To be argued by
Ashlyn Dannelly

06-2261-PR

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

CARL DAVIS,

Petitioner-Appellant,

-against-

LEROY GRANT, Warden,

Respondent-Appellee.

- X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

ANDREW M. CUOMO
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 416-8624

BARBARA D. UNDERWOOD
Solicitor General

LUKE MARTLAND

ASHLYN DANNELLY
Assistant Attorneys General
of Counsel

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PRELIMINARY STATEMENT

Petitioner Carl Davis ("petitioner") appeals from an order of the United States District Court for the Southern District of New York (Hon. Paul A. Crotty, U.S.D.J.), dated December 16, 2005, dismissing a petition for a writ of habeas corpus challenging his 1997 New York State conviction for Reckless Endangerment in the First Degree, Grand Larceny in the Fourth Degree, and three counts of Assault in the Second Degree. The district court granted a certificate of

appealability pursuant to 28 U.S.C. § 2253(c)(2) to address the issue of whether petitioner was denied the right to confront witnesses when he was removed from the courtroom for a portion of the trial and, in view of the fact that he was proceeding pro se, the court did not appoint standby counsel to represent him or direct his legal advisor to cross-examine prosecution witnesses. (A: 398-99, 338-397).[1]

Petitioner was convicted and sentenced in the Supreme Court, New York County. He ultimately was re-sentenced to an aggregate indeterminate term of from ten and one-fourth years imprisonment to twelve years imprisonment.[2]

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this habeas corpus proceeding pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 2253(a) in that the district court's December 16, 2005 order finally disposed of the matter. Judgment was entered on December 22, 2005 (A: 400), and respondent filed a timely notice of appeal dated January

[1] "A:" designates pages in the Appendix filed by petitioner.

[2] Petitioner was originally sentenced improperly as a persistent violent felony offender. On remand for re-sentencing, he was sentenced to concurrent terms of seven years imprisonment and five years imprisonment for two of the assault convictions, three and one-fourth to seven years imprisonment for reckless endangerment, and two to four years imprisonment for grand larceny. The remaining five-year assault sentence runs consecutively to all of the other terms of imprisonment.

20, 2006. (A: 401).

ISSUES PRESENTED FOR REVIEW

When the trial court removed petitioner, who represented himself pro se, from the courtroom for disruptive conduct and did not require standby counsel to represent him during his absence:

1) Was the Appellate Division, First Department's holding that petitioner was not deprived of his Sixth Amendment right to confront witnesses at trial contrary to, or an unreasonable application of, clearly established Supreme Court law?

2) If so, was any resulting error harmless?

STATEMENT OF THE CASE

A. Factual and Legal Background

1. The Crime

Petitioner's conviction stems from his theft of a livery cab owned by Andres Blanco. On October 18, 1995, Blanco left his livery cab and used the restroom at a gas station on 155th Street in Manhattan, leaving his keys in the ignition. When Blanco returned from the restroom, he saw a man sitting in the driver's seat of the cab, with the motor running; the man then drove off, heading north toward Broadway.

Blanco summoned police officers Alexandra Baez[3] and Crystal Smith-Dixon, who drove with Blanco in their patrol car, searching for the cab. While in the police car, Blanco was informed by a taxi dispatcher on a hand-held radio that his cab was seen heading north on Broadway. Other police officers also radioed Baez and Smith-Dixon, informing them that a vehicle matching the description of Blanco's cab had been spotted in the north Broadway area and was being pursued.

At the intersection of Broadway and St. Nicholas Avenue, police officers Bomsik Kim and Sean Harris observed petitioner driving Blanco's cab at a high rate of speed; he subsequently crashed into the back of another car stopped at a red light. As Kim approached the cab on foot, petitioner ignored the officer and drove away at a high rate of speed, heading east on a westbound street. When Kim and Harris returned to their patrol car, they received a radio transmission that petitioner was driving erratically on Harlem River Drive. Kim and Harris pursued petitioner while he narrowly missed colliding into police officer Edwin Ramos's patrol car. When Kim and Harris passed St. Nicholas Avenue, petitioner collided with their patrol car, injuring both officers.

Following the collision, petitioner fled from Blanco's cab, running as

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[3] During pre-trial proceedings, Baez used the name Alexandra Gomez but, at the time of the trial, had changed her surname to Baez (T: 195), (A: 74).

several police officers chased him on foot. Petitioner remained in the officers' sight from the time he exited the cab until officer Thomas Smith tackled him on the sidewalk outside St. Nicholas Park. Petitioner resisted Smith's efforts to handcuff him, injuring Smith's ankle in the process; he ultimately was subdued by more than four police officers.

Petitioner was detained at St. Nicholas Park until Blanco, Baez, and Smith-Dixon arrived, approximately ten minutes from Blanco's first report that his cab had been stolen. Blanco informed the officers that the wrecked livery cab belonged to him. Following his arrest, petitioner threatened to hurt and kill officer Baez when he was released from custody.

By New York County Indictment No. 10060/95, petitioner was charged with six counts of Assault in the Second Degree, and one count each of Reckless Endangerment in the First Degree, Grand Larceny in the Fourth Degree, and Criminal Possession of Stolen Property in the Fourth Degree.[4]

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[4] The trial court did not submit three of the assault counts to the jury. Those counts involved the same three police officers as the other assault counts, but were based on a different theory and the court found their submission "would be duplicative and confusing to the jury." (T: 439). The trial court also declined to submit the fourth-degree criminal possession of stolen property count, finding it was duplicative of the grand larceny count. (T: 439-40).

2. The First Trial

Petitioner's first trial counsel moved unsuccessfully to suppress the identification procedures and statements made by petitioner to the police. Before the conclusion of voir dire, petitioner moved for reassignment of counsel on the grounds that counsel was ineffective for failing to file various motions and refusing to adopt petitioner's proposed trial strategy; petitioner's counsel acknowledged the conflict and joined in the motion. The prosecutor argued that petitioner's motion for new counsel was a delay tactic, and the court apparently agreed stating, "my feeling . . . is that this is a stall," but the court nonetheless granted the motion to relieve counsel and declared a mistrial. (T1: 115-16).[5] After the court's ruling, petitioner attempted to discuss trial issues with the court, and the court responded by instructing petitioner to discuss the issues with his new attorney, stating, "[i]n other words, don't act pro se when you could have an attorney." (T1: 117-18).

