dr. Halavonich's post-conviction letter and Dr. Schwartz-Watts's opinion provide "clear, strong, and uncontradicted" evidence of Petitioner's incompetence and present a "facially meritorious claim for relief." (Doc. # 64 at 47).

However, the record does contain contradictory evidence. As noted in the factual discussion and analysis of Ground One above, the record is replete with evidence of Petitioner's competence, including the trial court's findings based on personal observations and live expert testimony. Taking the record as a whole, including the Halavonich letter, the Supreme Court of South Carolina's finding that Petitioner remained competent throughout his trial would not be unreasonable.

Ground Three

In Ground Three, Petitioner asserts that the trial judge failed to secure a knowing, voluntary, and intelligent waiver of Petitioner's right to present mitigating evidence. The undersigned finds this ground entirely without merit.

The Supreme Court of the United States has "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." *Schriro v. Landrigan*, 550 U.S. 465, 479 (2007). Nor has the Court ever "required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence." *Id.* Accordingly, the state court's summary dismissal of this claim on the merits would not constitute an unreasonable application of clearly established federal law.

Grounds Four & Five: Removal from Courtroom, Pro Se Status, and ShacklesRelevant Facts

After Petitioner's first outburst during the sentencing phase, with the jury out of the room, the trial judge warned Petitioner that he would put him in a back room if he continued to be disruptive. (App. 3552). Petitioner responded that he would be disruptive back there as well (*Id.*). The judge told Petitioner that if he further disrupted the proceedings, he may be shackled or gagged. (App. 3553).

After Petitioner's second outburst, the trial judge sent the jury out of the room and ordered that Petitioner be placed in a conference room at the back of the courtroom with a glass partition so he could observe the proceedings. (App. 3556). Again, the trial judge warned Petitioner that if he was disruptive again, he would be gagged. (App. 3557). At the trial judge's direction, Petitioner was initially restrained, but the restraints were removed before the jury returned to the courtroom. (*See Doc. # 44-15 at 4, State v. Roberts*, 632 S.E.2d 871, 873 (S.C. 2006)).

The trial judge explained his decision to remove Petitioner from the courtroom on the record as follows:

Let the record reflect that the defendant once again has disrupted these proceedings with his outburst contrary to the court's previous warnings. The court said it would not give him further warning.

The court will place him in a room at the back of the courtroom that has a glass partition to allow him to hear all of the proceedings. He can also see the proceedings as he desires. There's a system that feeds into the room that allows him to hear all of the testimony.

Previously the defendant indicated he did not wish to be here. He has authorized stand-by counsel to interject objections, handle the exhibits, and make the closing statement if necessary.

Because he continues to maintain that he will constantly interrupt these proceedings, the court has taken this action.

The court has also warned the defendant that if necessary he will be gagged.

We will put him back in the room and see if he - - if he has another outburst. Then at that point we will take the step of actually gagging him, which I hope we do not have to do.

(App. 3556-57). Throughout sentencing, the judge offered to allow Petitioner to return to the courtroom if he could do so without being disruptive. However, Petitioner indicated that he preferred to remain in the back room. (App. 3596-97, 3681, 3738). Ultimately, Petitioner returned to the courtroom, unrestrained, to make his closing statement to the jury.

Ground Four

In Ground Four, Petitioner asserts that the trial judge erred in failing to terminate his *pro se* status. Specifically, Petitioner argues that his outbursts and unwillingness to participate in the penalty phase of his trial "provided the trial court with ample reason and justification to revoke" his *pro se* status. (Doc. # 31 at 30). Further, Petitioner asserts that by appointing standby counsel, but restricting

their role and allowing Petitioner to continue *pro se*, the trial court “ensured that Petitioner would receive less protection than the law afforded him and guaranteed a sentence of death.” (*Id.*).

