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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County

Honorable Maite Murphy, Circuit Court Judge

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

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

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

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

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

Prior to the commencement of the sentencing phase of his capital trial, petitioner informed the trial judge that he did not wish to participate in or attend the sentencing hearing. *App. p.3448, l.6 – p.3449, l.5.* Petitioner offered no coherent explanation for wishing to absent himself from the proceedings other than he did not think the sentencing phase would "do anything for me to no extent" and that he was not concerned with the outcome. *App. p.3449, l.21 – p.3450, l.6.* Petitioner stated he did not wish to attend:

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

App. p.3486, ll.10-16.

The trial court tried to reason with petitioner to no avail, and ultimately concluded that petitioner would remain as his own counsel and also remain in the courtroom for sentencing. *App. p.3541, ll.1-13.* The trial court did not, however, seek or obtain any expert opinion or insight into whether petitioner was, at that point in the proceedings, competent to stand trial or to completely waive the presentation of mitigation.

Petitioner informed the court that he would be disruptive if he was required to remain in the courtroom. *App. p.3514, ll.10-17.* The trial judge took a "wait and see" approach. When the prosecution called its first witness, petitioner stood up, in the presence of the jury, and said:

"Blessed be the Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." *App. p.3550, ll.14-19.* The trial judge briefly attempted to "plow ahead," but petitioner repeated the above refrain when the next question was asked. *App. p.3550, l.22 – p.3551, l.4.* The trial judge removed petitioner from the courtroom, sent the jury to the jury room, and brought petitioner back into the courtroom where petitioner informed the court that he would continue to be disruptive because he "did not wish to engage in the proceedings." *App. p.3551, l.20 – p.3552, l.5.* The court told petitioner that he had to attend the sentencing proceeding, and that if he continued to be disruptive he would put petitioner in a room in the back of the courtroom where he could see and hear the proceedings. *App. p.3552, l.10 – p.3553, l.7.*

When proceedings commenced, both petitioner and the trial judge were true to their word. When the prosecution again sought to elicit testimony from its first witness, petitioner stood up and again said: "Blessed be Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Issac, Ishmael, Jacob and Jesus." *App. p.3556, ll.3-5.* The trial judge ordered that petitioner be placed in the "room at the back of the courtroom that has a glass partition to allow him to hear all the proceedings. . . and see the proceedings as he desires." *App. p.3556, ll.18-21.* The court also ordered that petitioner be shackled and said he would gag petitioner if he had another outburst. *App. p.3561, ll.21-23 and p.3557, ll.6-7.* Standby counsel was ordered to resume representation to a limited extent including the responsibility to lodge any objections to inadmissible evidence. *App. p.3556, l.24 – p.3557, l.2.* Petitioner, however, was allowed to control the defense presentation, or non-presentation as it turned out, of evidence.

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

IV. APPELLATE AND POST-CONVICTION PROCEEDINGS.

On direct appeal, petitioner was represented by Joseph Savitz and Robert Dudek of the Office of Appellate Defense.[6] Appellate counsel raised a single issue on appeal, i.e., whether it was error for the trial judge to require petitioner to be present at the penalty phase of the proceedings. This Court affirmed on July 24, 2006. *State v. Roberts*, 632 S.E.2d 871 (S.C. 2007).

Petitioner filed a *pro se* application for post-conviction relief which contained a number of search and seizure and speedy trial issues. *App. pp.4535-4544.* Glenn Waters and Carl Grant were appointed by Judge Roger Young to serve as PCR counsel. *App. p.5249, l.1 – p.5251, l.11.* The transcript of the appointment hearing does not indicate that either attorney had ever been involved in a capital post-conviction case in state or federal court, or that they had attended any appropriate CLE programs as defined in S.C. Code § 17-27-160(B). PCR counsel's inexperience worked to petitioner's detriment, since counsel failed to: (1) conduct any independent investigation; (2) interview trial counsel; (3) seek or obtain a copy of trial counsel's files; (4) secure any expert or investigative assistance; (5) have petitioner evaluated by a psychiatrist or psychologist to determine: a) whether he was competent to proceed in post-conviction relief proceedings; or, b) whether he was competent at the sentencing phase of the trial; and, (6) even to spend enough time on petitioner's case to justify submitting a bill for payment of attorneys

[6] Petitioner moved to represent himself on direct appeal, alleging that the Warden of Leiber Correctional Institution and his appellate counsel were conspiring to deny him access to the courts. *State v. Roberts*, 614 S.E.2d 626, 627 (S.C. 2005). This Court denied the motion. *Id.* at 628.

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

The post-conviction relief hearing, conducted before Judge Young on October 13-14, 2008, consisted primarily of counsel calling petitioner to the stand to state his grievances with trial and appellate counsel. *App. pp.4599-4920.* On September 17, 2009, Judge Carmen Mullen signed verbatim the state's order denying post-conviction relief.[8] *App. pp.5176-5229.*

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

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

[7] The issue asserted in the amended application was that the "trial judge failed to make the proper findings to determine if the applicant knowingly and intelligently understood the implications of proceeding *pro se.*" *App. p. 4564.*

[8] For reasons which are not clear from the record, this Court reassigned the case to Judge Mullen on December 17, 2008, after the PCR hearing. Judge Mullen entered the order denying post-conviction relief. Despite the fact that Judge Mullen did not preside over the post-conviction relief hearing, the order contains a number of credibility findings. The order also noted on a number of occasions that no new evidence of incompetency was presented in the post-conviction proceedings.

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

ARGUMENT

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

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

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

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

A. RELEVANT LEGAL PRINCIPLES.

"[T]he State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause," which "forbids the prosecutor to challenge potential jurors solely on account of their race." *Batson*, 476 U.S. at 89. This mandate is violated where even a single juror is removed on the basis of his or her race. *Id.* at 95. A defendant has standing to raise an equal protection challenge under *Batson* even when he and the excluded jurors are not members of the same race. *Powers v. Ohio*, 499 U.S. 400 (1991).

Analysis of an asserted *Batson* violation proceeds in three steps. *See Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*). First, the opponent of a peremptory strike must make a "*prima facie* case of purposeful discrimination ...." *Batson*, 476 U.S. at 96. Second, "[o]nce the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging [the] jurors [in question]." *Batson*, 476 U.S. at 97. Third, if the prosecutor succeeds in articulating a facially race-neutral reason for exercising a particular strike, the "trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98.

"[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.'" *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (*Miller-El I*) (quoting *Purkett v. Elem,* 514 U.S. 765, 768 (1995) (*per curiam*)). At bottom, "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991).

"More than a century ago, the Supreme Court held that a State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 106 U.S. 1712, 1716 (1986). Furthermore, the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id.* The competence of a person to serve as a juror is unrelated to race and depends on their "ability impartially to consider evidence presented at trial." *Id.* Allowing jurors to be selected in a discriminatory manner harms the defendant and undermines the confidence of the public. *Id.* at 1718. The Equal Protection clause forbids the prosecutor to exercise peremptory challenges in a discriminatory manner. *Id.* at 1719.

B. THE PROSECUTION'S PURPORTED RACE NEUTRAL REASONS WERE CLEARLY PRETEXTUAL.

Petitioner, who is African-American, maintained at trial that the prosecution unlawfully used its peremptory challenges to exclude Edith Owens, Matthew Young, Antwoine Croson, and Kerrie Brown, who were also African-American. *See App. p.1340, l.1 – p.1353, l.1.* In fact, the state challenged four of the five African-American jurors that were presented. Given the number of challenges against black jurors excluded and the percentage that constituted of jurors in the pool, petitioner clearly made out a *prima facie* case.

Assuming, *arguendo*, that the prosecution set forth a "race neutral" reason for the challenges, which in the case of Mr. Crosson (just not a "good" juror) is highly doubtful, the prosecution's explanation were pretextual. The evidence of pretext is clear from the fact that the prosecution did not challenge a significant number of similarly situated white members. Moreover, the race-neutral reasons provided by the prosecutor were conflicting and unsupported by the *voir dire.*

The prosecutor premised the dismissal of Edith Owens on the fact that she was afraid of the defendant, that she was weak on the death penalty, and that she did not know anything about the case. *App. p.1340, ll.11-15.* However, one can search the *voir dire* in vain for any indication whatsoever that Ms. Owens was afraid of petitioner, and the prosecution offered no evidence to support its assertion. However, after being questioned by petitioner, Joy Smith, a white juror, did state that "[her] heart was about to jump out of [her] skin." *App. p.671, ll.8-9.* Yet, the prosecution found her to be completely satisfactory. Furthermore, other white jurors were seated with substantially weaker views on the death penalty and who had the same amount of information about the case as Ms. Owens. Without elaborating or hesitating, Ms. Owens categorized herself as the type of person who would have to listen to all the evidence before determining whether the death penalty would be warranted. *App. p.279, ll.8-23.* Bruce Batastini, a white male, however, gave virtually identical answers about the death penalty and he too said he had not heard anything about the case. *See e.g., App. p. 564, l.1 – p.566, l.14.* Jannie Glover, also white, stated that she had not heard or read anything about the case. *App. p.987, ll.18-20.* Yet the prosecution did not challenge either juror. Therefore, because there is nothing to support the assertion that Ms. Owens was afraid of the defendant, and because other jurors who did not know anything about the case and who had similar views on the death penalty were seated, Ms. Owens exclusion raises to the level of purposeful discrimination.

The prosecution's reasons for striking Matthew Young were that he knew a defense witness, knew about the case, and was weak on the death penalty. *See e.g., App. p.1342, ll.6-11.* However, the record is clear that the prosecution was mistaken in its belief that Mr. Young knew a defense witness. The trial judge erroneously dismissed the state's factual error as irrelevant. *See e.g., App. p.1345, ll.19-23.* Even if the mistake is irrelevant because it is wrong, the

prosecution's other reasons fail on their own terms. First, as noted above, the prosecution challenged Ms. Owens because she did not know enough about the case. Then, it switched positions and challenged Mr. Young because he allegedly knew too much. This "shell game" of conflicting reasons for the challenges is sufficient in and of itself to find pretext. But, setting aside the contradictory positions, Michelle Wilson, for example, was able to provide more information about the case than Mr. Young, stating "I just know that two cops were killed, that the [men] that were killed had families and children." *App. p.543, ll.10-12.*[9] Like Mr. Young, Ms. Wilson indicated she was a category three individual, and she would have to listen to all the evidence before imposing the death penalty. *App. p.545, l.6 – p.546, l.21.* Because other similarly situated white jurors were not challenged by the prosecution, it was purposeful discrimination to challenge Mr. Young.

Antwoine Crosson was struck because the prosecutor knew his brother, and the prosecutor stated that he was "just not a good juror." *App. p.1350, ll.1-3.* However, Mr. Crosson assured the trial judge he would not harbor any bias against the State based on his brother's prior arrest. *App p.538, ll.7-16.* Furthermore, several white jurors had family members that had been arrested and prosecuted. Cynthia Milanesi's fiancé had been arrested for a DUI. *App. p.583, ll.13-17.* Michelle Wilson's husband had been arrested for a DUI. *App. p.549, ll.13-18.* Neither Ms. Milenesi nor Ms. Wilson was peremptorily challenged by the prosecution. Because other white jurors were seated who had the same characteristics as Mr. Crosson, petitioner has established that the alleged race neutral reason was pretextual.