3. The Second Trial

a. Petitioner's Request to Proceed Pro Se

Petitioner's new trial commenced on February 26, 1997 before a different

[5] Parenthetical references preceded by "T1:" refer to the transcript of the mistrial proceedings, while "P:" refers to the February 26, 1997 court appearance at which petitioner moved to proceed pro se; "T:" refers to the trial at issue in this appeal.

judge. At the outset of the trial, petitioner's assigned counsel, Raymond Aab, informed the court that petitioner wished to proceed pro se, but "asked that [Aab] sit next to him as advisory counsel." (P: 5), (A: 11). The court (Rothwax, J.) then addressed petitioner and told him that every defendant who had proceeded pro se during the court's career had been convicted. (P: 5-6), (A: 11-12). Specifically, the court informed petitioner that he faced "substantial dangers in your representing yourself," including the fact that, because petitioner faced a potential twenty-five years to life imprisonment, and had an extensive criminal history, "this is probably your last and final case. You lose this one and you lose big. You lose good, you lose forever. You're in until you're a very old man." (P: 6), (A: 12). Next, the court told petitioner that, "it's probably smart for you to have a lawyer represent you who has tried cases before and who knows how to try cases, as you do not." (P: 6), (A: 12).

The court also informed petitioner that he would "get no special benefit from [the court]," because the court would not "allow [petitioner] to do things that I wouldn't allow a lawyer to do." (P: 7), (A: 13). As examples, the court stated that petitioner would not be allowed to testify unless he took the stand, and would not be able to ask improper questions. (P: 7), (A: 13). The court emphasized that petitioner would not get "any additional leeway if [he] represent[ed] himself." (P:

7), (A: 13). Additionally, the court noted that, in its experience, "defendants who represent themselves don't know what they are doing, and often get confused even if they are, as you are, intelligent, that the case gets tried much more quickly than it does with lawyers who know what they are doing." (P: 7), (A: 13).

When the court asked petitioner if he understood the dangers, petitioner answered, "[y]es"; when the court asked if petitioner had any questions about its warnings, petitioner said, "[n]o" and stated that he had heard the court. (P: 7-8), (A: 13-14). Petitioner then stated that he wished to represent himself at trial, and the court granted the motion. (P: 8), (A: 14). The court stated that Aab would act as petitioner's legal advisor. (P: 8), (A: 14).

At that point, the court stated that it was aware that petitioner had "acted up in the courtroom" before Justice Bradley in the initial trial; but, when petitioner asked, "[a]cted up to what extent?" the court answered, "I don't know. I wasn't there. Okay. Maybe you didn't." (P: 8), (A: 14). However, the court noted that Bradley had declared a mistrial, but warned petitioner, "I'm not strong on mistrials. We begin this trial and we finish this trial." (P: 8), (A: 14). The court then cautioned petitioner that if he acted up in the courtroom, his behavior would be factored into his sentence, if he were convicted. (P: 9), (A: 15).

As petitioner exited the courtroom, petitioner stated, "I don't want him,"

referring to Aab. (P: 9), (A: 15). When the court responded that Aab would be his legal advisor, petitioner again stated, "I don't want him. I like to make it on the record." (P: 9), (A: 15). The court again responded that Aab would act as petitioner's legal advisor. (P: 9), (A: 15).

b. The Pretrial Proceedings and Voir Dire

Petitioner's trial commenced on March 3, 1997 before Justice Rothwax and a jury. Petitioner appeared pro se, with Aab present as his legal advisor. At the outset of the proceedings, petitioner objected to the court's ruling that it would allow the prosecution to elicit, if petitioner testified, the fact that he had two prior convictions and had used two aliases. (T: 3-8), (A: 18-23). When the court asked petitioner whether Carl Davis was his true name, petitioner responded that it was not, but would not give the court his real name. (T: 8), (A: 23).

As part of the court's preparation for voir dire proceedings, petitioner gave the court the name of the one witness he intended to call. (T: 9-10), (A: 24-25). The court described the voir dire procedure and instructed petitioner that he "ought to be conferring with your legal advisor." (T: 11), (A: 26). The court then warned petitioner that it would curtail improper voir dire questioning, and that petitioner could object to the court's rulings, but could not argue with the court. (T: 11), (A: 26). The court then stated, "I put you on notice that if you argue with

me in front of the jury or if you choose to characterize my rulings I will remove you from the courtroom. I will not tolerate misbehavior from you during the course of this trial." (T: 11), (A: 26). Petitioner answered, "I understand that." (T: 11), (A: 26).

After the parties and the court discussed various pre-trial issues and motions (T: 12-33), (A: 27-31), the court informed petitioner that he would take additional objections at a later time, and directed that the potential jurors be brought in. (T: 34), (A: 32). Petitioner responded by stating, "[t]hat is why you hate the Appellate Division so much." (T: 34), (A: 32). The court then warned petitioner, "[w]atch what you say in court . . . be very careful." (T: 34), (A: 32). Petitioner then stated, "I wanted to make a motion of recusal" and, at that point, the jury panel entered the courtroom. (T: 35), (A: 33).

Petitioner participated during the first portion of voir dire, asking questions of potential jurors. (T: 84-111). After a recess, when the court again allowed petitioner the opportunity to ask questions of potential jurors, Aab asked to approach the bench. (T: 127). Aab then informed the court that petitioner had asked Aab to conduct voir dire; the court responded, "It is up to him, either you want to represent yourself or you want Mr. Aab to represent you." (T: 128), (A: 34). When petitioner responded, "[n]o, I don't want him to represent me," the

court answered, "[t]hen you ask the questions." (T: 128), (A: 34). When petitioner protested that Aab was his assistant, the court informed petitioner "either he is representing you or you are representing yourself." (T: 128), (A: 34). Petitioner continued to argue the point, and the court again stated that Aab could only conduct the questioning if he were representing petitioner. (T: 128), (A: 34). Petitioner then questioned potential jurors, challenged one juror for cause, and made peremptory challenges. (T: 132-36), (A: 35).

At the conclusion of voir dire, the court addressed petitioner and stated, "it is clear to me you don't know what you are doing." (T: 138), (A: 36). The court noted that petitioner had difficulty speaking up loudly and expressing himself; the court informed petitioner the trial would only get more difficult, and exhorted petitioner to act in his best interests and "allow Mr. Aab to represent you." (T: 138-39), (A: 36). The court noted that petitioner had "repeatedly conferred with Mr. Aab" and stated that it was "desirable [that he] continue to do so." (T: 139), (A: 36-37). The court suggested that petitioner use the lunch hour to confer with Aab and consider allowing Aab to proceed as his counsel. (T: 139-40), (A: 37). As the judge exited the courtroom, petitioner attempted to argue that he had had no "attorney visit," and wanted to finish a list of exceptions he had begun earlier in the day; the court told him he would hear the exceptions at the end of the day.

(T: 140-41), (A: 37-38).