While a competent criminal defendant has a right to proceed without counsel, *see Faretta v. California*, 422 U.S. 806, 807 (1975), that right is not absolute, *see Martinez v. Court of Appeal of California*, 528 U.S. 152, 161-62 (2000). A trial court may “terminate self-representation or appoint ‘standby counsel’ – even over the defendant’s objection – if necessary,” such as when “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.*

However, a defendant who does not 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 appoint standby counsel when defendant removed from courtroom not objectively unreasonable application of Supreme Court precedent); *Clark v. Perez*, 510 F.3d 382, 395-96 (2d Cir. 2008) (no Sixth Amendment violation where court did not revoke *pro se* status of defendant removed from courtroom because of conduct). Rather, “[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations,” and “[t]rial judges . . . must be given sufficient discretion to meet the circumstances of each case.” *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

“[T]he balance between a defendant’s right to self-representation and the need to ‘ensur[e] that evidence admitted against [him] is reliable and subject to . . . rigorous adversarial testing’ is a delicate matter.” *Davis*, 532 F.3d at 140 (quoting *Maryland v. Craig*, 497 U.S. 836, 846 (1990)). In this case, after much deliberation and discussion with both Petitioner and standby counsel, the trial judge came to a resolution that, in his view, struck this delicate balance. By removing Petitioner from the courtroom, but placing him in an area where he could see and hear the proceedings and communicate with his standby counsel, the trial judge allowed Petitioner to maintain control of his own defense while

also discontinuing the disruptions. In addition, Petitioner's standby counsel remained at the counsel table with instructions to object where necessary, further safeguarding the adversarial process. On this record, the undersigned cannot conclude that the state supreme court's dismissal of this claim would be an objectively unreasonable application of clearly established Supreme Court precedent.

Ground Five

In Ground Five, Petitioner asserts that his death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without an individualized determination by the trial judge.

"[C]ourts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." *Deck v. Missouri*, 544 U.S. 622, 633 (2005). However, this rule is not absolute and "permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling." *Id.* "But, any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." *Id.* Further, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" *Id.* at 635 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

In *Deck*, the Supreme Court emphasized that the rule against shackling, especially in capital proceedings, is intended to combat potential prejudice, not to prevent trial judges from taking appropriate precautions in their courtrooms. *See Deck*, 544 U.S. at 632 ("We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms. But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken

account of the circumstances of the particular case.”). Accordingly, the Court’s holding is limited to the use of *visible* shackles. *Id.* at 624 (“We hold that the Constitution forbids the use of visible shackles during the penalty phase”). Here, the Supreme Court of South Carolina expressly found that Petitioner’s restraints were not visible to the jury. (Doc. # 44-15 at 4, *State v. Roberts*, 632 S.E.2d 871, 873 (S.C. 2006)). After a thorough review of the relevant portion of the record, the undersigned cannot say that the state court’s dismissal of this claim would be an unreasonable determination of the facts or an unreasonable application of clearly established federal law.

Grounds Six – Eight: Ineffective Assistance of Counsel

Grounds Six through Eight raise various claims of ineffective assistance of counsel. “A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “First, the defendant must show that counsel’s performance was deficient.” *Id.* “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* “This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* “Judicial scrutiny of counsel’s performance must be highly deferential,” and “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. As the Supreme Court has noted:

Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is “doubly” so, *Knowles*, 556 U.S. at —, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is

substantial. 556 U.S. at —, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington, 131 S.Ct. at 788.

Ground Six

In Ground Six, Petitioner contends that he was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel when trial counsel failed to object to evidence of general prison conditions during the penalty phase of the trial. (Doc. # 31 at 36). Specifically, Petitioner states that attorneys Kelly and Thornton failed to object to statements made by Solicitor Stone during his closing argument and to statements by James Sligh, a South Carolina Department of Corrections official, about living conditions of prisoners in the general population of the South Carolina Department of Corrections. (App. 3636–39, 3794). Petitioner cites to *State v. Bowman*, 623 S.E.2d 378 (S.C. 2005), and *State v. Burkhardt*, 640 S.E.2d 450, 453 (S.C. 2005) (also involving testimony by James Sligh), which hold that evidence relating to prison conditions is beyond the scope of what a jury should consider in determining whether a convicted defendant should be sentenced to death or to life without parole. (Doc. # 31 at 38).