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[9]When asked about what he had heard or read about the case, Mr. Young only knew that the case was about "[a] struggle situation, like a bust or something," but he was unable to provide any specific details. *App. p.441, l.23.*

Finally, the prosecution struck Kerri Brown allegedly because she had not heard about the case and because she was the victim of a pending criminal domestic violence proceeding. *See e.g., App. p.1351, ll.16-18.* As for the domestic violence proceeding, it is difficult – if not impossible – to imagine how being a victim of domestic violence would render her a poor juror for the State. If anything, it would have made her more likely to favor the prosecution. Additionally, as noted above, the prosecution seated Jannie Glover who also had not heard or read anything about the case. *App. p.987, ll.18-20.* Furthermore, during the *voir dire* examination the prosecution explicitly asked Ms. Brown "[w]ould the fact that he is African-American have any effect on your ability to issue a fair, and impartial trial?" *App. p.1009, ll.11-13.* No similar questions were asked of white jurors. Because the prosecution dismissed Ms. Brown for not knowing enough about the case after dismissing others for knowing too much, seating other jurors that also had not heard or read about the case, and based on the disparate questioning of Ms. Brown, the relevant circumstances rise to the necessary inference of purposeful discrimination.

The prosecution exercised its peremptory strikes in a discriminatory manner to exclude African-American members from the jury. The trial judge's determination that the prosecution's stated reasons were race neutral and not pretextual was erroneous.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO *SUA SPONTE* ORDER A NEW COMPETENCY HEARING PRIOR TO SENTENCING AND/OR TERMINATE PETITIONER'S *PRO SE* STATUS, AND PETITIONER WAS INCOMPETENT DURING HIS CAPITAL TRIAL.

A. RELEVANT LAW REGARDING COMPETENCY.

This Court has held that the test for determining competency is "'whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings

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

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

> [e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.

Drope v. Missouri, 420 U.S. 162, 181 (1975). This principle applies to both phases of a capital trial. *See, e.g., United States v. Mason*, 52 F.3d 1286, 1293 (4th Cir. 1995) (rejecting the district court's holding that defense counsel's failure to raise the issue of competence until after the first phase of the trial was a valid reason for denying the motion for a competency hearing in the penalty phase). At any stage of a criminal trial, "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope*, 420 U.S. at 172 (citing *Pate v. Robinson*, 383 U.S. 375 (1966)).

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

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

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

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

B. RELEVANT LAW REGARDING *PRO SE* STATUS.

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

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

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

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

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

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

> [i]f no counsel is appointed to represent an absent pro se defendant, there is a real danger that the ensuing lack of rigorous adversarial testing that is the norm of Anglo-American criminal proceedings will undermine the accuracy of the truth-determining process."

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

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

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

Id.

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

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

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

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

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

D. PETITIONER WAS INCOMPETENT DURING HIS CAPITAL TRIAL.

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

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

> proceedings against him and to assist in his defense were significantly impaired.

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

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

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

The South Carolina Legislature enacted S.C. Code Ann. § 17-27-160 Capital Case Post-Conviction Procedures in 1996 with the intention of "opting-in" to the expedited habeas corpus procedures for capital cases contained in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Tucker v. Moore*, 56 F.Supp.2d 611, 613-14 (D.S.C. 1999) (State argued that S.C. Code Ann. § 17-27-160 was enacted to attempt to satisfy 28 U.S.C. §§ 2261(b)-(c) of AEDPA).[11] To qualify as an "opt-in" jurisdiction, a state is required to, *inter alia*, establish a mechanism to provide qualified and adequately compensated counsel in post-conviction proceedings and appoint counsel pursuant to that mechanism, per 28 U.S.C. § 2261(b), and offer counsel to all state prisoners under capital sentence, per 28 U.S.C. § 2261(c). The statute enacted by the legislature in response to this mandate requires the appointment of two attorneys for indigent applicants, at least one of which:

> [M]ust have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications

[11] The United States District Court in *Tucker* construed § 17-27-160(B) as requiring one of the two appointed attorneys to have either: (1) previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings; or, (2) meet the requirements of capital trial counsel in § 16-3-26(B) and § 16-3-26(F) *and* have completed at least twelve hours of continuing legal education in *capital appellate* and/or *post-conviction* defense. Report and Recommendation at 10-13, *Tucker v. Moore*, 56 F.Supp.2d 611 (D.S.C. 1999) (No. 0:98-681-8BD). Respondent conceded these requirements and further conceded that Tucker's PCR counsel, who were admittedly qualified under §16-3-26(B), did not qualify for appointment as post-conviction counsel under the language of the statute at issue here. *Id.* Counsel in *Tucker* had the same experience as counsel appointed to represent petitioner.

> set forth in Section 16-3-26(B) [five years practicing law with three years in the actual trial of felony cases] and Section 16-3-26(F) [any Supreme Court promulgated guidelines for attorneys handling death penalty cases] **and** (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

S.C. Code Ann. § 17-27-160(B) (emphasis added).

It is uncontested that neither of petitioner's post-conviction relief (PCR) attorneys had either (1) previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings; or, (2) twelve hours of continuing legal education or professional training in capital appellate and/or post-conviction defense within two years of their appointment to represent petitioner in this case. The statutory language is clear and unambiguous. Therefore, because petitioner's court-appointed counsel did not meet the clear standard for appointment contained in S.C. Code §17-27-160(B), petitioner's case should be remanded to the circuit court for the appointment of qualified counsel and for additional post-conviction proceedings. There is no other remedy that would not effectively render the statutory qualifications a nullity.

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

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

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

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

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

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

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

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

Id. at 405.

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

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

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

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

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

[14] As explained in petitioner's Motion to Remand For Additional Post-Conviction Proceedings, undersigned counsel has not conducted a new post-conviction investigation. However, a review of the trial record has identified, *inter alia*, the following issues which were not included in the amended application for post-conviction relief:

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

(2) The trial judge failed to fulfill his obligation, required by the Due Process Clause of the Fourteenth Amendment and the corresponding provision of the South Carolina Constitution, to make an adequate inquiry into petitioner's competency to stand trial when petitioner began to act in a bizarre and irrational manner prior to and during the sentencing phase of the trial. *Drope v. Missouri*, 420 U.S. 162 (1975) (trial judge's failure to suspend the proceedings and have the defendant evaluated for competency violated due process when there was evidence suggesting the defendant's mental condition had deteriorated).

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

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

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

(5) Petitioner was deprived of a fair and reliable determination of whether the death penalty was the appropriate punishment, guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, due to: a) the admission of excessive and inflammatory victim impact evidence; and, b) the admission of evidence and argument regarding the conditions of confinement in general population. *See Payne v. Tennessee*, 467 U.S. 1025 (1993) (permitting only a "brief glimpse" of the life of the victim); *Darden v. Wainwright*, 477 U.S. 168 (1985) (recognizing that inflammatory comments at the sentencing phase can deprive the defendant of fair sentencing proceeding).

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

(7) Petitioner was denied his right to the effective assistance of counsel on direct appeal, guaranteed by the Due Process Clause of the Fourteenth Amendment and the corresponding provision of the South Carolina Constitution, due to appellate counsel's failure to raise, *inter alia*, the following issues on direct appeal: a) the trial judge's failure to conduct a competency hearing at sentencing; b) the trial judge's failure to terminate petitioner's pro se status and appoint standby counsel; c) the prosecution exercised its peremptory strike in a racially discriminatory manner d) the trial judge erroneously excluded evidence of third party guilt; and, e) a statement made by petitioner was obtained in violation of *Miranda*.[10] *See Southerland v. State*, 524 S.E.2d 833 (S.C. 2002) (Appellate counsel found ineffective for failing to raise meritorious issues on appeal.

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

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

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

CONCLUSION

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

Respectfully submitted,

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ATTORNEY FOR PETITIONER

February 17, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Applicant's Petition for Writ of Certiorari and a copy of the Appendix have been served upon Respondent's counsel by first class mail, postage prepaid, this 17th day of February, 2011, upon the following:

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

Jill A. Rider

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

TYREE ROBERTS AKA,
ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

PETITIONER'S ISSUES PRESENTED

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

2. Whether the trial court abused its discretion and thereby denied petitioner's constitutional rights to due process and a fundamentally fair trial by failing to sua sponte order a new competency hearing prior to sentencing and/or terminate petitioner's pro se status, and WHETHER petitioner was in fact incompetent during his trial proceedings.

3. Whether Petitioner was denied due process and equal protection of the law and is thus entitled to a new post-conviction relief proceeding where: (a) petitioner's PCR counsel were not qualified under S.C. Code 5 17-27-160(B); (b) PCR counsel were ineffective; and, (c) Judge Carmen Mullen signed the state's order denying post-conviction relief, which contained numerous credibility findings, even though Judge Mullen was not present during the PCR hearing and did not hear the testimony of any witness.

STATEMENT OF THE CASE

In March 2002, the Beaufort County Grand Jury indicted Petitioner for two charges of murder for the shooting deaths of two Beaufort County Sheriff's Deputies (02-GS-07-0369 & 0370). (App. 4534-35). The state gave notice of intent to seek the death penalty, and served its notice of evidence in aggravation.

Petitioner represented himself at his jury trial, but Attorneys Gerald Kelly and Sean Thornton remained throughout the trial to assist. Voir dire in the case began before the Honorable Daniel F. Pieper on October 6, 2003. Trial began on October 10, 2003. (App. 1316). On October 21, 2003, Petitioner's jury convicted him of both charges. (App. 3472-73).

The sentencing phase of his trial began on October 22, 2003. Judge Pieper submitted the following aggravating factors to the jury:

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

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

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

(App. 3851, 4529).

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

A timely Notice of Appeal was filed with the South Carolina Supreme Court. Petitioner was represented on direct appeal by Joseph L. Savitz, III, and Robert M. Dudek, of the South Carolina Office of Appellate Defense, after the South Carolina Supreme Court denied Petitioner's motion to proceed on direct appeal *pro se*. State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (2005) (App. 4973-81). On March 7, 2006, Petitioner submitted a Final Brief of Appellant to the state supreme court, in which he raised the following issue:

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

The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent on February 17, 2006. Oral argument was held before the South Carolina

Supreme Court on May 24, 2006. The South Carolina Supreme Court issued an opinion dated July 24, 2006, affirming the sentence. State v. Roberts, 369 S.C. 580, 632 S.E.2d 871 (2006).

Following a Petition for Stay of Execution by Petitioner and a Return by the State, the South Carolina Supreme Court issued an Order dated September 7, 2006, in which it stayed the execution so that Petitioner could file a petition for writ of certiorari with the United States Supreme Court. Petitioner filed his petition dated November 9, 2006, in which he raised the following issue:

> May a capital defendant waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reasons for requiring him to be present?

The State, through Assistant Attorney General S. Creighton Waters, filed a Return to the Petition for Writ of Certiorari dated February 5, 2007. The United States Supreme Court denied the Petition for Writ of Certiorari by Order dated March 19, 2007.

Petitioner filed a *pro se* Application for Post-Conviction Relief dated March 12, 2007. (App. 4535-44). Following a Petition for a Stay of Execution, the South Carolina Supreme Court issued an order on May 4, 2007, assigning Judge Young continuing jurisdiction over the matter. In August 2007, Judge Young signed an Order appointing Glenn Walters, Esquire, and Carl Grant, Esquire, as attorneys for Petitioner, and giving them until February 8, 2008, to file an Amended Application. On October 9, 2007, the State served its Return, Motion to Dismiss and Motion for Summary Judgment in response to Petitioner's *pro se* Application for Post-Conviction Relief. (App. 4569-98). On February 8, 2008, PCR counsel filed an Amended Application for post-conviction relief, asserting "[t]rial judge failed to make the proper findings to determine if the Applicant knowingly and intelleigently[sic] understood the implications of

prooceding[sic] pro se." (App. 4562-68). The State filed its Amended Return on March 21, 2008. (App. 4545-61).