Before opening statements, a seated juror informed the court that he could not be fair because his "impression" of petitioner made it impossible to be objective; he was the third juror excused under similar circumstances. (T: 142-44), (A: 39-41). At that point, the court stated, "[a]gain I remind you Mr. Davis that representing yourself is a counter productive way of proceeding. We now have had three jurors who said they don't like you, and it might be better for you to be represented by Mr. Aab. That is entirely up to you." (T: 144-45), (A: 41-42). In response, petitioner stated that Aab had not prepared any defense, visited him, sent investigators to photograph the scene, and made no effort to further the defense that he was mistakenly identified. (T: 145), (A: 42). Petitioner then stated, "either way, I will probably, I'm not an attorney, I run the risk, you know, fast, great risk of being convicted, no doubt. I will definitely be convicted with him as well." (T: 145), (A: 42). Aab then stated that he would not prejudice petitioner's case, but that his theory of the defense merely was "quite different than [petitioner]'s theory of the case." (T: 145-46), (A: 42-43). Petitioner responded by stating that there was a "conflict of interest" and, as he had previously stated, "I didn't want [Aab] to represent me." (T: 146), (A: 43). The court then stated the trial would proceed, and explained to petitioner the procedure for opening statements. (T: 146-47), (A:

43).

During the prosecutor's opening statement, petitioner objected. (T: 164). He then made a brief opening statement in which he stated that, while someone stole Andres Blanco's livery cab, he did not. (T: 165-66), (A: 44-45).

c. The People's Evidence

On October 18, 1995, Andres Blanco parked his livery cab at a gas station on 155th Street in Manhattan, leaving the keys in the ignition while the station attendant filled the gas tank, and he went to the station's restroom. (T: 304-18), (A: 183-97). Four minutes later, Blanco returned from the restroom, noticed his motor was running, and saw a man with "dark skin" sitting in the driver's seat of the cab. (T: 307, 312), (A: 186, 191). Blanco saw the man from the back, and described him as having short hair and being shorter than Blanco. (T: 307), (A: 186). Before Blanco could reach the cab, the man drove off in the cab, heading north toward Broadway. (T: 305-08), (A: 184-87).

Blanco ran to the street corner, where he flagged down a patrol car occupied by New York City Police Officers Alexandra Baez and Crystal Smith-Dixon. (T: 308-09, 183-84, 196-97), (A: 187-88, 62-63, 75-76). Blanco explained that he had been "held up" by a black male who took his cab and drove north on Broadway. (T: 184-85, 196-97, 239, 309), (T: 63-64, 75-76, 118, 188). Blanco then rode in

the patrol car with Baez and Smith-Dixon as they searched for the thief on Broadway. (T: 185-87), (A: 64-66). During the drive, Blanco radioed a dispatcher at his taxi company on a hand-held transmitter to report the theft. (T: 308-09), (A: 187-88). Shortly thereafter, Blanco received a radio message from the taxi company that his cab was seen heading north on Broadway. (T: 187), (A: 66). Other police officers on patrol also radioed Baez and Smith-Dixon that a car matching the description of Blanco's livery cab was observed in the north Broadway area and was being pursued. (T: 187, 241), (A: 66, 120).

At the intersection of Broadway and St. Nicholas Avenue, police officers Bomsik Kim and Sean Harris were issuing a traffic violation when they observed petitioner operating Blanco's cab northbound on Broadway. (T: 376-78, 401-04), (A: 255-57, 280-83). Kim and Harris saw that petitioner was a black male in his late twenties with a "slight Afro" hair cut. (T: 378-79, 392-93, 403-04, 414-15), (A: 257-58, 271-72, 282-83, 293-94). As petitioner drove Blanco's cab at a high rate of speed, he crashed into the back of another car that had stopped for a red light. (T: 377-78, 388-89, 402-03), (A: 256-57, 267-68, 281-82). When Kim approached the driver's side of the vehicle to determine whether petitioner was injured, petitioner refused to roll down the car window and ignored Kim, who was in police uniform. (T: 403), (A: 282).

When the light turned green, petitioner "peeled out of the intersection at a high rate of speed," and drove across the safety zone dividing Broadway and St. Nicholas Avenue, heading east on a westbound street; Kim stepped out of the way to avoid injury. (T: 378-79, 389-90, 404), (A: 257-58, 268-69, 283). When Kim and Harris returned to their patrol car, they heard a radio transmission that petitioner was observed operating the cab in a "very erratic manner" on Harlem River Drive, "jumping in and out of traffic," and running red lights. (T: 270-74, 287, 404-05), (A: 149-53, 166, 283-84). Kim and Harris pursued petitioner and, as their police car passed St. Nicholas Avenue, petitioner was traveling at a "really fast speed," and after nearly colliding with a patrol car driven by officer Edwin Ramos, collided with Harris and Kim's patrol car. (T: 260-63, 406), (A: 139-42, 285). Upon impact, Harris's chest slammed into the steering wheel, while Kim's head struck the windshield and his ribs hit a steel computer box located in the front of the car; Harris suffered nerve damage to his face and muscle injury to his neck, back, and chest, while Kim fractured two ribs and injured his leg. (T: 382, 386-87, 397, 407, 411-14), (A: 261, 265-66, 276, 286, 290-93).

After the collision, petitioner fled from Blanco's cab, running across the street toward the west side of St. Nicholas Avenue. (T: 253-54, 261-62, 382-83, 408), (A: 132-33, 140-41, 261-62, 287). Several police officers arrived at the

scene and chased petitioner on foot. (T: 253-54, 262, 348-49, 366-67, 383, 385), (A: 132-33, 141, 227-28, 245-46, 262, 264). Multiple officers did not lose sight of petitioner from the time he fled the cab until he was tackled on the sidewalk outside St. Nicholas Park by police officer Thomas Smith. (T: 253-54, 262, 348-49, 366-67, 383-85, 408-09), (A: 132-33, 141, 227-28, 245-46, 262-64, 287-88). When Smith attempted to handcuff petitioner, he resisted, rolling around, kicking, punching, and lying on his hands. (T: 253-55, 262-63, 349, 372-73, 383-85, 409-10), (A: 132-34, 141-42, 228, 251-52, 262-64, 288-89). Finally, petitioner was subdued by more than four police officers. (T: 383-84), (A: 262-63). During the scuffle, Smith injured his ankle. (T: 349), (A: 228).

Approximately ten minutes had elapsed from the time Blanco reported the theft until petitioner was apprehended. Petitioner was detained at St. Nicholas Park until Blanco arrived with officers Baez and Smith-Dixon. (T: 188, 198, 241, 310), (A: 67, 77, 120, 189). Blanco informed the officers that the cab petitioner had crashed into the police car belonged to him. (T: 189, 209, 242-43), (A: 68, 88, 121-22).

Following petitioner's arrest, petitioner complained of facial injuries and requested medical treatment. (T: 194), (A: 73). He was taken from the police station to an ambulance; while at the ambulance, petitioner told officer Baez that

she "was going to be sorry when he got out because he was going to hurt [her] and kill [her]." (T: 194-95), (A: 73-74).

d. Petitioner's Evidence

Petitioner did not call any witnesses, but introduced a police department property clerk motor vehicle invoice into evidence, along with a Corrections Department photograph of petitioner, taken approximately seven days after the theft of Andres Blanco's livery cab. (T: 434-37, 461-67), (A: 313-16).

e. Petitioner's Outbursts and Removal from the Courtroom

Petitioner was present during the testimony of George McMillin, an investigator for the Manhattan District Attorney's office, who described aerial photographs of the area in which Andrew Blanco's livery cab was stolen and subsequently recovered. (T: 166-67), (A: 45-56). Petitioner made objections during McMillin's testimony, and cross-examined him. (T: 174, 176-77, 179-81), (A: 53, 55-56, 58-60). Petitioner also was present during the testimony of police officer Alexandra Baez and conducted a detailed cross-examination of her. (T: 195-209), (A: 74-88).