The holding in *State v. Burkhardt* is based on South Carolina law. As a general rule, issues of state law are not valid grounds for federal habeas corpus relief. See *Wright v. Angelone*, 151 F.3d 151, 156–58 (4th Cir. 1998); *Chance v. Garrison*, 537 F.2d 1212, 1215 (4th Cir. 1976); and *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960); cf. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“We have stated many times that ‘federal habeas corpus relief does not lie for errors of state law.’ . . . Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-

court determinations on state-law questions.”) (citations omitted). As this ground is based on state law, Ground Six provides no basis for granting federal habeas corpus relief.

Moreover, under *Faretta v. California*, 422 U.S. 806, 834 (1975), Petitioner was acting *pro se* during the trial and during the penalty phase. As a result, the District Court should find that he is precluded from raising ineffective assistance of counsel claims with respect to Grounds Six, Seven, and Eight. In *Faretta*, the Court stated:

We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353. Of course, a State may—even over objection by the accused—appoint a “standby counsel” to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. See *United States v. Dougherty*, 154 U.S.App.D.C. 76, 87—89, 473 F.2d 1113, 1124—1126.

The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of “effective assistance of counsel.”

Faretta, 422 U.S. at 834 n. 46.

Here, Petitioner was never relieved of his *pro se* status during the penalty phase. (See Doc. # 43 at 66). Hybrid representation in South Carolina courts is precluded under cases such as *State v. Stuckey*, 508 S.E.2d 564, 564—65 (S.C. 1998) (stating there is no right to hybrid representation under the South Carolina Constitution or the Sixth Amendment of the U.S. Constitution). The United States Court of Appeals for the Fourth Circuit has also held that “a *pro se* defendant has no right to standby

counsel when he chooses to proceed *pro se*.” *United States v. Beckton*, 740 F.3d 303, 307 (4th Cir. 2014) (citing *United States v. Singleton*, 107 F.3d 1091, 1100 (4th Cir. 1997) (right to counsel and right to represent oneself are “mutually exclusive”)).

The Courts of Appeals to address the matter have held that, under *Faretta*, since there is no constitutional right to standby counsel, no claim of ineffective assistance of counsel can arise from standby counsel. See, e.g., *United States v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1997) (“Morrison claims that his standby counsel ineffectively assisted him. We have held that ‘there is no constitutional right to hybrid representation . . . where [the defendant] shared the duties of conducting her defense with a lawyer.’ . . . [W]ithout a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel.”) (citation omitted); *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997) (“Absent a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective.”) (citations omitted); *United States v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992) (“This court knows of no constitutional right to effective assistance of standby counsel.”).

Grounds Six through Eight arise out of Petitioner’s decision to represent himself at trial, a right guaranteed by the holding in *Faretta*, 422 U.S. at 836 (“In forcing *Faretta*, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense.”). Since the Court of General Sessions, under *Faretta*, was required to allow Petitioner to proceed *pro se* in his death penalty trial, the District Court should find that no valid ineffective assistance of counsel claim has been raised, despite the presence of standby counsel. Although the United States Court of Appeals for the Fourth Circuit has not decided the specific matter, it is recommended, in light of the decision of the Court of Appeals in *Beckton*, 740 F.3d at 307 (a direct appeal holding that there is no right to hybrid representation), that the

District Court follow the reasoning of the United States Courts of Appeals for the Second and Seventh Circuits and hold that, since there is no right to hybrid representation, a claim for ineffectiveness of standby counsel does not arise where the criminal defendant, of his or her own choice, is proceeding *pro se* in a criminal trial, including the penalty phase. *See, e.g., Morrison*, 153 F.3d at 55; *Schmidt*, 105 F.3d at 90; *Windsor*, 981 F.2d at 947. *See also Allen v. Warden, Keen Mountain Corr. Center*, No. 1:13cv726, 2014 WL 1613455, at *6 (E.D. Va. April 22, 2014) (“[B]ecause a defendant has no right to standby counsel, he has no right to effective standby counsel.” (citing *Schmidt*, 105 F.3d at 90)). *Hargrove v. U.S.*, C.A. No. 3:12-cv-124, 2013 WL 6148071, at *3 (N.D. W. Va. Nov. 22, 2013) (“There is no constitutional right to effective assistance of standby counsel.” (citing *Windsor*, 981 F.2d at 947)).