An evidentiary hearing was held in the post-conviction relief action at the Charleston County Courthouse before the Honorable Roger M. Young, Sr., Circuit Court Judge on October 13-14, 2008. (App. 4599-4920). Petitioner was present and was represented by Glenn Walters, Esquire and Carl B. Grant, Esquire. Id. Respondent was represented by Assistant Attorneys General S. Creighton Waters and Alphonso Simon, Jr. Id. Several exhibits were introduced at the hearing. Further, the depositions of Joseph L. Savitz, III, Esquire; Robert M. Dudek, Esquire; Dr. Donna Schwartz-Watts; Gerald Kelly, Esquire; Sean Thornton, Esquire; and Solicitor I. McDuffie Stone, III were introduced into evidence as well.[1] (App. 4877-79, 5019-5133). On December 18, 2008, the post-conviction relief action was transferred to the jurisdiction of the Honorable Carmen T. Mullen, Circuit Court Judge. On September 17, 2009, the PCR Court filed an Order of Dismissal with Prejudice, denying relief upon all of the claims raised in the post-conviction relief action. (App. 5176-5229).

Petitioner timely filed a Notice of Appeal. Initially, Petitioner was represented by Glenn Walters, Esquire, one of his PCR counsel. Mr. Walters moved to be relieved from representing Petitioner. Pursuant to Petitioner's request, this Court appointed John Blume, III, Esquire to represent Petitioner in his appeal of the Order in the post-conviction relief action.

On July 21, 2010, Petitioner filed a Motion to Remand for Additional Post-Conviction Proceedings. In the Motion, Petitioner argued PCR trial counsel was not properly qualified, and some issues PCR appellate counsel believed were meritorious were not raised in the PCR.

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

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

STATEMENT OF FACTS[2]

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

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

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

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

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

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

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

The trial court was concerned with Petitioner' decision, but was also disturbed that to appoint counsel to represent Petitioner at sentencing might compromise his right to proceed *pro se*. Petitioner continued to maintain that he did not intend to confront any witnesses, and did

not want to see the witnesses. He persisted in advising the court that if forced to remain present, he would be disruptive. As neither party could point to specific case law governing the circumstances, the court determined the best course of action was to proceed with Petitioner present in the courtroom, with the condition that if he became disruptive, the trial judge would take such action as necessary. Petitioner indicated his desire that counsel not represent him in any way, but ultimately decided counsel could remain as stand-by counsel to object to the introduction of improper evidence.

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

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

REASONS WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

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

After jury selection, Petitioner requested a Batson hearing. (App. 1339-40). At the hearing, Petitioner objected to the strikes used by the State against four jurors. First, Petitioner challenged the strike of Juror Edith Owens. The State argued she was dismissed because "in observing her during the *voir dire*, I had the impression that she was afraid of the defendant." The solicitor also noted that she was weak on the death penalty and she stated during *voir dire* that she knew nothing about the case. (App. 1340). The trial court found that to be a facially neutral reason. Petitioner contended that Kristen Lindsay was a similarly situated juror, specifically asserting "I wouldn't want to use the characteristic - - afraid of the prosecution, but in similarity as far as she would not be - - would feel intimidated by the prosecution - - authority of the prosecution." (App. 1341). The trial court found the Juror Lindsay was not similarly situated, and denied the Batson motion as to Juror Owens.

Second, Petitioner challenged the strike of Juror Matthew Young. (App. 1342). The solicitor stated he struck Juror Young because he indicated that he knew a defense witness named Jabari. (App. 1342). The solicitor also noted that Young indicated he heard about the incident on the street, and Young was weak on the death penalty. (App. 1342). The trial court found the reasons to be facially neutral. Petitioner initially indicated that Juror Jeannine Savage was similarly situated. (App. 1345-46). He then withdrew her name because she knew a law enforcement official at the time. Instead, Petitioner asserted Colene Murray was similarly situated. In further support of his argument that the strike was pretextual, Petitioner argued that Murray indicated she knew Mr. Stone, the solicitor. In response, the trial court noted that the solicitor was not a defense witness, and again asked Petitioner for something to

indicate the strike was pretextual. Petitioner continued to argue Ms. Murray was similarly situated. The trial court denied the Batson motion as to Juror Young.

Third, Petitioner challenged the striking of Juror Antwoine Crosson. The solicitor stated that Crosson was from the solicitor's hometown; the solicitor knew Crosson's brother; the solicitor's wife taught at Crosson's high school for over twenty years; and the solicitor had prosecuted Crosson's brother for criminal sexual conduct. (App. 1349-50). The trial court found that to be a facially neutral reason for striking Crosson. Petitioner did not contend any other juror had a family member that had been prosecuted by the solicitor. As a result, the trial court denied the Batson motion to Juror Crosson. (App. 1351).

Fourth, Petitioner challenged the striking of Juror Kerrie Brown. (App. 1351). The solicitor stated Brown was struck because she had a pending criminal domestic violence charge, and Petitioner's case started from a criminal domestic violence incident. (App. 1351). The trial court found that was a facially neutral reason. (App. 1351, 1352). Petitioner did not assert that any member of the jury was similarly situated to Juror Brown. (App. 1352). Thus, the trial court denied the Batson motion as to Juror Brown. (App. 1352-53). At the PCR hearing, Petitioner argued he was entitled to relief upon his Batson motion. (App. 4685-86, 4726-33)

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

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

The PCR Court correctly denied relief upon this claim because it was a freestanding claim that was improper for post-conviction relief. (App. 5216). Respondent submits the same

is true for this claim now. Petitioner could have properly raised this claim at trial, and challenged the trial court's ruling in his direct appeal. He did not. As a result, this claim was properly denied and dismissed.

As properly noted by the PCR Court, post-conviction relief is not a substitute for remedies available at trial or on direct appeal. S.C. Code Ann. § 17-27-20(b). This Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). Altogether, this claim was properly denied by the PCR Court. Thus, a writ of certiorari should not be granted to review this argument for relief.

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

Even if this Court finds Petitioner's first argument is appropriate for post-conviction relief, Petitioner is not entitled to relief because the argument raised is not preserved for review. As already noted, Petitioner had the opportunity at trial to identify jurors who were similarly situated to the ones struck by the solicitor during jury selection. While Petitioner did raise a Batson question as to the four jurors now challenged, Petitioner did not raise the arguments now presented in his petition for writ of certiorari as part of his argument at trial. Since these arguments were not preserved for appellate review, these claims should be denied and dismissed. See generally State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see

also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

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

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

1. **What occurred at trial**

At a pre-trial hearing before Judge Perry M. Buckner on November 12, 2002, Petitioner complained to the judge that he had filed a motion to dismiss his attorneys because he felt they were sabotaging his case. (App. 3889). The solicitor requested that the competency evaluation be done by a certain date, and when counsel Thornton indicated he had no objection to that, Petitioner stated he objected to it. (App. 3888-91).

At a pre-trial hearing before Judge Pieper on July 25, 2003, there was an extensive colloquy regarding Petitioner's motion to represent himself. Petitioner noted he had finished high school and had taken some college coursework, and had also educated himself on the criminal justice system by studying the Constitution, PCR materials, trial proceedings, and statutes. He pointed out he had done PCR work for other inmates and filed numerous motions in his case. Petitioner stated he thought his lawyers were incompetent and lazy, and further complained about them withdrawing his speedy trial motions. Petitioner also complained that his lawyers hired an expert to make him look like he had a mental problem, when in fact the State expert found him competent; and he thought the State expert was far more professional and qualified. Petitioner noted his lawyers had given him a sheet on the dangers of self-

representation, and the appointed defense lawyers agreed that if Petitioner was found to be competent he could in fact represent himself. The trial court discussed the fact that by waiving counsel, Petitioner was waiving it for the entire case. The trial court also noted Petitioner might find himself shocked and dazed by a guilty verdict when faced with proceeding on with the penalty phase. The court also warned Petitioner that his failure to properly raise issues at trial would preclude them on appeal and he would have no one to blame in PCR. Despite this, Petitioner continued to indicate his desire to represent himself, and the court specifically noted Petitioner was very coherent. After Petitioner reiterated his free, knowing, and intelligent decision, the court indicated its intent to allow Petitioner to proceed *pro se*, pending a Blair hearing. (App. 3900-3945).

As the hearing progressed and various housekeeping and logistical matters were discussed, Petitioner listed for the court a relatively long list of people he wished to subpoena, including law enforcement personnel, DSS employees, and other witnesses. (App. 3951-55). After some further housekeeping matters, the court accepted as a court's exhibit the document setting forth the dangers of *pro se* representation that counsel Kelly had given to Petitioner. (App. 3955-56). The court inquired again if Petitioner understood everything that transpired, and after Petitioner indicated he did, the court gave him an additional week to think over *pro se* representation. The court also noted that Petitioner would need to be prepared at the hearing the following week to argue any motions he may have if the case was to go forward as soon as possible as Petitioner desired. (App. 3955-58). Before the hearing concluded, Petitioner and the judge discussed some expert witnesses he wished to pursue, and Petitioner explained to the judge why he wished to have a psychological expert on false statements and a firearms expert. (App. 3958-64).

The Blair hearing was held on August 1, 2003. Defense-retained psychiatrist Dr. Schwartz-Watts testified that Petitioner was not competent to represent himself, based on her assessment of his paranoia, psychosis, and reasoning for wanting to represent himself. Specifically, Dr. Schwartz-Watts stated that at their third interview Petitioner was psychotic and not in touch with reality, and had since refused to see her. She felt Petitioner did not have the capacity to assist his attorneys, because he thought they were conspiring with the solicitor. She also felt he did not have the capacity to look at different decisions about how to defend himself, because he refused to consider any kind of mental health mitigation. She admitted, though, that she could not give an opinion as to his competency at that moment since he had refused to see her again. (App. 3975-91).

When cross examined by Petitioner, Dr. Schwartz-Watts acknowledged that Petitioner did not want to meet with her on any occasion. During the second interview, while Petitioner agreed that while he initially consented to having the interviews taped, he forgot it was recording, and was very angry that Dr. Schwartz-Watts might disclose the tape to other people. Schwartz-Watts also acknowledged that she was aware Petitioner was upset about the videotaping when she attempted to speak with Petitioner a third time. (App. 3991-97).

During cross examination by the solicitor and questioning by the judge, Dr. Schwartz-Watts stated Petitioner's intelligence was sufficient, but she was concerned not with the decisions he makes but with the reasoning behind them - given that he thought he could do better than his attorneys, and that they were Masons who were conspiring with the solicitor to deny him a fair trial based on his religious beliefs. She also thought his mental illness precluded him from considering issues in mitigation. However, she admitted she thought some of Petitioner's decisions about experts were "brilliant." Further, she conceded to the judge that

if Petitioner decided to accept the opinion of another expert who thought he was competent that certainly could be a rational decision, unless he was doing so because of his illness. Ultimately, she stated Petitioner had some "good" and "strong" ideas about how to defend his case, but she questioned the reasoning by which he arrived at those ideas. She stated it would not be unusual for him to be mistrusting since he was accused of killing two police officers, but felt he "crossed the line" with his belief that his attorneys were part of a conspiracy. Dr. Schwartz-Watts acknowledged that making an irrational decision does not render one incompetent. (App. 3997-4011).

The defense psychologist stated Petitioner refused to see him, and he had elevated scores on a portion of a test indicating defensiveness and underreporting of symptoms. On cross by Petitioner, he agreed Petitioner had average intelligence, no neuropsychological deficits, and no indications of malingering. (App. 4017-25).