At the conclusion of Baez's testimony, the court denied petitioner's written motions to dismiss the indictment, to produce confidential police files, and for a daily copy of the trial transcript. (T: 212-16), (A: 91-95). At that point, petitioner

moved to recuse Justice Rothwax, citing "out right blatant prejudice." (T: 216), (A: 95). In support of the motion, petitioner argued, inter alia, "I'm not receiving a fair trial. I'm forced to represent myself. You forced me to have counsel that has not prepared a case for me which there is an expressed conflict of interest right in the record." (T: 217), (A: 96). The court denied the recusal motion and stated, "[t]he record should, of course, reveal Mr. Aab you are not the first attorney in this matter. [Petitioner] has a lot of trouble finding attorneys who are prepared to represent him. He keeps on trying to fire them. He has fired his last attorney in this proceeding." (T: 218), (A: 97).

The following day, March 4, 1997, after the court denied the People's request to introduce evidence of a similar crime committed by petitioner, petitioner argued, "I don't have legal representation, that I don't want this man to represent me. I am incapable to represent myself." (T: 225), (A: 104). The court responded, "I am tired of that . . . [y]ou had one previous attorney, now you have had two. You rejected both of them. Two is enough. You have your exception." (T: 226), (A: 105). Petitioner continued to argue, stating, "I want to say one thing, that is the reason why I rejected this attorney as well as I did the other one because he wanted the defense which I'm not comfortable with because it fits none of the circumstances that fit in my case." (T: 226), (A: 105). The court responded that

petitioner had already argued that point, and asked petitioner to "[s]top it," but petitioner continued to argue; at that time, the court stated, "I'm going to remove you from the courtroom." (T: 226-27), (A: 105-06). Petitioner asked, "[h]ow could I represent myself if you remove me," and the court answered, "I don't care if you are representing yourself . . . Put [petitioner] in. We will proceed without you if need be." (T: 227), (A: 106). Petitioner then was removed from the courtroom.

Petitioner's legal advisor explained that petitioner wanted to base his defense upon the argument that he was not driving Blanco's car, while Aab's theory would be that the collision with the police car was beyond petitioner's control; the two theories were inconsistent. (T: 227-28), (A: 106-07). Aab opined, "[petitioner] is making a record for appeal purposes. That is the purpose behind his motion. This is what he has indicated to me." (T: 228), (A: 107). Petitioner was then brought back into the courtroom, and the trial continued. (T: 229), (A: 108).

Before the prosecutor could call his next witness, petitioner yelled, "Ladies and gentlemen of the jury, I don't believe I'm receiving a fair trial because in this courtroom because the judge is prejudice." (T: 229), (A: 108). The court then removed petitioner, and instructed the jury not to allow his "misbehavior to affect

their ability to fairly and impartially weigh the evidence." (T: 229-30), (A: 108-09). While the jury returned to the jury room, petitioner again was brought into the courtroom. (T: 231), (A: 110). When the judge tried to speak, petitioner interrupted, saying, "[t]he record should reflect that when you give me an attorney who will present the defense I would like presented, which is an identification defense, as opposed to an intent defense, then I will be ready to go to trial." (T: 232), (A: 111). Petitioner again interrupted the court, and the following exchange occurred:

[Petitioner]:	I don't want the man to represent me, Judge Rothwax. Just like the last one, his defense is a culpable defense. I wasn't in the vehicle. I didn't steal the vehicle. I don't want him to represent me. I would like to have an attorney. Obviously, I can't represent myself. So I am entitled to an attorney who will represent me in a manner in which I would like to be represented not cause I got some farfetched idea because I wasn't in the vehicle. I would like you to recuse yourself. You have been completely prejudice to any motions I have made. They are reasonable. You won't let me put them in the record. Your outspoken representation of defendant's rights in newspapers, television shows and books.
The Court:	You will be in front of me.
[Petitioner]:	I will if you say so. I'm putting on the record I don't want him to represent me.

The Court: Do you want him to sit next to you?

[Petitioner]: I don't want him next to me. I would like an attorney to represent me and present a defense that I ask him to represent for me, not a defense that he would like –

The Court: Are you finished?

[Petitioner]: Which doesn't fit. Yes, I'm finished.

The Court: Mr. Aab is your legal advisor.

[Petitioner]: He is nothing to me. I don't recognize him as anything.

The Court: Mr. Aab, please take a seat in the first row. Please take a seat in the first row. Thank you. Now I put you on notice that we are going to be bringing the jury in.

[Petitioner]: I put you on notice I'm going to prejudice the jury.

The Court: What are you going to do?

[Petitioner]: Bring them in.

The Court: What are you going to do?

[Petitioner]: Bring them in.

The Court: No.

[Petitioner]: No, bring them in. I'm not going to say what I'm going to do, bring them in.

The Court: I will give you notice.

[Petitioner]: You give me nothing, you give me an attorney.

The Court: This defendant is – remove him.

[Petitioner]: Judge –

The Court: Remove him.

[Petitioner]: Judge

The Court: Go inside. We will try it in your absence.

[Petitioner]: I don't want him to represent me or anything –

The Court: Not to worry, not to worry. This case will be tried without Mr. Aab and without the defendant.

(T: 232-35), (A: 111-14).

The jury returned to the courtroom, and the trial continued in petitioner's absence. (T: 235), (A: 114). Police officer Crystal Smith-Dixon testified and, at the conclusion of her direct examination, the court brought petitioner into the courtroom to determine whether he would "behave himself." (T: 236-245), (A: 115-24). The court informed petitioner, "I am advising Mr. Davis we have now taken direct testimony of Police Officer Crystal Smith-Dixon. If Mr. Davis gives me his assurances that he will behave properly in the courtroom I will allow him to remain in the courtroom and cross-examine Police Officer Crystal Smith-Dixon. If he does not give me that assurance he will again be removed from the

courtroom, we will call the next witness." (T: 246), (A: 125). Petitioner then assured the court that he would "behave," and not speak out of turn. (T: 247), (A: 126). The court explained, "[i]f you undertake to make speeches to the jury, you understand you will be removed from the courtroom," and petitioner answered, "[y]es." (T: 247), (A: 126). When the court asked whether petitioner wanted Aab to sit with him at the defense table, petitioner answered, "[n]o. I take exception to him even representing me and that I don't have representation because . . . you haven't afforded me that." (T: 247), (A: 126).