Based upon the foregoing, the state court’s denial of this claim on the merits would not in itself constitute an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.

Ground Seven

In Ground Seven, Petitioner contends that he was deprived of his Sixth and Fourteenth Amendment rights to effective assistance of counsel by trial counsel’s failure to object to the “extensive amount of victim impact evidence” introduced at the penalty phase. (Doc. # 31 at 40). Petitioner contends that Ground Seven, though not raised in the application for PCR, was exhausted by the filing of the petition for writ of habeas corpus filed in the original jurisdiction of the Supreme Court of South Carolina on February 18, 2011. (Doc. # 31 at 45-46). According to Petitioner, the introduction of this evidence, though allowable under *Payne v. Tennessee*, 501 U.S. 808 (1991) (victim impact evidence

allowable), violated the holding in *Booth v. Maryland*, 482 U.S. 496 (1987), which was not overruled by *Payne*, 501 U.S. at 830 n. 2. (Doc. # 31 at 41–42).

Moreover, Petitioner contends that trial counsel's failure to object "created an impermissible risk that the jury's decision was based on emotion, sympathy, and a desire to comply with the wishes of the victim's family" and was unreasonable and prejudicial to Petitioner under *Strickland v. Washington*, 466 U.S. 668 (1984). (Doc. # 31 at 44). Petitioner also states that the victim impact statements violated his Due Process rights because they failed to observe the fundamental fairness essential to the very concept of justice under *Lisenba v. California*, 314 U.S. 219 (1941). (Doc. # 31 at 44 n.13).

Respondents contend that this ground is also procedurally defaulted and note that Petitioner was never relieved of his *pro se* status during the penalty phase. (Doc. # 43 at 67–68). Respondents also argue that under *Payne v. Tennessee*, and under state cases such as *State v. Rocheville*, 425 S.E.2d 32, 36 (S.C. 1993), *State v. Hughey*, 529 S.E.2d 721, 730–31 (S.C. 2000), *State v. Ivey*, 481 S.E.2d 125 (S.C. 1997), and *State v. Byram*, 485 S.E.2d 360 (S.C. 1997), the victim impact evidence was admissible. (Doc. # 43 at 69). Respondents also rely on *United States v. Wilson*, 493 F. Supp. 2d 364 (E.D.N.Y. 2006), a federal death penalty case concerning the murder of an undercover officer, to show that a State may introduce evidence of the crime's impact on the community at large to counteract or rebut a defendant's mitigating evidence. (Doc. # 43 at 69). Also relevant, according to Respondents, are cases from outside this district and circuit upholding admissibility of the effect of a law enforcement officer's murder in the penalty phase of a trial. (*Id.* at 69–70).

Respondents argue that, since the victim impact evidence was admissible under both state and federal case law, "an objection would be fruitless." (*Id.* at 70). Respondents rely on *Hough v.*

Anderson, 272 F.3d 878 (7th Cir. 2001), which holds that an ineffective assistance of counsel claim arising out of a failure to object to admissible evidence fails both prongs of the *Strickland* test because the failure to object was not deficient or prejudicial. (Doc. #43 at 70).

As indicated in the previous discussion of Ground Six, the Court of General Sessions, under *Faretta*, was required to allow Petitioner to proceed *pro se* in his death penalty trial, so no valid ineffective assistance of counsel claim has been raised, despite the presence of standby counsel. In fact, the transcript of the sentencing phase reveals that Petitioner told the trial court on several occasions that he did not want his standby counsel to become counsel of record during the sentencing phase. (App. 3454–58, 3494–3505, 3532–36).