The court's psychiatrist and psychologist both found Petitioner competent to stand trial, and criminally responsible. The psychiatrist, Dr. Richard Frierson, diagnosed Petitioner as having a personality disorder with narcissistic and anti-social traits. Frierson noted that was not a major mental illness. He stated he would expect Petitioner to have elevated scores on the PAI because Petitioner tries to present himself in best light. (App. 4028-32).

On cross, Dr. Frierson testified he scheduled another meeting with Petitioner after viewing Dr. Schwartz-Watts' videotape of the interview. He discussed in detail these issues with Petitioner and concluded Petitioner's thoughts about the Masons and the court system were not delusional but an ideology shared by a number of people. Dr. Frierson had found information on the internet about books written on the Masons, and Petitioner agreed he had reason some of those books. Since Petitioner's beliefs were similar to what other people

believe about these organizations, Dr. Frierson found it to be a cultural belief that may be false rather than a delusion that was caused by mental illness. While Dr. Frierson certainly agreed Petitioner displayed narcissism and might overestimate his abilities, he saw no evidence Petitioner ever had a major depressive or manic episode. (App. 4032-39).

The court's psychologist, Dr. Musick, examined Petitioner four times and also agreed he was competent to stand trial. He noted Petitioner did show elevated scores on the positive impression management scale of the Personal Assessment Inventory test, or "PAI" test. This meant Petitioner was unwilling to disclose minor shortcomings to which others might admit. However, since Petitioner was presenting himself in the best light, Dr. Musick found that not to be surprising. (App. 4041-46).

During defense counsel's cross examination, Dr. Musick agreed that when there are scores on the positive impression management scale similar to Petitioner's score, the PAI manual cautions that the other scores might underestimate any psychopathology. Dr. Musick noted they compensated for that by spending a lot of time in the interviews as to any symptoms Petitioner might have. Dr. Musick also did not think Petitioner's beliefs about the Masons was a delusion but a cultural or subcultural belief, partly because Petitioner agreed he did not know if what he had read about Masons was true, and partly because there was information on the internet and in books reflecting similar views. (App. 4046-54).

During Petitioner's cross examination, Dr. Musick stated Petitioner was not retarded. Dr. Musick agreed that while Petitioner did have some suspiciousness and distrustfulness, that did not necessarily make one abnormal. He further noted Petitioner was well aware of his rights. Dr. Musick agreed with Petitioner's questioning that simply because one tried to portray himself in a positive light or did not admit to minor annoyances, that did not necessarily mean

he was hiding larger issues. Dr. Musick agreed that one would not be delusional if he believed in the existence of the Ku Klux Klan, Free Masonry, or "enemies." (App. 4055-58).

The court found based on the court's examiners' testimony as well as its own observations and interactions with Petitioner that he was competent, stating:

> THE COURT: I have watched the defendant in court, I gave the defendant the opportunity to ask questions in these proceedings for the very purpose of evaluating the defendant's demeanor, his behavior, whether the defendant is rational, whether he has an appreciation of these proceedings. The defendant asked some questions when he was addressing the witnesses, the questions were pertinent. I think the defendant listened to the testimony, he referenced some of that testimony in his questions and there is evidence in the record from the psychiatric testimony that the defendant is competent to so proceed and the Court upon review of all of these - - with the entire record finds that defendant does have such a rational understanding of these proceedings and does have the ability to present his defense, that I find that he is competent to proceed.

(App. 4060-61). The court then held another colloquy with Petitioner on his desire to represent himself, and engaged in a detailed and lengthy discussion with Petitioner on the responsibilities, dangers, and issues with *pro se* representation, particularly in a capital case. The judge further advised Petitioner not to represent himself, and told him he may be overwhelmed by the prospect of a sentencing phase if he were convicted. Petitioner held firm to his desire to represent himself. (App. 4061-67).

At that pre-trial proceeding, Petitioner was able to make and logically discuss a number of motions. These motions included a motion for bond; withdrawal of motion to change venue; motion to dismiss indictments for use of his former name; motion to dismiss indictments based on 4th Amendment issue; motion for a speedy trial; motion for release from segregation; motion to dismiss based on a conspiracy between judge, prosecutor and detention officials; motion to dismiss because arrest warrant is false based on error in one of the deputy's names; motion for *voir dire*; motion to sequester jurors; motion to dismiss based on false testimony

allegedly being presented to the Grand Jury; motion to dismiss because of the failure to include aggravating circumstances in the indictment; motion based on the lack of representation of minorities on the grand jury; motion to preclude the State from using any information gleaned during the competency evaluation, a motion to allow his investigators to examine the evidence, and a motion for a room wherein the defense team could meet during the trial. (App. 4080-4222). In *ex parte* proceedings, Petitioner then cogently discussed his requests for experts, including a false memory expert, a forensic evidence expert, a jury selection expert, and a firearms expert. Some of these requests were granted. (App. 4224-4257). An additional pre-trial hearing was held on October 1, 2003, at which Petitioner raised a number of other appropriate motions, as well as conducted an evidentiary hearing on his Fourth Amendment claims. (App. 4260-4449). Petitioner handled motions to quash in opposition to his subpoenas as well as *voir dire* issues at the pretrial hearing on October 3, 2003. (App. 4451-4522).

When trial commenced on October 6, 2003, Petitioner successfully conducted the capital *voir dire* without any significant incident, asking a number of questions that were probative of the jurors as to race, involvement with law enforcement, and the death penalty. He engaged in jury selection, made a motion for a Batson hearing, and discussed parameters of opening statement with the judge. (App. 63-1230, 1318-1350).

Petitioner then gave an opening statement that was pertinent, logical, and relevant to the issues in the case. Petitioner argued prosecution's opening statement was not the truth, that some of the witnesses were going to be lying, that some witnesses were be intimidated by officers, that Kimberly Blake kept changing her story, that he was shot and fled but was not the shooter of the officers, that the officers were not following the law and proper procedure when they searched the house, that the jury should not overlook lies, discrepancies, and

inconsistencies in making its decision, that the case was not about race because injustice could happen to any citizen, and that he was being falsely characterized as some sort of "radical guy, some Jamaica guy, or some poor black, racist-type, militant type of guy," when that was not the case. Petitioner concluded by appropriately thanking the jury, and reminding them of their promise to be impartial and give him a fair trial. (App. 1385-1414).

Petitioner then engaged in lengthy arguments and examinations of witnesses in an emotionally charged case. While Petitioner may have occasionally had trouble with rules of evidence and the like, he had no trouble whatsoever during the guilt phase in maintaining proper demeanor in the courtroom and displaying proper respect for the court, opposing counsel, and the witnesses. Petitioner repeatedly expressed his appreciation and respect to the trial court throughout the entirety of the guilt phase process. See, e.g. (App. 1914; 1976-79; 1991; 3456).

An issue arose after closing argument was completed in the guilt phase, while the jury was still in the deliberation. The court noted that while it had honored Petitioner's desire to represent himself, and even appointed stand-by counsel to help Petitioner, Petitioner apparently had said he did not intend to participate in sentencing. Petitioner agreed that he did not intend to present anything in mitigation. The court highlighted the importance of a case in mitigation, but Petitioner remained firm, stating that it would make no difference to him. (App. 3448-50).

Petitioner stated he wanted to continue to represent himself, but that he would not be attending the sentencing. When the judge said that he would need to be present, Petitioner replied he "wouldn't be able to sit there and attend that proceeding," and then proclaimed that he "waive[d] all the rights to any objections to anything in the event that I'm found guilty."

The judge engaged in another colloquy on Petitioner's right to give a statement to the jury, but Petitioner was adamant he did not want to present a sentencing case. (App. 3450-54).

The judge then held a meeting just with defendant and his stand-by attorneys. Petitioner stated that he did not want to participate in sentencing because:

> [I]t wouldn't have no bearing on me, because if I'm in prison for life, that's death to me. I can never accept that. You know, I don't find that [a life sentence] as a easy or something positive or good in my position. Death would be more preferable than life until I die in - - in prison.

Petitioner went on to say he did not want to be sentenced to death, but that life in prison was a form of death itself. Petitioner also told the court he did not want counsel appointed for sentencing, and this was a decision he had thought long and hard about. (App. 3454-58).

After the meeting, the court found Petitioner's decision to be voluntarily and knowingly made with regard to his sentencing phase rights. When the judge said Petitioner was going to remain present, though, Petitioner said he would probably be "unruly" and would have to be restrained. The court stated that Petitioner was not going to be unruly and that he would be restrained if need be, and lamented that Petitioner had not caused any other problems to this point. The court pointed out that "you asked to represent yourself, and you'll need to follow that through." (App. 3460-63).

Petitioner continued to make guilt phase motions and otherwise represent himself even after a verdict the next morning. He again reaffirmed his intention not to offer anything in sentencing. (App. 3463-82). However, as the parties discussed logistics, Petitioner stated that he had no intention of sitting in the courtroom listening to the case, and while he would NOT be violent, he would be unruly. The court responded that it had honored Petitioner's request to represent himself, and that a capital case required the defendant's presence. (App. 3482-83).

Petitioner again reaffirmed his waiver of his sentencing phase rights, even reciting them himself - - but warned that he would make a statement whenever he wanted to if he was in the presence of the jury. According to Petitioner, he did not care for the jury to know anything about him, because he had already presented everything he wanted to present in the guilt phase. Petitioner declined the court's suggestion that he sit in the back room where he could observe the proceedings. (App. 3484-88).

As the conversation continued, Petitioner said that from the beginning he had instructed his stand-by attorneys and investigators that there would be no mitigation witnesses called. The court decided to break for lunch, but warned Petitioner that his presence may be required and the court would deal with any misconduct. (App. 3490-92).

Before the break, Petitioner's standby attorneys conferred with him and reported their conversations with the judge. According to them, Petitioner (1) did not want to be supplanted as attorney of record, (2) did not want to put up evidence but did not care if standby counsel objected to or examined witnesses during the state's case, (3) did not want to be present, but felt it was going to be up to the judge whether to put him in the back room. They then discussed the possibility of standby counsel representing Petitioner in a limited capacity during the sentencing phase. The court reviewed some cases, and standby counsel proposed that consistent with Petitioner's wishes they be limited in action to three things: to make objections, to give argument, and to stipulate. Petitioner expressly refused to comment. (App. 3494-3505).

After lunch, the court again took up the issue, phrasing it as attempting to balance Petitioner's right to represent himself with his right not to present evidence or testify.

Petitioner then spoke up and again said he would be a disruption if forced to remain. The court told Petitioner it would deal with that if it arose. (App. 3512-14).

When the court asked Petitioner how he planned on being disruptive, Petitioner said "just verbally . . . [but] not any profanity or anything like that, or disrespectful." Petitioner said he did not want to see any of the witnesses, and again stated that he wanted to "waive any defense in reference to that proceeding," and wanted to "waive my right to not even be there if I have the right." He was "respectfully" ready to accept the jury's sentence when that time came. (App. 3516-18). Petitioner had no problem with standby counsel handling the witnesses and the objections, and freely and voluntarily waived his right to be present. (App. 3518-20).

The court then discussed with the lawyers whether they had to wait for Petitioner to be disruptive to exclude him, or whether they could just take him at his word that he would be. Standby counsel asserted that Petitioner could waive his right to be present. (App. 3521-23). The court stated that was the question at issue, but pointed out that Rule 16 of the rules of criminal procedure seemed to require a capital defendant's presence. (App. 3523-30).