At that point, the jury returned to the courtroom. (T: 247-48), (A: 126-27). Petitioner immediately yelled, "I think all of you jurors are a bunch of racist crackers, house niggers and wetback Puerto Ricans." (T: 248), (A: 127). He was removed from the courtroom. (T: 248), (A: 127). The court instructed the jury to disregard petitioner's remarks, and stated, "[t]here will be no cross-examination of you, officer." (T: 248), (A: 127).

The People then called Lieutenant Thomas Keane to testify. (T: 248), (A: 127). At the conclusion of Keane's testimony, the court did not expressly offer Aab an opportunity for cross-examination, and Aab did not ask to question the officer. (T: 258), (A: 137).

Next, the People called police officer Edwin Ramos. (T: 259), (A: 138). At

the conclusion of Ramos's direct testimony, the court recessed and brought petitioner into the courtroom. (T: 263-64), (A: 142-43).

The court instructed petitioner, "[a]gain . . . I want to advise you, you are welcome and entitled to be present and participate fully so long as you abide by the rulings of the court. If you misbehave you will be removed from the court. I am sure you understand that." (T: 264), (A: 143). Petitioner indicated that he understood, and asked that "Mr. Aab be allowed to cross-examine the witnesses, and I be allowed to handle other parts like my summation." (T: 264), (A: 143). The court stated that it would not allow that, explaining, "[e]ither you will represent yourself or Mr. Aab will represent you. I'm not going to have mixed representation where you represent yourself part of the time [and] Mr. Aab represents you part of the time." (T: 265), (A: 144). When the court stated that petitioner "would be well advised to have Mr. Aab represent you," petitioner again argued that, "Mr. Aab hasn't established or investigated any defense in my behalf. He hasn't done nothing in my behalf." (T: 266), (A: 145). The court again declined to allow petitioner hybrid representation, and petitioner stated, "I take exception [to] him representing me in any capacity whatsoever." (T: 266), (A: 145).

The trial proceeded with petitioner and his legal advisor present; police

officers Ronald Kelly and William Domenech testified and petitioner cross-examined each of those witnesses. (T: 279-83, 292-95), (A: 158-62, 171-74). After Domenech's testimony, the court noted that petitioner "was not present in the courtroom" during the testimony of Smith-Dixon, Keane, and Ramos and stated, "I have ordered the minutes of the testimony of those three witnesses, and those minutes will be made available to [petitioner] . . . so he can see that testimony, and utilize it in his summation for any purpose he may wish to do so or in aid of cross-examination of other witnesses." (T: 299-300), (A: 178-79). The People's evidence continued; petitioner cross-examined prosecution witness Andres Blanco. (T: 314-30), (A: 193-209).

After a recess, the trial resumed on March 6, 1997. (T: 334), (A: 213). At that time, the court stated that the court reporter had provided petitioner with the transcript of the testimony of Dixon-Smith, Keane, and Ramos "for his use and in the event he wishes to refer to it during his summation or with regard to cross-examination of other witnesses." (T: 335), (A: 214). Petitioner subsequently moved for a mistrial on the ground that he was denied his right to confront those witnesses. (T: 338), (A: 217). The court denied the motion, stating, "[t]he situation you found yourself in was one entirely of your own making." (T: 338), (A: 217). Petitioner then argued that the court "could have set up an audio visual

system" via which he could have observed the testimony after his removal, and the court stated that, "we have no audio visual system available in this courthouse." (T: 339), (A: 218).

The People's case proceeded with the testimony of police officers Thomas Smith, James Scanlon, Sean Harris, Bomsik Kim; petitioner cross-examined each of those witnesses. (T: 355-59, 369-73, 392-99, 414-17), (A: 234-38, 248-52, 271-78, 293-96). At the conclusion of the People's evidence, the court denied petitioner's motion to dismiss the charges on insufficiency of evidence grounds. (T: 422-23), (A: 301-02).

During the pre-charge conference, petitioner again moved for a mistrial on the ground that his rights to confront witnesses had been violated. (T: 444). The court denied the motion, stating, "[y]our inability to cross-examine this witness was occasioned by your own misbehavior. By your own misbehavior, you forfeited, gave up, and waived your right to cross-examine." (T: 444-45).

f. Petitioner's Summation

During his summation, petitioner apologized for his outbursts and stated that he had done so "because at that time I felt I was not being given a fair trial, [and] I still don't think I am." (T: 468). Petitioner further explained that he had made those comments for "technical reasons," because he "felt [he] wanted to get

out of here because of what [he] just explained." (T: 468-69).

After the prosecutor's summation and the court's jury charge, Aab stated, "I would just like the record to reflect that I have given considerable advice to [petitioner], virtually none of which was followed." (T: 539). Aab also stated that he had prepared and written out a summation for petitioner, and he disregarded it in its entirety. (T: 539).

The jury returned a verdict of guilty on each of the submitted counts, including three counts of second-degree assault, first-degree reckless endangerment, and fourth-degree grand larceny. (T: 570-75).

g. Sentencing

On May 14, 1997, petitioner was sentenced as a persistent violent felony offender to three concurrent terms of twenty-five years to life imprisonment for the assault convictions, to run consecutively to terms of three and one-half to seven years imprisonment for the reckless endangerment conviction, and two to four years imprisonment for the grand larceny conviction.

B. The State Appellate Proceedings

On direct appeal, petitioner was represented by counsel, Stanley Neustadter and De Nice Powell, Esq., of the Cardoza Appeals Clinic, who filed a brief in the Appellate Division, First Department, raising the following grounds for relief:

(1) the trial court denied petitioner his right to counsel by denying his motion for new counsel and forcing him to either proceed pro se or be represented by counsel with whom he had a conflict; (2) petitioner's confrontation rights were violated when the court removed him and did not allow him to cross-examine prosecution witnesses; (3) in violation of petitioner's due process rights to a fair trial, the prosecution released the stolen car without prior notice and the trial court failed to impose any sanction as a result; and (4) in response to the jury's questions, the court unfairly marshaled evidence despite the prosecution's failure to elicit any proof that petitioner had stolen the car. Petitioner also filed a pro se supplemental brief, in which he argued that he was denied the right to testify before the grand jury and was improperly arraigned without counsel.

By Decision and Order dated March 23, 2000, the court unanimously affirmed petitioner's judgment of conviction and remanded for re-sentencing.[6] People v. Davis, 270 A.D.2d 162 (1st Dept. 2000). (A: 318). The Appellate Division held that the denial of petitioner's "mid-trial request for new counsel was a proper exercise of discretion," as petitioner's "disagreement with counsel's

[6] The People conceded that petitioner improperly had been adjudicated a persistent violent felony offender. On remand, petitioner was re-sentenced to an aggregate indeterminate term of from ten and one-fourth years imprisonment to twelve years imprisonment.

strategy was not the kind of fundamental conflict that would require assignment of new counsel." 270 A.D.2d at 162. (A: 318). Because petitioner "was chased and apprehended by five police officers who never lost sight of him after he fled from the stolen car," the Appellate Division found that counsel's refusal to adopt a misidentification defense "did not render counsel ineffective." Id. (A: 318-19). Additionally, the Appellate Division found that the trial court "properly denied" petitioner's request for hybrid representation, petitioner's decision to proceed pro se "was knowingly and voluntarily made," and the trial court "thoroughly warned [petitioner], who was no stranger to the criminal justice system, about the dangers of self-representation." Id. (A: 319).