The transcript indicates that Petitioner authorized standby counsel to make objections. (App. 3518–20, 3538–42, 3861). This authorization for standby counsel to make objections did not relieve Petitioner of his *pro se* status at the sentencing phase. Under longstanding South Carolina law, see *Stuckey*, 508 S.E.2d at 564–65, hybrid (*pro se* and counsel) representation is not allowed. As indicated in the discussion of Ground Six, there is no right to hybrid representation. See *Beckton*, 740 F.3d at 307; *Morrison*, 153 F.3d at 55; *Schmidt*, 105 F.3d at 90; *Windsor*, 981 F.2d at 947. Accordingly, the District Court should follow the reasoning of the United States Courts of Appeals for the Second and Seventh Circuits and hold that, since there is no right to hybrid representation, a claim for ineffectiveness of standby counsel does not arise where the criminal defendant, of his or her own choice, is proceeding *pro se* in a criminal trial, including the penalty phase.

Moreover, even if this court deemed the presence and limited participation of standby counsel to constitute actual representation during the penalty phase, the Court of Appeals has held that failure of counsel to object to admission of repetitive or cumulative evidence in the sentencing phase of

a capital murder case did not prejudice the defendant. *See Bowie v. Branker*, 512 F.3d 112, 123 (4th Cir. 2008) (“We conclude that the MAR court did not unreasonably apply Supreme Court precedent in concluding that counsel’s failure to appeal the admission of Rochelle’s statement did not prejudice Bowie in his sentencing.”).¹⁴

It appears that Petitioner is attempting to infer that standby counsel’s failure to object to victim impact evidence during the penalty phase allowed the prosecution, so to speak, to “pile on” more victim impact evidence. A failure to object to admission of corroborative or cumulative evidence does not constitute ineffective assistance of counsel. *See, e.g., Muhammad v. Kelly*, 575 F.3d at 370; *Whitley v. Bair*, 802 F.2d 1487, 1493–94 (4th Cir. 1986) (pre-AEDPA case). Moreover, Petitioner’s failure to assist his standby counsel and his failure to participate meaningfully in the penalty phase can refute a claim of ineffective assistance of counsel. *See Schriro v. Landrigan*, 550 U.S. 465, 478 (2007); *Gardner v. Ozmint*, 511 F.3d 420, 427 (4th Cir. 2007).

Thus, the state court’s denial of this claim on the merits would not in itself constitute an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.

¹⁴ A “Motion for Appropriate Relief” (“MAR”) is the State of North Carolina’s equivalent for what in South Carolina is known as an Application for Post-Conviction Relief. *See State v. Sullivan*, 717 S.E.2d 581, 584 (N.C.App. 2011); and N.C. Gen.Stat. § 15A–1420 (Westlaw 2014).

Ground Eight

In Ground Eight, Petitioner contends that he was deprived of his Sixth and Fourteenth Amendment rights to the effective assistance of counsel when trial counsel failed to object to inflammatory and improper statements made during the prosecution's closing argument, which rendered the sentencing phase fundamentally unfair. (Doc. # 31 at 46). Petitioner cites, *inter alia*, *Darden v. Wainwright*, 477 U.S. 168, 178–79 (1986), and *Viereck v. United States*, 318 U.S. 236 (1943), and contends that the use of a war analogy at App. 3791–92 and App. 3801–02 infected the penalty phase with unfairness. (Doc. # 31 at 47). Petitioner also contends that Ground Eight was exhausted in the habeas petition (No. 2011-185866) filed in the original jurisdiction of the Supreme Court of South Carolina on February 18, 2011, and that the “state court’s summary dismissal of this claim constituted both an unreasonable determination of the facts in light of the record that was before the court, and an unreasonable application of clearly established federal law.” (Doc. # 31 at 47–48).