Ultimately, the judge concluded that Rule 16 required Petitioner to be present. The court offered to allow Petitioner's father to sit at counsel table with Petitioner, but Petitioner declined. The court then directed that the trial proceed, and stated he was going to continue to honor Petitioner's desire to represent himself. (App. 3532-36).

The next morning, after a detailed colloquy Petitioner again stated he still wanted to continue to represent himself. Petitioner agreed that standby counsel could make objections and give a closing statement. (App. 3538-42).

After an opening charge by the judge, the State began its sentencing phase case. As soon as the solicitor asked his first question, Petitioner stood up and recited, "blessed be

Yahweh, el Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." The court asked Petitioner to take a seat, which he did, and the solicitor tried to ask the question again. Petitioner stood up a second time and recited the same religious phrase. At this point the court ordered the jury to step out. (App. 3548-51; 3553).

Petitioners told the judge that he intended to continue interrupting the proceedings. The court noted that he had already warned Petitioner about misbehavior, but was going to warn him one last time, and that if he continued to misbehave, he would be removed from the courtroom and placed in the back room. (App. 3551-53). When the jury returned, the trial court immediately gave a curative instruction. (App. 3555).

When the solicitor started questioning the witness again, Petitioner stood up and recited the same religious phrase. The court ordered jury out, and put on the record that since Petitioner repeatedly refused to behave, he would be put in the back room where there was a glass partition allowing him to see the proceedings and hear the testimony. The court noted that Petitioner had authorized his counsel to make objections and give closing statement. Petitioner requested that the sound be turned off in the back room, but the judge said he could not do that. Instead, Petitioner could cover his ears if he wanted. Again, Petitioner asked to be "exempted" from or to "waive" the proceeding, but the court denied it, stating the rules required his presence. (App. 3555-60). When the jury returned, the trial court gave another curative instruction. (App. 3566-67). The sentencing phase finally began.

After a couple of witnesses testified, the lunch recess was taken. The judge offered to let Petitioner back to counsel table, but Petitioner told the court he would rather remain in the back. Petitioner promised not to be disruptive again if his restraints were removed, and the

court agreed. Petitioner said he could hear everything, but he would raise his hand if he could not. (App. 3596-97).

After a number of further witnesses, the court again invited Petitioner to return to counsel table. Petitioner again declined, saying he was "fine" in the back, that he could hear and see everything, and that he did not mind standby counsel operating on his behalf in the limited fashion. (App. 3681). Witnesses continued for the rest of the day. (App. 3682-3735).

The next morning, the trial court asked Petitioner if he would make outbursts in placed in court, and Petitioner said he would. Petitioner said he preferred to stay in the back room, and again said that he had no problem with standby counsel representing him in the limited fashion consistent with his desire not to present a case in mitigation. (App. 3738-40).

Finally, at the close of the State's case, the court gave Petitioner one last chance to present a case in mitigation, testify or give a closing statement. Petitioner declined to present a case or testify, but agreed his counsel could argue in closing. (App. 3760-63). Upon inquiry, Petitioner again stated he would not return to the front of the courtroom without making outbursts. (App. 3765).

During the State's closing argument, Petitioner apparently decided to participate again, by twice making objections through his counsel. Despite these actions, Petitioner again declined to return to counsel table, stating that he preferred to remain in the back. (App. 3789-90; 3795-97). Petitioner ultimately decided to return to the courtroom. He gave a fairly lengthy closing statement to the jury in which he personally apologized to the victim's families. Like his other arguments, the closing argument Petitioner gave was logical, appropriate, and relevant to the issues. After finishing his argument, Petitioner returned to counsel table for the rest of the case. (App. 3829-40).

Petitioner remained calm and coherent after the sentencing phase verdict, renewed his motions, apologized to the family, and thanked the trial judge. (App. 3871-73).

2. These issues are not preserved for appellate review.

Petitioner never directly raised a claim the trial court abused its discretion and thereby denied petitioner's constitutional rights to due process and a fundamentally fair trial by failing to sua sponte order a new competency hearing prior to sentencing and/or terminate petitioner's pro se status. Thus, to the extent Petitioner raises this claim in this petition, it should be denied. Plyler v. State, 309 S.C. 408, 424 S.E.2d 777 (1992) (issue must be both raised and ruled upon by the PCR Court to be preserved for appellate review); Rule 59(e), SCRCP (providing avenue for any party to move to alter or amend judgment); see Bostick v. Stevenson, 589 F.3d 160, 164 (4th Cir. 2009) (acknowledging same applied consistently and regularly in South Carolina after Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)). Thus, these arguments in the petition for writ of certiorari should be dismissed because they are not preserved for appellate review.

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

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

upon which to overrule the trial court's determination on competency. (App. 5214-15). In light of the fact that no new evidence regarding Petitioner's competency was presented at the evidentiary hearing, any claim regarding Petitioner's competence would have been inappropriate for post-conviction relief because it could have been raised in the direct appeal. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). Altogether, this claim was properly denied by the PCR Court. Thus, a writ of certiorari should not be granted to review this argument for relief.

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

The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally incompetent defendants. See Pate v. Robinson, 383 U.S. 375, 384-86, 86 S.Ct. 836 (1966). The test for mental competence is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. McLaughlin v. State, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003). At the time of Petitioner's trial, the level of competence required to waive counsel was the same as the level of competence to stand trial, as long as the waiver was knowing and voluntary. Sims v. State,

313 S.C. 420, 438 S.E.2d 253 (1993) (discussing and quoting Godinez v. Moran, 509 U.S. 389 (1993)).

> A petitioner may make a procedural competency claim by alleging that the trial court failed to hold a competency hearing after the defendant's mental competency was put in issue. To prevail, the petitioner must establish that the state trial court ignored facts raising a "bona fide doubt" regarding the petitioner's competency to stand trial. Pate, 383 U.S. at 384-86, 86 S.Ct. 836; see also Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir.1995). Even if a petitioner is mentally competent at the beginning of the trial, the trial court must continually be alert for changes which would suggest that he is no longer competent. See Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Although there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant." Id.

Burket v. Angelone, 208 F.3d 172, 191-92 (4th Cir. 2000).

"[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope, 420 U.S. at 172, 95 S. Ct. at 904 (citing Pate, 383 U.S. 375, 86 S.Ct. 836 (1966)). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope, 420 U.S. at 181, 95 S. Ct. at 908.

First, the trial court held a thorough Blair hearing in which he was found competent to stand trial and represent himself. Thus, Petitioner can only prevail on this claim if there was evidence to support his assertion that his demeanor at trial warranted a second competency hearing. In this case, the trial court had no basis upon which to find Petitioner was no longer competent to either stand trial or represent himself at trial. As noted above and as found by the PCR Court, Petitioner reasonably represented himself during the course of his trial. "A sane demeanor may alone obviate the need for the court to inquire into a defendant's competence.

Drope, supra, 420 U.S. at 179, 95 S.Ct. 896.... And the court need not inquire if no other circumstances signal a need for a competency examination." Jermyn v. Horn, 266 F.3d 257, 289 (3d Cir. 2001). Further, "bad trial tactics do not prove a defendant incompetent. A defendant has the right to conduct his own defense to his detriment." Wise v. Bowersox, 136 F.3d 1197, 1204 (8th Cir. 1998) (finding a second competency hearing was not required even though petitioner alleged he made "foolish decisions" during his trial)(citing Faretta, 422 U.S. at 834, 95 S.Ct. at 2540-41).

The trial court was previously made aware that Petitioner would attempt to argue that his arrest was the result of a conspiracy. Whether Petitioner's conspiracy theories indicated he was competent was very much at issue during the Blair hearing. Both Dr. Frierson and Dr. Musick indicated the beliefs did not support a finding of a serious mental illness in Petitioner's case because his thinking was not delusional; it was instead an ideology/cultural belief that was shared by a number of people regarding the Masons. (App. 4034-37, 4051-52). Further, Frierson noted he did not find sufficient evidence of a major depressive episode or a manic episode. (App. 4038). Thus, the fact that Petitioner alluded to a conspiracy theory during his examination of witnesses did not constitute new information that would given the trial court reason to believe Petitioner's competency was an issue.

Petitioner's decision against having the trial court consider whether the lesser included offense of voluntary manslaughter was also not evidence of incompetency. Petitioner clearly enunciated that he did not want to have a lesser included offense charged because he did not commit the act. (App. 3272-74). This was consistent with Petitioner's assertion that self-defense was not an issue in his case, because he contended there was no act by him. (See App. 3276).

Finally, Petitioner's actions at the beginning of the sentencing phase did not constitute evidence of incompetence. From the discussion regarding the sentencing phase that was conducted while the jury was deliberating, it is clear in the record that Petitioner did not want to be a part of the sentencing phase of trial. That was in part to Petitioner's assertion that he was ambivalent towards his sentence.

> My position - - position is - - is that I can't differentiate between life and death if it cames (sic) to a guilty verdict. And it wouldn't have no bearing on me, because if I'm in prison for life, that's death to me. I can never accept that. You know, I don't find that as a easy or something positive or good in my position. Death would be more preferable than life until I die - - in prison. . .

(App. 3455). After the jury's verdict, Petitioner again insisted the sentencing verdict was of no concern to him. (App. 3487). Petitioner was adamant that he did not want to participate in the sentencing phase. He consistently informed the court that he would be disruptive is forced to stay in the courtroom, but he would not act violently. (App. 3483, 3514, 3516-17, 3521-22). And, as was noted by Mr. Thornton, standby counsel,

> He handled himself, as far as - - his demeanor in the courtroom was fine. He treated the judge with respect; he treated opposing counsel with respect; he did not make any outbursts. Regardless of what my opinion is on how well he did as a layman, you know, in a death penalty case, the fact of the matter is he comported as he was supposed to during the trial, and even at the end when he decided he did not wish to be present during the sentencing, he did not make any large disturbance in the courtroom.

(App. 4892-93). In all, there is insufficient evidence in the record to support a finding the trial court should have conducted a second competency hearing in Petitioner's case. The trial judge, who observed Petitioner throughout the pretrial and trial proceedings, had the most occasion to discern whether Petitioner's competency was waning. At no point during the course of the trial on the record does the court indicate Petitioner's competency was in question. Since there was

not sufficient evidence to warrant a second competency hearing, Petitioner is not entitled to relief upon this claim. It should therefore be denied and dismissed.

Petitioner's claim that the trial court abused its discretion in not terminating Petitioner's pro se status is also without merit. First, Petitioner's contention that the trial court both removed Petitioner from the courtroom and restricted standby counsel's ability to proceed is not supported by the record. While Petitioner was removed from the defense table, he remained in the courtroom in a back room from where he was able to both observe and hear the proceedings. (See App. 3552). Furthermore, it was Petitioner, and not the court, who placed the restrictions on what standby counsel could present. Petitioner consistently maintained that he did not want a mitigation case presented at trial. Standby counsel informed both Petitioner and the trial court that if they were made counsel of record, they would not abide by Petitioner's request not to present a mitigation case. (App. 3525-29). Thus, the only way Petitioner could maintain control over the presentation of his defense case in the sentencing phase was to maintain his status as counsel of record.