Next, the Appellate Division found that the trial court "properly removed [petitioner] from the courtroom when, despite several warnings, he behaved in a disruptive manner on several occasions, and his conduct was admittedly designed to provoke a mistrial." 270 A.D.2d at 162-63. (A: 319). The Appellate Division held that petitioner "was not deprived of his rights to confrontation or counsel; he alone was responsible for the manner in which the trial was conducted." 270 A.D.2d at 163. (A: 319). As the Appellate Division noted, petitioner "hurled racial epithets at the jurors when given the chance to cross-examine a witness who had testified in his absence, thereby causing his removal for a second time." Id.

(A: 319-20). Moreover, the Appellate Division concluded that petitioner "repeatedly instructed the court that he did not want his attorney (serving as his standby legal advisor) to represent him in his absence, while at other times seeking hybrid representation." Id. (citation omitted). (A: 320).

With respect to petitioner's sentence, the court held that his adjudication as a persistent violent felony offender was improper, and remanded for resentencing. Id. (A: 320). Finally, the court "considered and rejected" petitioner's remaining claims. Id. (A: 320).

Petitioner's counsel submitted a leave application to the New York State Court of Appeals, seeking leave to appeal on the same grounds advanced in the Appellate Division. In a certificate dated May 22, 2000, a Judge of the Court of Appeals denied leave to appeal. People v. Davis, 95 N.Y.2d 795 (2000).

C. The District Court Proceedings

On May 23, 2001, petitioner submitted in the district court an undated pro se petition for a writ of habeas corpus, in which he asked the court to review the same issues he had argued on direct appeal in the Appellate Division, including his claim that his Sixth Amendment right to confront witnesses was violated when he was removed from the courtroom during prosecution witness testimony. (A: 322-37).

In a report and recommendation dated January 5, 2006, a magistrate judge recommended that the petition be dismissed with prejudice. (A: 338-97). With respect to petitioner's claim that he was denied the right to confront witnesses when he was removed from the courtroom and the trial court did not appoint standby counsel to represent him, the magistrate judge recommended that a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) should issue. (A: 395-96).

In addressing petitioner's confrontation claim, the magistrate judge found that, while the claim "presents a difficult issue, the Appellate Division's conclusion was not an unreasonable application of federal law, as determined by the holdings of the Supreme Court." (A: 372). While a defendant's right to be present at all stages of trial is fundamental, the magistrate judge noted that a defendant can waive or forfeit his right to be present by disruptive behavior. (A: 372-73). The magistrate judge found that there was "no question that petitioner waived his right to be present at portions of his trial when, after being warned that he would be removed from the courtroom if he did not comport himself properly, he disrupted the trial and hurled epithets at the judge and jury." (A: 373).

Because petitioner was proceeding pro se and (at his request) was not represented by standby counsel upon his removal, the magistrate judge found that

his confrontation rights were implicated and the proceeding "was no longer adversarial." (A: 373-74). However, the magistrate judge also concluded that petitioner's conduct "made it extremely difficult for the trial court to permit petitioner to confront all of the witnesses against him," as he not only had forfeited his right to be present, but also "had explicitly informed the court that he did not want Aab to play any role in his representation." (A: 376). As a result, the trial court's "options were limited." (A: 376). The magistrate judge could "perceive no way the trial court could have simultaneously quieted petitioner, acceded to petitioner's demands that Aab not represent him, and given petitioner the ability to cross-examine officers Smith-Dixon, Keane, and Ramos." (A: 376-77).

The magistrate judge also noted that the trial court could have appointed Aab as petitioner's counsel, over petitioner's objection. (A: 377). However, the issue was "not whether the trial court had discretion to direct Aab to cross-examine the witnesses or whether its failure to do so was unwise," but to "determine, applying AEDPA, whether there was clearly established Supreme Court precedent which required the trial court to do so." (A: 377-78). Under the circumstances of petitioner's case, the magistrate judge concluded that there was not. (A: 378).

Specifically, the magistrate judge concluded that there was no complete

deprivation of the right to counsel, because petitioner waived his right to counsel by demanding that Aab not represent him and also forfeited his right to cross-examination by his own conduct. (A: 378). Further, the magistrate judge noted that petitioner could have attempted to re-call the witnesses who testified in his absence once the prosecution had concluded its case, but did not do so. (A: 378-79). In light of the trial court's "numerous warnings of imminent removal," suggestions that petitioner employ Aab as counsel, and the "second chance" the court allowed petitioner after every removal, the magistrate judge found that "the trial court's actions were not unreasonable applications of clear Supreme Court precedent. On the contrary, representation and cross-examination were always within petitioner's reach." (A: 379).

The magistrate judge noted that, under Supreme Court case law, a defendant may not deliberately act to delay a criminal proceeding or force a mistrial. (A: 379). As a result, the Court's "precedent suggests that it would be inappropriate to require the court to declare a mistrial either because there was no standby counsel available to commence representation, or because the defendant refused representation by standby counsel." (A: 380). The magistrate judge noted that the Supreme Court's concerns about trial disruptions were "particularly pertinent in petitioner's case, as petitioner admitted during summation that he had disrupted

his trial for strategic purposes." (A: 380). Thus, if he were awarded a new trial, "he would essentially be rewarded for orchestrating his removal from the courtroom, while refusing representation by Aab." (A: 380-81).

Because petitioner alone was responsible for the manner in which the trial proceeded, and in light of the entirety of the circumstances, the magistrate judge found that the Appellate Division's conclusion that he was not deprived his right to confront witnesses was objectively reasonable in light of Supreme Court precedent. (A: 382-83). "Although the fundamental rights at issue here were well-established on a generalized level," the magistrate judge concluded that there are no "holdings of the Supreme Court which were unreasonably applied in the highly unusual situation with which the trial court was confronted." (A: 383). Additionally, the magistrate judge found that no complete deprivation of petitioner's confrontation rights occurred here, because he, inter alia, "received constitutionally effective standby counsel who could have taken over representation had petitioner agreed, and he could have cross-examined witnesses, either pro se or by delegating representation to Aab." (A: 384). Petitioner alone was "solely responsible" for forfeiting those rights. (A: 384).

In an order dated December 16, 2005, the district judge found "no error" in the report and recommendation, concluding that, "[i]t is pellucidly clear that

petitioner is the direct cause of all the constitutional errors he now claims. (A: 398-99). The court opined that, "[r]ecognizing any of his meritless claims would be a perversion of justice." (A: 399). The court then accepted and adopted the report and recommendation in full. (A: 399).