As with Grounds Six and Seven, Respondents state that Ground Eight is procedurally defaulted. They also argue that, since there is no right to hybrid representation, under *Faretta* and cases from the Second and Seventh Circuits, there can be no valid claim of ineffective assistance of counsel when a defendant is proceeding *pro se*. (Doc. # 43 at 71–72). Respondents also contend that the claims do not warrant relief because each side was allowed to make their own arguments, juries are presumed to follow their instructions, and there was no prejudice to Petitioner. (*Id.* at 73–74). Respondents also argue that *Viereck v. United States* is inapposite on the facts because *Viereck* concerned a violation of the Foreign Agents Registration Act during a declared war, not the murder of two people. (Doc. # 43 at 74–75). Respondents also rely on the curative instruction at App. 3856–57. (Doc. # 43 at 75).

As with Grounds Six and Seven, the District Court should follow the reasoning of the United States Courts of Appeals for the Second and Seventh Circuits, and hold that, since there is no right to hybrid representation, a claim for ineffectiveness of standby counsel does not arise where the criminal defendant, of his or her own choice, is proceeding *pro se* in a criminal trial, including the penalty phase.

Furthermore, a federal court, when reviewing alleged acts of prosecutorial misconduct, must determine “whether the prosecutor’s comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Darden*, 477 U.S. at 181 (concerning a prosecutor’s improper closing argument in guilt phase of death penalty trial). A prosecutor’s remarks do not rise to that level merely by being “offensive” or “improper.” “[I]t is not enough that the prosecutors’ remarks were undesirable or even universally condemned.” *Id.* at 180–81 (internal quotation marks omitted). Instead, the standard is the “narrow one of due process, and not the broad exercise of supervisory powers.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974). To prevail under this standard, the defendant in a criminal case must show that “the prosecutor’s remarks or conduct were improper and, second . . . that such remarks or conduct prejudicially affected his substantial rights so as to deprive him of a fair trial.” *United States v. Scheetz*, 293 F.3d 175, 185 (4th Cir. 2002); *see also United States v. Wilson*, 135 F.3d 291, 297 (4th Cir. 1998).

The “war” analogy used in the prosecution’s closing argument does not rise to the level contemplated by the Supreme Court in *Darden* and *Donnelly*. *See Darden*, 477 U.S. at 179 (“The prosecutors then made their closing argument. That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair.”). *Viereck*, which is cited by Petitioner, is not on point because there is no evidence that the prosecutor in

Petitioner's criminal case was attempting to associate Petitioner with enemies of the United States in a declared war. Moreover, even if the prosecutor's war analogy was deemed to be improper, the comments did not infect the trial with unfairness as to make the resulting death sentence a denial of due process, as required by *Wilson*, 135 F.3d at 297. There is no indication that the prosecutor offered the remarks with an intention to mislead the jury or that the remarks otherwise diverted the jury's attention from the evidence during the penalty phase. Hence, the prosecutor's use of a war analogy provides no basis for habeas relief. See *United States v. Caro*, 597 F.3d 608, 624–25 & n. 7 (4th Cir. 2010) ("Our concerns [about the prosecutor's comments] notwithstanding, on these facts we cannot find such prejudice as to warrant reversal.") (direct appeal in a federal death penalty trial).

Thus, the state court's denial of this claim on the merits would not in itself constitute an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.

Ground Nine: Discriminatory Peremptory Challenges

In Ground Nine, Petitioner asserts that the prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of his Sixth and Fourteenth Amendment rights.

After jury selection, Petitioner requested a *Batson*¹⁵ hearing. At the hearing, Petitioner objected to the strikes used by the State against four jurors. First, Petitioner challenged the strike of Juror No. 286. The solicitor argued that he dismissed Juror No. 286 because he "had the impression that she was afraid of" Petitioner. The solicitor also noted that Juror No. 286 was weak on the death penalty and stated during *voir dire* that she knew nothing about the case. (App. 1340). The trial court found that the solicitor had proffered a facially neutral explanation. Petitioner asserted that Juror No. 229 was

¹⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986)

similarly situated, arguing that Juror No. 229 would be afraid of the prosecution, or at least the prosecution's authority. (App. 1341). The trial court found that Juror No. 229 was not similarly situated and denied the *Batson* motion as to Juror No. 286.