Second, a defendant who is not willing to abide by courtroom protocol does not automatically forfeit his right to self-representation. See Davis v. Grant, 532 F.3d 132, 149 (2d Cir. 2008) (finding state court's failure to instruct standby counsel to represent defendant when he was removed from courtroom was not an objectively unreasonable application of Supreme Court precedent); see Clark v. Perez, 510 F.3d 382, 395-96 (2d Cir. 2008) (finding no violation of Sixth Amendment rights when court did not revoke pro se status of defendant who removed herself from courtroom through conduct). Altogether, it is within the trial court's discretion whether to revoke a defendant's pro se status based upon disruptive conduct. Here, the trial court did not abuse its discretion in not relieving Petitioner of his pro se status. Petitioner

indicated he did not want to be relieved as counsel of record, and he did not want to present a case during the sentencing phase. Standby counsel indicated to the court that they would present a case, contrary to Petitioner's wishes, if made counsel of record. In balancing Petitioner's clear statement of his strategy for the sentencing phase, the fact his strategy would not be followed if he was relieved, and the fact the court had the alternative of having Petitioner remain in the courtroom and still maintain control of his case, the trial court clearly reasoned the best alternative would be to not terminate Petitioner's pro se status. Altogether, Respondent submits that Petitioner's allegations about his demeanor in the courtroom are not supported by the record. The record clearly reflects that Petitioner was able to present a logical and coherent defense in the guilt phase. This was not an abuse of discretion.

5. Petitioner has not shown that he was incompetent-in-fact during the course of his trial.

Petitioner asserts that he was incompetent in fact during the entire course of his trial. In support of this claim, Petitioner relies upon an affidavit from Dr. Rikki Lynn Halavonich, who claims

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

(App. 5258-59).

First, Respondent submits this affidavit that was attached to a prior Motion to Remand for Additional PCR Proceedings cannot be relied upon in finding Petitioner was mentally incompetent at trial. See generally Drope, 420 U.S. at 181, n. 17, 95 S. Ct. at 908, n. 17; Pate v. Robinson, 383 U.S. 375, 387, 86 S. Ct. 836, 843, 15 L. Ed. 2d 815 (1966) (noting Supreme

Court has emphasized the difficulty of retrospectively determining an accused's competence to stand trial.). "Retrospective determinations of whether a defendant is competent to stand trial or to plead guilty are strongly disfavored." Weisberg v. State of Minnesota, 29 F.3d 1271, 1278 (8th Cir.1994), cert. denied, 513 U.S. 1126, 115 S.Ct. 935 (1995). Furthermore, this affidavit was not presented to the PCR Court

Second. Dr. Halavonich's opinion is based upon her belief that there was some agreement that Petitioner suffered from a serious mental illness. (App. 5258, #4). That was not the case. At the Blair hearing, Dr. Frierson testified that Petitioner suffered from "a personality disorder with narcissistic and antisocial traits." (App. 4031). He further testified that was not considered a major mental illness. (App. 4031). Dr. Musick's testimony at the hearing also did not support a finding that Petitioner was suffering from a serious mental illness. (See App. 4035-60). The only testimony at the hearing that indicated Petitioner suffered from a serious mental illness was that of Dr. Schwartz-Watts. She found Petitioner suffered from bipolar disorder. (App. 3983). However, she also noted that she could not state what Petitioner's mental state was at the hearing because he refused to talk with her. (App. 3990). Halavonich does not make a diagnosis that Petitioner suffers from or previously suffered from a serious mental illness. In fact, Halavonich does not even diagnose Petitioner with any illness. Furthermore, Halavonich indicates in both the letter and her affidavit that she did not review Petitioner's trial transcript in its entirety. It appears from her affidavit that she may not have even reviewed the testimony of Dr. Musick and Dr. Frierson that was presented at the Blair hearing, In light of the discrepancies between the findings made by those who examined Petitioner before trial, Halavonich's lack of a diagnosis of a serious mental illness, and the fact

that post-conviction determinations of one's competence to stand trial are generally disfavored, this claim should be denied and dismissed with prejudice.

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

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

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

2. PCR Counsel was qualified.

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

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

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

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

Clearly these lawyers were well-versed in what it takes to try a capital case. Thus, there was no violation of the capital PCR qualification statute.

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

Even if it is assumed that PCR trial counsel in this case were not qualified under the statute, Petitioner would not be entitled to relief upon his due process and equal protection claims. There is no constitutional right to counsel in post-conviction proceedings. See generally Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Coleman v. Thompson, 501 U.S. 722 (1991); Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997).

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

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

In the unpublished order issued by this Court denying the petition for habeas corpus of Kevin Dean Young, this Court pointed out that S.C. Code Ann. § 17-27-160(B) does not provide a remedy for its violation. It went on to cite cases for the proposition that the failure to meet statutory standards for death qualification for *trial* counsel did not result in *per se* reversal but still needed to be assessed for prejudice. Kevin Dean Young v. State of South Carolina, Unpub. Order (S.C. Sup. Ct. November 1, 2000) (citing Aeschliman v. State, 973 P.2d 749 (Idaho Ct. App.1999); State v. Misch, 656 N.E.2d 381 (Ohio Ct. App. 1995); and State v. Maletta, 781 P.2d 350 (Or. Ct. App. 1989)). Altogether, Petitioner has not established he is entitled to relief upon this allegation.

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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Attorney General

JOHN W. MCINTOSH
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June 6, 2011

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

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Case No. 2007-CP-07-715

TYREE ROBERTS, SK 6012
AKA ABDIYYAH BEN ALKEBULANYAHH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

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

ALPHONSO SIMON, JR.

June 6, 2011

RECEIVED
JUN 28 2011
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

ABDIYYAH BEN ALKEBULANYAHH, #6012 ..... *Petitioner,*

v.

STATE OF SOUTH CAROLINA, ... *Respondent.*

PETITIONER'S REPLY

JOHN H. BLUME
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Counsel for Petitioner

ARGUMENT IN REPLY

I.

Petitioner is Entitled To Relief on His *Batson* Claim.

A. This Court Should Consider the Merits of petitioner's *Batson* Claim.

Respondent argues that the post-conviction relief (PCR) judge properly rejected petitioner's *Batson* claim on the basis that it was not appropriately pled as a PCR claim. *Return To Petition For Writ Of Certiorari (hereafter "Return") at p. 10.* At trial, petitioner made a *Batson* motion after the prosecution struck a number of African-American jurors during jury selection. *App. p.1388, l.25 – p.1340, l.1.* On direct appeal, this Court denied petitioner's request to represent himself, and his appeal was handled by Joseph Savitz and Robert Dudek of the Office of Appellate Defense. *See State v. Roberts*, 364 S.C. 583, 614 S.E.2d 626 (2005). Appellate counsel failed to raise the *Batson* issue on appeal.

Petitioner filed a *pro se* application for post-conviction relief which contained a number of search and seizure and speedy trial issues. *App. pp.4535-4544.* Glenn Walters and Carl Grant were appointed by Judge Roger Young to serve as PCR counsel. *App. p.5249, l.1 – p.5251, l.11.* Neither Mr. Walters nor Mr. Grant, however, had the requisite experience and training required by S.C. Code § 17-27-160. Their lack of experience worked to petitioner's detriment, since PCR counsel failed to obtain funds for investigative and expert services, conducted no independent investigation, did not even obtain a copy of trial counsel's files, and – other than petitioner – called no witnesses at the PCR hearing. Respondent now argues that petitioner's *Batson* claim should be rejected here because petitioner's unqualified post-conviction counsel failed to properly plead it as a claim that appellate counsel was ineffective for failing to raise the *Batson* claim on appeal. *See Return at p. 11* (citing *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517,

520 (1993)) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel).

Petitioner has repeatedly argued that he should be afforded one "fair bite" at the PCR apple. That PCR counsel did not even know the basic rules of post-conviction pleading and practice is simply further evidence that petitioner was denied fundamental due process at his initial PCR. This Court should review petitioner's *Batson* claim or, at a minimum, remand the case to the Circuit Court for appropriate additional proceedings.

B. Petitioner's *Batson* arguments are appropriate for this Court's review.

Second, respondent argues that even if petitioner's *Batson* claim is appropriate for PCR, petitioner is not entitled to relief because he did not explicitly argue at trial all of the comparison analysis points that are now included in his petition for writ of certiorari. *Return at p.11.* Respondent misunderstands the legal test that this Court must follow in analyzing petitioner's *Batson* claim.

Batson provides a three-step process for adjudicating a claim that a peremptory challenge was based on race. First, a defendant must make a "*prima facie* case of purposeful discrimination . . . ." *Batson*, 476 U.S. at 96. Second, "[o]nce the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging [the] jurors [in question]." *Id.* at 87. Third, if the prosecutor succeeds in articulating a facially race-neutral reason, the court then has a "duty to determine if the defendant has established purposeful discrimination." *Id.* at 98. In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Supreme Court "made it clear that in considering a *Batson* objection, *or in reviewing a ruling claimed to be Batson error*, all of the circumstances that bear upon the issue of racial animosity

must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (emphasis added) (discussing the Court's opinion in *Miller-El*, 545 U.S. at 239). *Miller-El* further made clear that the circumstances to be considered necessarily include side-by-side comparisons of black venire panelists who were struck and white panelists who were allowed to serve:

> 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 under *Batson's* third step.

Miller-El, 545 U.S. at 241.

The *Miller-El* Court explicitly rejected the argument comparative juror analysis was inappropriate on federal habeas review because *Miller-El* did not raise a comparative juror argument before the state court. *Id.* at 241, n.2. The Court noted that there is a "difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." *Id.* Moreover, the Court observed that "[t]here can be no question that the transcript of *voir dire*, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts." *Id.* More recently, the Supreme Court again engaged in a comparative juror analysis that was not argued at the trial level, and reiterated that appellate review of a *Batson* claim must include "*all* of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478, 483 (holding that the prosecutor's facially race-neutral reason was implausible given the prosecutor's acceptance of white jurors who disclosed similar concerns).

"[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Id.* at 478. Petitioner properly raised a *Batson* claim at trial. In reviewing petitioner's

claim, this Court should consider all of the evidence and arguments that bear on the issue of racial animosity, including his comparative juror analysis.

II.

Petitioner's Constitutional Rights to Due Process and a Fundamentally Fair Trial Were Violated Because: (A) The Trial Court Failed To *Sua Sponte* Order a New Competency Hearing Prior to Sentencing and/or Terminate Petitioner's *Pro Se* Status; and, (B) Petitioner Was In Fact Incompetent During His Trial Proceedings.

Respondent raises four arguments concerning the merits of petitioner's competency-related claims: (1) petitioner's claims are not preserved and/or properly raised for PCR; (2) the trial judge satisfied the burden of inquiring as to petitioner's competency at trial; (3) petitioner was competent-in-fact at trial; and, (4) the trial judge did not abuse his discretion by failing to order a new competency hearing prior to sentencing and/or terminate petitioner's *pro se* status.

A. This Court should consider the merits of petitioner's competency-related claims.

Respondent raises two separate procedural default arguments regarding petitioner's competency-related claims. First, respondent argues that petitioner's claims are procedurally defaulted for purposes of PCR because they could have been raised at trial, but were not. *Return at p.25* ("the PCR Court did find Petitioner's challenge to his competence to stand trial was procedurally barred" and "the PCR Court noted that a freestanding claim regarding competency can be raised on direct appeal"). Second, respondent argues that petitioner's claims are further defaulted here because the arguments he raises in his petition for writ of certiorari are not the same arguments that PCR counsel attempted to raise in the amended application for post-conviction relief. *Id.*

Once again, respondent's procedural default arguments serve to highlight the fundamental unfairness of what has occurred in petitioner's case so far. First, petitioner – who was mentally ill and incompetent-in-fact – was allowed to proceed *pro se*, despite circumstances raising a bona fide doubt as to his competency, because the trial court failed to order a new competency hearing. Then, the trial court removed petitioner from the courtroom, but failed to terminate petitioner's *pro se* status, leaving him unrepresented for the duration of the penalty phase of his capital trial. On direct appeal, no argument regarding petitioner's competency could be raised because petitioner, representing himself, did not raise the issue at trial, nor could he, given that he was, in-fact, incompetent and actually absent from the courtroom for much of the proceedings. Respondent now argues that any competency issues are forever barred because they could have been raised at trial. In the alternative, respondent argues that petitioner's competency claims are not preserved for appellate review because his unqualified PCR counsel, who did nothing to investigate and prepare petitioner's case for PCR, did not know how to properly plead petitioner's claims for PCR. Respondent's position is untenable. Moreover, it stems from respondent's misunderstanding of the law regarding competency.