The district court entered judgment on December 22, 2005, dismissing the petition with prejudice and granting a limited certificate of appealability. (A: 400). Petitioner filed a notice of appeal dated January 20, 2006. (A: 401).

STANDARD OF REVIEW

This Court's review of a district court ruling on a petition for a writ of habeas corpus is de novo. Jones v. Vacco, 126 F.3d 408, 413 (2d Cir. 1997); Maldonado v. Scully, 86 F.3d 32, 35 (2d Cir. 1996); Chalmers v. Mitchell, 73 F.3d 1262, 1266 (2d Cir. 1996).

The standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs any of petitioner's claims that were adjudicated on the merits in state court. See 28 U.S.C. § 2254(d)(1). Under this standard, this Court may grant habeas corpus relief with respect to petitioner's claim only if petitioner can show that the state court's rejection of that claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.

§ 2254(d)(1).

A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 413 (2000) (O'Connor, J., for the Court).

In order to prevail under the "unreasonable application" clause, petitioner bears a heavy burden to show that the state court identified the correct governing legal principle from the Supreme Court's precedent but "unreasonably applie[d] that principle to the facts" of his case. Id. "[A]n unreasonable application of federal law is different from an incorrect application of federal law." Id. at 410 (emphasis in original). "Under § 2254(d)(1)'s 'unreasonable application' clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003) (quoting Williams, 529 U.S. at 411). Rather, the state court's application of federal law must be "objectively unreasonable." Lockyer, 538 U.S. at 76 (citing Williams, 529 U.S. at 409).

SUMMARY OF ARGUMENT

Under the unique circumstances in this case, where petitioner represented himself pro se, was removed from the courtroom after intentionally disrupting the trial, and adamantly refused to allow his legal advisor to act as his counsel upon his removal from the courtroom, petitioner's rights under the Confrontation Clause of the Sixth Amendment were not violated by his failure to cross-examine three prosecution witnesses. As the Appellate Division, First Department properly concluded, petitioner alone was responsible for his inability to cross-examine three of the prosecution's twelve witnesses. The Supreme Court has not found a denial of confrontation rights on materially indistinguishable facts and, thus, the Appellate Division's finding that petitioner's Confrontation Clause rights were not violated was not an "unreasonable application of" clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1).

Even if this Court were to find that petitioner's Confrontation Clause rights were violated by the New York County Supreme Court's refusal to allow cross-examination of three prosecution witnesses, any resulting error was harmless in light of petitioner's ability to cross-examine nine additional prosecution witnesses, including testimony overwhelmingly duplicative of the testimony given during the period petitioner was removed from the courtroom. Moreover, there was

overwhelming evidence of petitioner's guilt. Accordingly, this Court should affirm the decision of the district court and dismiss the petition for a writ of habeas corpus.

ARGUMENT

POINT I

THE APPELLATE DIVISION'S FINDING THAT PETITIONER'S SIXTH AMENDMENT RIGHTS TO CONFRONT WITNESSES WERE NOT VIOLATED WAS NOT AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED SUPREME COURT LAW.

On direct appeal, the state court rejected petitioner's Confrontation Clause claim on the ground that petitioner "alone was responsible for the manner in which the trial was conducted." People v. Davis, 270 A.D.2d 162, 163 (1st Dep't 2000). (A: 319). As the state appellate court noted, petitioner "hurled racial epithets at the jurors when given the chance to cross-examine a witness who had testified in his absence, thereby causing his removal for a second time." Id. (A: 319-20). Moreover, the state court correctly explained that petitioner "repeatedly instructed the court that he did not want his attorney (serving as his standby legal advisor) to represent him in his absence, while at other times seeking hybrid representation." Id. (citation omitted). (A: 320).

The Appellate Division's rejection of petitioner's Confrontation Clause claim was objectively reasonable and consistent with existing Supreme Court precedent. It is beyond dispute that the Constitution permits a trial court to exclude an unruly defendant from his trial, Illinois v. Allen, 397 U.S. 337, 342-43 (1970), and also permits – indeed requires – a trial court to permit a defendant to refuse the assistance of counsel. Faretta v. California, 422 U.S. 806, 835-36 (1975). Therefore, the trial court's indisputably proper following of these two well-established principles did not result in a violation of petitioner's rights under the Confrontation Clause. If this Court accepts petitioner's arguments, then the trial court either improperly excluded petitioner from trial or improperly allowed him to refuse the assistance of counsel. The Supreme Court's holdings do not support either proposition. Thus, if this Court concludes that the Confrontation Clause prohibits the trial court's actions in this case, it would be establishing a new rule, rather than applying settled Supreme Court precedent. Such a new rule cannot be the basis for the grant of a writ of habeas corpus. That is, even if this Court now concludes that the trial court's conduct violated the Confrontation Clause, the state court's contrary decision did not involve an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States" at the time petitioner's conviction became final. 28

U.S.C. § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 379-80 (2000).

A. The Trial Court Appropriately Removed Petitioner From the Courtroom Due to Petitioner's Unruly Behavior

Petitioner's failure to cross-examine police officers Smith-Dixon, Keane, and Ramos resulted from his intentional courtroom outbursts, which were designed to provoke a mistrial, coupled with his refusal to accept the assistance of counsel. Petitioner acknowledged during his summation that he had made the outbursts in an effort to "get out of here" because he felt he was not receiving a fair trial. (T: 468-69). His appointed legal advisor did not cross-examine those three witnesses or act as his counsel during his removal at petitioner's explicit instruction that the legal advisor not act on his behalf. (T: 232-35), (A: 111-14). Moreover, petitioner was promptly provided with transcripts of the testimony of the witnesses, and made no attempt to recall them in order to conduct cross-examination. (T: 335), (A: 214). As the Appellate Division correctly found, petitioner alone was responsible for his failure to cross-examine the witnesses, and the trial court did not violate his rights under the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment, which applies to states through the Fourteenth Amendment, guarantees an accused the right to confront the witnesses against him and to be present in the courtroom at every stage of his

trial. Illinois v. Allen, 397 U.S. 337, 338 (1970) (citing Pointer v. Texas, 380 U.S. 400 (1965) and Lewis v. United States, 146 U.S. 370 (1892)). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). Moreover, "the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." Van Arsdall, 475 U.S. at 685.

Petitioner conducted cross-examinations of the prosecution's first two witnesses. Petitioner then aggressively argued with the court about the role of his legal advisor, and the court warned petitioner that he would be removed if he continued and, after petitioner continued to protest, the court removed him. (T: 216-27), (A: 95-106). Petitioner was almost immediately brought back into the courtroom and then, as the jury returned to the courtroom, intentionally disrupted the proceedings by shouting that he was not receiving a fair trial. (T: 229), (A: 108). Petitioner was removed from the courtroom a second time. (T: 229-30), (A: 108-09). After the jury left the courtroom, the court brought petitioner back in, and he proceeded to argue with the court, stating that he did not want his legal advisor to represent him, and that he was planning to "prejudice the jury." (T: 231-35), (A: 110-14). As petitioner was being removed from the courtroom for a third

time, petitioner clearly stated, "I don't want him to represent me or anything," referring to his legal advisor. (T: 235), (A: 114). Only then did the trial proceed.