Second, Petitioner challenged the strike of Juror No. 297. (App. 1342). The solicitor stated he struck Juror No. 297 because the juror indicated that he knew one of the defense witnesses. (*Id.*). In addition, the solicitor noted that Juror No. 297 was weak on the death penalty and had heard about the incident. (*Id.*). The trial court found these reasons facially neutral. Initially, Petitioner argued that Juror No. 321 was similarly situated, but then argued that Juror No. 273 was similarly situated because she indicated that she knew the solicitor. The trial judge found that knowing the solicitor was not equivalent to knowing a defense witness and denied the *Batson* motion as to Juror No. 297.

Third, Petitioner challenged the strike of Juror No. 95. The solicitor stated that Juror No. 95 was from the solicitor's hometown; he knew Juror No. 95's brother; his wife taught at Juror No. 95's high school for over twenty years; and the solicitor had prosecuted Juror No. 95's brother for criminal sexual conduct. (App. 1349-50). The court found those facially neutral reasons. Petitioner did not contend that the solicitor had prosecuted any other juror's family member. So, the trial court denied the *Batson* motion as to Juror No. 95. (App. 1351).

Fourth, Petitioner challenged the strike of Juror No. 45. (App. 1351). The solicitor stated that he struck Juror No. 45 because that juror was connected to a pending criminal domestic violence charge and Petitioner's case arose out of an incidence of criminal domestic violence. (*Id.*). The trial court found this reason facially neutral. (App. 1351-52). Petitioner did not assert that any member of the jury was similarly situated, and the trial court denied the *Batson* motion as to Juror No. 45. (App. 1352-53).

The Fourteenth Amendment's Equal Protection Clause makes it unconstitutional to strike a juror on the basis of race or gender. *Batson*, 476 U.S. at 96-98. When a party asserts a *Batson* violation, the court must analyze the assertion in three steps:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008) (alteration in original) (citing *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005)).

Petitioner argues that the trial judge clearly erred at the third step because the solicitor's proffered justifications were not believable. See *Hernandez v. New York*, 500 U.S. 352, 365 (1991) ("the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed"). "[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." *Miller-El*, 545 U.S. at 338-39. "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.* at 339. Due to the trial court's superior position to determine credibility, "a state court's finding of the absence of discriminatory intent is 'a pure issue of fact' accorded significant deference." *Id.* (quoting *Hernandez*, 500 U.S. at 365). Moreover, reflecting the need for deference, under § 2254 review, "[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." *Id.* at 340.

Petitioner has offered evidence of other similarly situated jurors and of an alleged history of discriminatory use of peremptory strikes by the solicitor's office. The court has reviewed this evidence and the transcript and does not find reason to overturn the state court's determination. Thus, based on the record before it, the court cannot find that the state court unreasonably applied clearly established federal law or an unreasonable determination of the facts.

Ground Ten: Prejudicial Extraneous Influences

In Ground Ten, Petitioner asserts that he was denied his Sixth and Fourteenth Amendment right to a fair and impartial jury as a result of multiple prejudicial, extraneous influences on the jury. Specifically, Petitioner, based on affidavits from law students reciting information received in interviews with the jurors, asserts that during their penalty deliberations, jurors relied heavily on religion: several jurors held hands and prayed; some jurors brought Bibles and copies of Scripture they had reproduced in the jury room; jurors relied on specific Bible passages to help decide if Petitioner would get the death penalty; and one juror reported consulting with a minister for guidance. (Doc. # 44-40 at 87-91). In addition, after discovering dog excrement in the jury box, the jurors were informed by court personnel that the excrement came from a bomb-sniffing dog brought in because of threats from Petitioner's associates. (*Id.*).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to trial by an impartial jury. See U.S. Const. amend VI. An impartial jury is one that arrives at its verdict "based on the evidence developed at trial" and without external influences. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "No right touches more the heart of fairness in a trial," *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988), "and this right applies equally to sentencing proceedings that are tried to a jury," *Barnes v. Joyner*, 751 F.3d 229, 240 (4th Cir. 2014).