It has long been accepted that "the conviction of an accused person while he is legally incompetent violates due process." *Pate v. Robinson*, 383 U.S. 375, 378 (1966). This "prohibition is fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). A court's "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope*, 420 U.S. at 172 (1975) (describing the Court's holding in *Pate v. Robinson*, 383 U.S. 375 (1966)). In *Drope*, the Supreme Court endorsed the position that there is an important difference between ordinary trial errors, which may be subject to procedural default,

and errors affecting fundamental constitutional rights, which "may be raised even though the error could have been raised on appeal." *Drope*, 420 U.S. at 174. Just as in petitioner's case, *Drope* involved a "dispute concern[ing] 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." *Id.* at 174-75. Under these circumstances, the Court held that it was "incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Id.* at 175. In accordance with *Drope*, this Court should address petitioner's competency claim because it affects petitioner's fundamental right to a fair trial and because of the unique circumstances in this particular case.

B. Petitioner's due process rights were violated when the trial court failed to inquire into petitioner's competency to stand trial when the circumstances raised a bona fide doubt regarding competency.

1. A pre-trial *Blair* hearing is not dispositive.

Respondent argues that because "the trial court held a thorough *Blair* hearing in which [petitioner] was found competent to stand trial and represent himself," petitioner can only prevail if the evidence supports "his assertion that his demeanor at trial warranted a second competency hearing." *Return at p. 27.* Respondent effectively argues that because the judge ordered the initial *Blair* hearing and was also in the best position to perceive the defendant's behavior throughout the trial, petitioner's clam fails. However, the Supreme Court has explicitly recognized that even when a defendant has previously been deemed competent, a second competency hearing may become necessary. *Drope*, 420 U.S. at 181. A judge "must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competency to stand trial." *Id.* In *Pate v. Robinson*, *supra*, and *Drope v. Missouri*, *supra*, the Supreme Court held that a trial judge has an ongoing duty to scrutinize the defendant's

mental competency throughout the course of the trial and be vigilant of any behavior that creates a bona fide doubt as to the defendant's mental fitness to participate in the proceeding. *Pate*, 383 U.S. at 385-86; *Drope*, 420 U.S. at 179.

In *Drope*, for example, the Supreme Court held that the defendant's due process rights were violated when the trial court failed to suspend the trial for a competency hearing in the face of accumulating evidence of incompetency. *Id.* 420 U.S. 162. "In order to determine whether there is a reasonable cause to order a competency hearing, a trial court must consider all evidence before it, including evidence of irrational behavior, the defendant's demeanor at trial, and medical opinions concerning the defendant's competence." *United States v. Mason*, 52 F.3d 1286, 1290 (4th Cir. 1995) (citing *Drope*, 420 U.S. at 180; *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987); *Thompson v. Blackburn*, 776 F.2d 118, 123 (5th Cir. 1985)). A judge faced with possible evidence of incompetence "must 'look at the record as a whole and accept as true all evidence of possible incompetence' in determining whether to order a competency hearing." *Mason*, 52 F.3d at 1290 (quoting *Smith v. Ylst*, 826 F.2d 872, 877 (9th Cir. 1987)). A pretrial competency hearing and finding of competency is only one piece of the record, not a dispositive fact.[1]

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[1] While the petitioner was found competent at his *Blair* hearing, the psychiatric testimony proffered by the experts put the trial court on notice that his mental state was at best precarious. Dr. Schwatz-Watts concluded that petitioner likely suffered from bio-polar disorder, and Dr. Frierson and Dr. Musick noted that petitioner seemed unable to appreciate his shortcomings. Trial Tr. 4043-44. While the psychiatrists diverged in their conclusions, all of their testimony about the defendant raised disconcerting observations about petitioner's intellectual and psychological deficiencies. The Court in *Drope* noted that "[t]here are of course, no fixed or immutable signs which indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts." *Drope*, 350 U.S. at 180. Here, the testimony of the three psychiatrists put the judge on notice that petitioner was prone to delusional thinking and

2. Petitioner's bizarre demeanor at trial.

Drope recognized that the competency inquiry includes not only medical opinions, but also the defendant's behavior and demeanor at trial. *Id.* at 180. Respondent claims that petitioner made rational choices when he decided not to play an active role in his trial, not to have the aide of counsel, to restrict the role of his appointed counsel during sentencing, and to refuse presentation of any mitigating evidence. Simply because a defendant articulates a trial strategy, and makes definitive choices, does not mean that defendant is competent.

> If the mental state of the accused prevents a rational understanding of the proceeding, the foundation for the accused's power to control the defense is lacking. An incompetent is no longer 'in control' of his decision-making process and is therefore incapable of making the decisions required by the process that may result in a finding of blame and imposition of punishment.

Norma Schrock, *Defense Counsel's Role in Determining Competency to Stand Trial*, 9 GEO. J. LEGAL ETHICS 639, 654 (1996). Furthermore, respondent's argument is based on a mischaracterization of the record evidence. Petitioner behaved in an increasingly bizarre manner during the trial: he referred to himself in the third person,[2] at one point in the trial he seemed completely baffled by a witness' use of a protractor,[3] he espoused wide ranging conspiracy theories,[4] and at various times was unable to comprehend simple instructions from the judge.[5] Petitioner was in an especially vulnerable position given that he was representing himself. Just

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was unable to grasp his own limitations. Armed with such information, the judge had a duty to be especially alert to the petitioner's behavior throughout the trial. When the defendant's behavior became increasingly bizarre during the penalty phase, that coupled with the previous testimony of the psychiatrists, raised a bona fide doubt as to the petitioner's competency.

[2] *See, e.g., Trial Tr.* 1406.

[3] *Trial Tr.* 2411–2413.

[4] *See, e.g., Trial Tr.* 1587, 2016, 2036, 2335, 3223.

[5] *Trial Tr.* 806.

as the judge predicted at the start of the trial, the guilty verdict led to "disorientation and confusion" and the petitioner's ultimate mental collapse.[6] Prior to commencement of the sentencing phase, petitioner declared his intention to absent himself from the proceedings and seemed unable to cope with the stresses and responsibility of completing the rest of the trial. Petitioner's unpredictable and strange conduct culminated in him disrupting the trial more than once, chanting "Blessed be Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus."[7] Rather than ordering a competency hearing upon viewing petitioner's bizarre and unreasonable behavior, the judge simply shackled petitioner and removed him from the courtroom.[8]

Just as in *Drope*, when petitioner was forced to leave the courtroom, his "absence bears on the analysis [of competency] in two ways: first, it was due to an act which suggests a rather substantial degree of mental instability contemporaneous with the trial . . . second, as a result of petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him." Petitioner's incompetence is further highlighted by the fact that he had already manifested an inability to assist his counsel—a direct outgrowth of his paranoia and irrational understanding of their role and their ability to aid him in his criminal defense. The record as a whole demonstrates that the trial judge was constitutionally required to order a competency hearing when petitioner's behavior at the penalty phase of the trial raised a bona fide doubt regarding his competency.

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[6] *Trial Tr.* 3935.

[7] *Trial Tr.* 3550.

[8] *Id.*

3. Dr. Halavonich's Retrospective Determination of Petitioner's Competency

Respondent criticizes Dr. Halavonich's report noting "retrospective determinations of whether a defendant is competent to stand trial or to plead guilty are strongly disfavored." *Return at 32.* Respondent also mischaracterizes Dr. Halavonich's report, asserting that Dr. Halavonich failed to definitively diagnose petitioner as suffering from mental illness.

"Although retrospective competency hearings are disfavored, they are permissible 'whenever a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant.'" *Clayton v. Gibson*, 199 F.3d 1162 (10th Cr. 1999) (citing *Moran v. Godinez*, 57 F.3d 690, 696 (9th Cir. 1994)). "A 'meaningful' determination is possible where the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original state proceedings." *Reynolds v. Norris*, 86 F.3d 796, 802 (8th Cir. 1996). Here, the record clearly establishes that petitioner's behavior became increasingly bizarre and erratic as the trial progressed. Petitioner's ultimate breakdown occurred after the start of the sentencing phase when he became so disoriented and overwhelmed that he was unable to participate in the trial and had to be removed from the courtroom. Relying on the trial transcript, the PCR hearing transcript, the report of Dr. Schwart-Watts dated July 29, 2003, the deposition of Dr. Schwartz-Watts dated August 13, 2008, the forensic evaluation report by Dr. Richard Frierson dated March 10, 2003, voluminous writings of petitioner, as well as several interviews with petitioner, Dr. Halavonich's report concluded that "Mr. Alkebulanyahh's documented behaviors, particularly just prior to and during the penalty phase of the trial, indicate his mental status had then declined to an extent consistent

with a lack of capacity to rationally understand the proceedings or participate in his defense at that point in time." *Report of Dr. Halavonich, page 4, dated January 28, 2011.* Dr. Halavonich also wrote in her report, "Mr. Alkebulanyahh's historical symptoms, his behaviors during his capital murder trial, and his clinical presentation are consistent with a diagnosis of Temporal Lobe Epilepsy (TLE)." *Report of Dr. Halavonich, page 4, dated January 28, 2011.*

Given Dr. Halavonich's report and the evidence she relied on to draw her conclusion, a retrospective determination that petitioner was not competent at the time of his trial is permissible, and at a minimum, further testing and another competency hearing should be ordered. Respondent argues that petitioner cannot prevail on his claim that he was incompetent at trial because he has not sufficiently developed the facts to prove that he was incompetent-in-fact. Return at p. 32-33. However, Dr. Halavonich opines, to a reasonable degree of medical certainty, that petitioner became incompetent during the penalty phase. Respondent presented no counter professional opinion on this issue in its Return. Furthermore, petitioner has previously asked for funding for experts, a remand for a hearing and other opportunities to develop the facts, all of which have been denied by this Court. Thus, at a minimum, petitioner is entitled to funding to further develop the claim and a remand to present additional evidence of his incompetency.

C. The Trial Judge Erred in Failing to Terminate Petitioner's *Pro Se* Status.

Respondent claims that petitioner was not actually removed from the courtroom because he was shackled and removed to a glass partition in the back of a large courtroom. *Return at p.30.* Respondent also argues that petitioner chose to be removed from the courtroom, chose not

to present any mitigating evidence, and chose to limit his attorneys' actions. *Id.* These arguments are inconsistent with the record evidence, common sense, and legal precedent.