Because of the importance of this right, “[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.” *Remmer v. U.S.*, 347 U.S. 227, 229 (1954). However, this presumption is not conclusive, and “the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.” *Id.*

Thus, “not every allegation of an unauthorized communication between a juror and a third party will trigger the *Remmer* presumption and its corresponding hearing requirement.” *Barnes*, 751 F.3d at 244. Rather, “the *Remmer* presumption and hearing requirement are triggered after the party attacking the verdict satisfies the ‘minimal standard’ of showing that ‘extrajudicial communications or contacts [between a juror and a third party] were more than innocuous interventions.’” *Id.* at 245 (quoting *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996)). In determining the nature of the third-party contact, courts refer back to the factors recited in *Remmer*: any private communication; any private contact; any tampering; directly or indirectly with a juror during trial; about the matter before the jury. *See Cheek*, 94 F.3d at 141 (citing *Remmer*, 347 U.S. at 229).

Reference to Bible Passages

It would not have been unreasonable for the state court to conclude that allegations that jurors relied on passages from the Bible or prayed together did not amount to a prejudicial extraneous influence triggering the need for a *Remmer* hearing. The Fourth Circuit has found that “the Bible is not an ‘external’ influence.” *Robinson v. Polk*, 438 F.3d 350, 364 (4th Cir. 2006). Rather, “the reading of Bible passages invites the listener to examine his or her own conscience from within.” *Id.* at 363. Thus,

the state court could have reasonably concluded that allegations of the physical presence and reading of the Bible in the jury room did not automatically warrant an investigation.

Fear of Retaliation

Similarly, the state court could have reasonably concluded that the jurors receiving information about the presence of a bomb-sniffing dog did not warrant a hearing. While that information came from a third-party—court personnel—it did not concern a matter before the jury and, thus, the contact does not fall under *Remmer*.

Third-Party Contact

Lastly, Petitioner alleges that a juror consulted with her minister during deliberations. Petitioner presents his allegation in an affidavit from a law student who interviewed the juror. In the affidavit, the law student states: “one juror stated that in addition to praying, she asked a minister for guidance on how to make a decision during the sentencing phase.” (Doc. # 44-40 at 89-90).

Respondents assert that this affidavit is not enough to trigger a *Remmer* hearing because it fails to identify the juror who allegedly made the statement, from whom she requested guidance, and what, if any, guidance she received. However, the undersigned does not find a requirement for such a specific showing in the relevant precedent. *See, e.g., Hurst v. Joyner*, 757 F.3d 389, 398 (4th Cir. 2014) (“The affidavits did not allege that [the juror] discussed with her father the facts or evidence that had been presented in the trial, or the status of the juror’s deliberations. Nor was there any evidence that [the juror’s] father expressed any opinion about the case or attempted to influence her vote. Nevertheless, [Petitioner] presented a credible allegation of a private communication about the matter pending before the jury, entitling [Petitioner] to the presumption of prejudice and an evidentiary hearing.”).

Rather, the record supports a finding that Petitioner made the requisite showing. While the affidavit does not offer much in the way of detail, it does clearly allege that a juror engaged in

private communication with a third-party. In addition, the juror sought “guidance on how to make a decision during the sentencing phase.” During the sentencing phase of Petitioner’s trial, the matter being decided was whether to impose a sentence of life imprisonment or a sentence of death. Thus, the affidavit alleges a private communication about the matter pending before the jury. *See Barnes*, 751 F.3d at 248-49.

Accordingly, should the court find that this claim is not procedurally defaulted, the undersigned recommends that the court deny Respondents’ motion for summary judgment as to this portion of this claim to allow for limited evidentiary development.

RECOMMENDATION

For the foregoing reasons, the undersigned recommends that the court grant Respondents’ motion for summary judgment and dismiss the petition for habeas corpus as procedurally barred. In the alternative, should the court find that the Supreme Court of South Carolina reached the merits of Petitioner’s claims, the undersigned recommends denying summary judgment as to Ground Ten, to the extent that it alleges improper third-party contact, and granting summary judgment as to all other grounds.

s/ Kevin F. McDonald
United States Magistrate Judge

November 5, 2014
Greenville, South Carolina