Simply because petitioner could hear and see what was occurring in the courtroom, does not mean that he was in fact present. *See Illinois v. Allen*, 387 U.S. 337 (1970). A defendant who is removed from the courthouse and allowed to watch a live internet stream of the trial, for example, is not present even though he is able to see and hear what is happening in his trial. In *Allen*, the Court noted that "one of the defendant's primary advantages of being present at trial, [is] his ability to communicate with his counsel." *Id.* at 344. The Confrontation Clause is meant to prohibit *ex parte* proceedings where the defendant is not present to challenge the veracity of the evidence presented against him. *Snyder v. Com. of Mass.*, 291 U.S. 97, 105-06 (1934). Here, petitioner was removed to a glass enclosure in the back of a large courtroom making communication with counsel, the court, and/or witnesses impractical, and diminishing his ability to perceive the testimony of the witnesses.[9]

Petitioner's removal for virtually the entirety of the sentencing trial made it impossible for him to present or control his case. Petitioner was removed at the sentencing stage of the trial—arguably the most important phase of a capital case as it determines whether defendant will receive life or death. *See Woodson v. North Carolina*, 428 U.S. 280 (1979). A trial judge may and should terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. *Faretta*, 422 U.S. at 834 n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with

[9] Not only was petitioner removed from the courtroom, but the trial court failed to terminate his *pro se* status. A *pro se* defendant who is placed in glass partition where he is only able to watch the trial cannot meaningfully be said to be present for the purposes of the trial.

relevant rules of procedural and substantive law."); *see also Allen*, 397 U.S. at 343 ("The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated."). To allow a defendant to remain counsel of record while he is simultaneously removed from the courtroom is to allow for the prosecution of a defenseless defendant.[10]

Finally, respondent claims that petitioner made a strategic choice to maintain his *pro se* status while simultaneously being removed from the courtroom. *Return at p.31.* However, in light of petitioner's dubious competency, any waiver of the right to be present at his sentencing trial cannot be said to be voluntary. While a defendant who is intentionally disruptive may waive his right to be present in the courtroom, when the defendant's misbehavior is the result of a mental disease or defect, the defendant cannot be said to have made an intelligent and voluntary choice to waive his right to be present. *Cf. Pate v. Robinson*, 383 U.S. 375 (1966) ("it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial"). Here, petitioner's disruptive behavior came in the form of religious chanting—a sign that defendant was suffering from hyper-religious delusions. Some rights are so fundamental to the fairness of the proceedings that they may not be waived absent the defendant's competent and voluntary waiver.

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[10] Respondent relies on *Davis v. Grant*, 523 F.3d 132 (2d. Cir. 2007), for the proposition that a *pro se* defendant who is not willing to abide by courtroom protocol can be removed from the courtroom without automatically forfeiting his right to self-representation. However, *Davis*, an appeal from a denial of federal habeas corpus relief, was decided under AEDPA. Moreover, the defendant in *Davis* was only removed for a limited portion of the trial and therefore lost the opportunity to cross-examine only three of the prosecution's witnesses. Here, the petitioner missed the entire sentencing phase of the trial. Finally, the court in *Davis* espoused numerous arguments against the removal of a *pro se* defendant without appointing counsel, including the argument that "the government's 'independent interest' in ensuring that criminal trials are fair and accurate favors the appointment of replacement counsel." *Id.* at 143 (citing *Wheat v. United States*, 486 U.S. 153, 160 (1988)). Thus, the dicta in *Davis* expressly advocates the appointment of counsel when a *pro se* defendant is removed from the courtroom.

Among these rights, are the defendant's right to counsel, and the defendant's right to be present during his trial. *See Westbrook v. Arizona*, 384 U.S. 150 (1966); *Johnson v. Zerbst*, 304 U.S. 458 (1938). The trial judge had the power and responsibility to terminate petitioner's *pro se* status when he began chanting disruptively and exhibited signs of severe mental illness as well as an unwillingness and inability to participate in the trial.

III.

Petitioner was denied due process and equal protection because his PCR counsel were not qualified under S.C. Code § 17-27-160(B), PCR counsel were ineffective, and Judge Carmen Mullen signed the state's order denying post-conviction relief, which contained numerous credibility findings, even though Judge Mullen was not present during the PCR hearing and did not hear the testimony of any witness.

Respondent raises three arguments regarding petitioner's due process and equal protection claims: (1) these claims are not preserved for appellate review; (2) PCR counsel was qualified under Chief Justice Toal's August 15, 2003 Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters; and, (3) Petitioner's rights to due process and equal protection were not violated even if PCR counsel was not qualified.

A. Petitioner's due process and equal protection claims are appropriate for this Court's review.

Once again, respondent attempts to avoid the merits of petitioner's claims by asserting that they are procedurally defaulted. In this case, respondent suggests that somehow PCR counsel themselves should have objected to their own appointment on the basis that they were inexperienced and unqualified. *Return at p. 33.* Because PCR counsel raised no such objection, respondent argues that petitioner's claims are now barred. Respondent's position is senseless. Petitioner has raised this claim at the earliest available opportunity, including a motion to remand

for additional post-conviction proceedings, a state habeas petition, and his petition for writ of certiorari. There can be no doubt that petitioner has diligently pursued this claim from the moment it reasonably became available.

B. Petitioner's PCR counsel were not qualified.

Respondent also argues that, despite the fact that petitioner's PCR counsel did not meet the requirements set forth by the plain language of S.C. Code § 17-27-160(B), they were nonetheless qualified under Chief Justice Toal's interpretation of that statute set forth in her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 15, 2003. *Return at p.34.* Respondent took this same position in its opposition to petitioner's Motion to Remand for Additional Post-Conviction Proceedings. In his reply to respondent's response to the motion to remand, petitioner argued: (a) that Chief Justice Toal's memorandum was outside the scope of her unilateral authority as Chief Justice of the Supreme Court as conferred upon her by the State Constitution and statute; and, (b) her interpretation of § 17-27-160(B) violates the separation of powers doctrine because it contradicts the clear and unambiguous statutory language that is not so plainly absurd that the legislature could not have intended it. *App. pp. 5282-5295.* Petitioner also moved to recuse the Chief Justice on the basis that her authority to issue the memorandum as well as the correctness of her interpretation of § 17-27-160(B) were at issue. *App. pp. 5299-5302.* The Chief Justice declined to recuse herself, calling her memorandum a mere "administrative" action, and concluding that "the promulgation of an administrative order or directive does not include a determination that it is valid because that would constitute an advisory opinion." *App. p.5305, Order Denying Motion to Recuse, dated August 30, 2010.* Thus, respondent's reliance on the Chief Justice's memorandum as dispositive on this issue is misplaced.

C. Petitioner's due process rights were violated.

Finally, respondent argues that even if petitioner's PCR counsel were unqualified under S.C. Code § 17-27-160(B), petitioner cannot establish a due process violation because he has not provided sufficient evidence to demonstrate that he was prejudiced by PCR counsel's failures. *Return at p.36.* Respondent does not dispute that PCR counsel failed to: (1) conduct any independent investigation; (2) interview trial counsel; (3) seek or obtain a copy of trial counsel's files; (4) secure any expert or investigative assistance or even seek funds for that purpose; (5) have petitioner evaluated by a psychiatrist or psychologist; or, (6) even spend enough time on petitioner's case to justify submitting a bill for payment of attorneys fees. Nevertheless, respondent speculates that PCR counsel could have had "strategic reasons for approaching the post-conviction relief action in the manner they did." *Return at p.36.* But there can be no strategic reason for essentially doing nothing. Inaction is not a strategy. There can be no legitimate reason for not doing the most basic tasks any minimally competent capital post-conviction counsel would do, *e.g.*, obtaining a copy of trial counsel's files, interviewing trial counsel, and seeking funds for investigative and expert assistance. Nor can there be a strategic reason for PCR counsel's failure to properly plead the minimal list of claims that they did attempt to raise. *See* AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN CAPITAL CASES (2003) Guideline 10.15.1 (C) and (E) (stating post-conviction counsel should, among other things: (1) seek to litigate all issues that are arguably meritorious; (2) make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review; (3) continually monitor the client's mental, physical and emotional condition; and, (4) continue an aggressive investigation of all aspects of the case). The ABA Guidelines have been cited with approval by the Supreme Court

of the United States on several occasions, *see, e.g., Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003), as well as by this Court, *see Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 363 (2008); *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007).

Respondent further asserts that "[a]ll petitioner has done is assert a list of claims that he claims should have been raised." *Return at p.36.* But, of course, there is little more that petitioner can do at this point. This is precisely the reason that this Court should remand and order a new post-conviction relief hearing where petitioner may have a legitimate opportunity at developing his claims through the assistance of qualified counsel utilizing appropriate discovery, funding, and investigative and expert services. While petitioner submits the claims he has presented are meritorious, they may only be the tip of the iceberg. Without the appointment of competent counsel and the opportunity to conduct an appropriate investigation, we will never know.

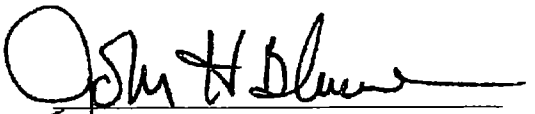
Underlying respondent's arguments is its basic position that the adequacy of petitioner's post-conviction representation is irrelevant. However, this Court has previously suggested that, in some circumstances, ineffective assistance of post-conviction counsel may be cognizable or a ground for allowing additional collateral proceedings. *See Washington v. State*, 478 S.E. 2d 833, 835 (S.C. 1996) (allowing second post-conviction application to proceed due to "many procedural irregularities" in the first post-conviction proceedings). Other jurisdictions also have held that in some circumstances inadequate post-conviction representation warrants additional post-conviction review. *See, e.g., Stevens v. Mississippi*, No, 2011-DR-006570SCT (Miss. S. Ct. May 5, 2011).

Furthermore, respondent completely fails to mention that on March 21, 2011, the United States Supreme Court granted a petition for a writ of certiorari in *Maples v. Maples*, 2011 WL 940889 (U.S.) to decide whether the Eleventh Circuit properly held that there was no "cause" to excuse a procedural default where Maples' state post-conviction counsel unreasonably failed to file an appeal. In light of *Maples*, the Supreme Court further granted a stay of execution to Daniel Wayne Cook pending disposition of his petition for a writ of certiorari, which raises the more general question of whether Cook is entitled under the Sixth and Fourteenth Amendments to have effective state post conviction counsel. *See Miscellaneous Order in Cook v. Arizona, 10-9742 (April 4, 2011).* On the following day, the Court also granted a stay of execution to Cleve Foster, allowing him to file a petition for rehearing raising essentially the same issue as in *Maples. See Miscellaneous Order in Foster v. Texas, 10-8317 (April 5, 2011).* Most recently, on June 6, 2011, the Court granted an additional petition for writ of certiorari in *Martinez v. Ryan*, 2011 WL 380903 (U.S.), which raises the question:

> In a capital case, does the Sixth, Eighth, or Fourteenth Amendment guarantee a right to effective postconviction counsel to raise a claim of ineffective assistance of counsel at trial where postconviction proceedings represented the first opportunity that the claim of ineffective assistance of trial counsel could be presented?

The questions presented in *Martinez* and *Maples* are directly on point in petitioner's case. Thus, given that petitioner was denied basic due process in his initial post-conviction proceedings, this Court should either: (a) grant the petition for writ of certiorari and allow full briefing on the merits; (b) remand the case to the Circuit Court for appropriate additional proceedings; and/or, (c) hold this case in abeyance pending the Supreme Court's decision in *Maples* and *Martinez*.

Respectfully submitted,



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June 28, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 06-CP-11-223

Abdiyyah ben Alkebulanyahh, #6012, *Petitioner*,

v.

State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Reply has been served upon Respondent's counsel by first class mail, postage prepaid, this 28th day of June, 2011, upon the following:

Alphonso Simon, Jr.
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Emily C. Paavola

Emily C. Paavola

The Supreme Court of South Carolina

Tyree Roberts, a/k/a Abdiyyah Alkebulanyahh,
Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-143286

ORDER

Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief. We deny the petition.

C.J.

J.

J.

J.

I would grant the petition.

Columbia, South Carolina

February 22, 2013

cc:
John H. Blume, III
Alphonso Simon, Jr.