The third witness, police officer Crystal Smith-Dixon, testified in petitioner's absence; following direct examination, petitioner was returned to the courtroom after the court warned him that he would be removed again if he disrupted the trial. (T: 236-47), (A: 115-26). Yet, when the jurors entered the courtroom, petitioner yelled racial epithets at them; he was removed for a fourth time. (T: 248), (A: 127). Petitioner conducted no cross-examination of officer Smith-Dixon and, as petitioner instructed, his legal advisor did not cross-examine her. Likewise, police officer Keane testified without being cross-examined. (T: 248-58), (A: 127-37). At the conclusion of police officer Ramos's testimony, no cross-examination occurred; petitioner then was returned to the courtroom. (T: 263-64), (A: 142-43). Petitioner made no additional outbursts and was not removed during the remainder of the trial. He continued to represent himself, and cross-examined the prosecution's remaining seven witnesses.

The trial court appropriately removed petitioner from the trial upon petitioner's intentional disruptions of the proceedings in accordance with settled principles of law. The Supreme Court has explicitly held that "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he

will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Illinois v. Allen, 397 U.S. 337, 343 (1970). At the discretion of the trial court, a defendant, via misconduct, may lose "the privilege of personally confronting witnesses." Allen, 397 U.S. at 342-43 (quoting Snyder v. Massachusetts, 291 U.S. 97, 106 (1934)). Once a defendant loses his right to be present, he can reclaim that right once he is willing to conduct himself with the appropriate decorum and respect. Allen, 397 U.S. at 343.

In this case, petitioner's disruptions were intentional and designed, as petitioner admitted during his summation, to cause his removal from the trial. (T: 468-69). Petitioner acted disruptively despite the court's repeated warnings that he would be removed if he persisted. (T: 11, 34, 226-27, 232-35, 246-48, 264), (A: 26, 32, 105-06, 111-14, 125-27, 143). During his last outburst, petitioner also told the court, "I put you on notice I'm going to prejudice the jury." (T: 234), (A: 113). Upon his removal, petitioner gave the court explicit instructions that he did not wish his legal advisor "to represent me." (T: 232-35), (A: 111-14).

The court gave petitioner ample opportunity to return to the courtroom and, eventually, petitioner did so, cross-examining the remaining seven prosecution

witnesses. Under these circumstances, the court's removal of petitioner without instructing his legal advisor to cross-examine the witnesses who testified during petitioner's absence did not violate his confrontation rights. Additionally, the court properly did not direct petitioner's legal advisor, against petitioner's explicit wishes, to cross-examine those witnesses on petitioner's behalf.

B. The Trial Court Appropriately Allowed Petitioner to Proceed Pro Se

The Sixth Amendment guarantees criminal defendants the right to represent themselves at trial, as long as they knowingly and voluntarily waive their right to appointed counsel. Faretta v. California, 422 U.S. 806, 835-36 (1975). Petitioner does not claim that his decision to appear pro se was not knowing and voluntary and, indeed, the trial court amply instructed petitioner about the dangers of representing himself; petitioner indicated that he understood those instructions. (P: 5-9), (A: 11-15). This Court has held that a defendant's voluntary and knowing waiver of counsel is "unqualified," and that a trial court's improper denial of a defendant's right to represent himself is "not subject to harmless error analysis, and requires automatic reversal of a criminal conviction." Wilson v. Walker, 204 F.3d 33, 37 (2d Cir. 2000) (citing Williams v. Bartlett, 44 F.3d 95, 99 (2d Cir. 1994) and Johnstone v. Kelly, 808 F.2d 214, 218 (2d Cir. 1986)).

To be sure, after petitioner disrupted the trial and was removed, the court

had the ability to terminate petitioner's pro se status. McKaskle v.Wiggins, 465 U.S. 168, 187-88 (1984). However, the Supreme Court has not held that in this circumstance the court is required to terminate a criminal defendant's pro se status; the trial court's decision not to do so here was particularly appropriate, because petitioner had adamantly refused to let standby counsel represent him. Nor was petitioner entitled to hybrid representation; a defendant must either represent himself or be represented by counsel. McKaskle v. Wiggins, 465 U.S. at 183. Moreover, petitioner was not entitled to the appointment of new counsel other than his assigned legal advisor.[7]

Additionally, while petitioner's proposed mistaken identity trial strategy may not have been wise, he was entitled to control the direction of his defense.

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[7] While the Sixth Amendment establishes that criminal defendants have the right to the assistance of counsel, U.S. Const. Amend. VI, Gideon v. Wainwright, 372 U.S. 335, 343 (1963), and the Supreme Court has acknowledged that criminal defendants are entitled to their preferred counsel, Wheat v. United States, 486 U.S. 153, 159 (1988), a criminal defendant's right to the appointment of the counsel of his choosing is not unqualified. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989). The right to counsel does not include the right to a meaningful attorney-client relationship, because "no court could possibly guarantee that a defendant will develop th[at] kind of rapport with his attorney." Morris v. Slappy, 461 U.S. 1, 13-14 (1983); see also Wheat, 486 U.S. at 159 ("the essential aim of the [Sixth]Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers"). Thus, while petitioner, for the second time, was presented with a qualified attorney who was not the lawyer of his preference, he was not entitled to be appointed new counsel.

Standby counsel "must generally respect" a defendant's preference to appear by himself at trial, and, "[a] defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The pro se defendant must be allowed to control the organization and content of his own defense." McKaskle v. Wiggins, 465 U.S. at 187-88, 174.

The trial judge was faced with a difficult dilemma. Petitioner deliberately obstructed the trial, arguing that he wished to have new counsel represent him, even though his legal advisor had a clear grasp on the issues and had developed a trial strategy. Instead, petitioner wished, at all costs, to adopt a mistaken identity strategy, even though he faced the testimony of multiple witnesses who had seen him flee from the stolen livery cab and resist arrest. Meanwhile, petitioner had the unqualified right to proceed without counsel, Wilson v. Walker, 204 F.3d 33, 37 (2d Cir. 2000), and the right to control his own defense, McKaskle v.Wiggins, 465 U.S. 168, 187-88, 174 (1984), and had specifically instructed the court not to allow his legal advisor to act on his behalf.

Balancing all of those interests, the trial court's decision to remove petitioner without directing his legal advisor to cross-examine the three prosecution witnesses was a reasonable application of relevant Supreme Court precedents. Petitioner points to no Supreme Court law requiring a different

conclusion.

C. The Appellate Division's Denial of Petitioner's Claim Was Not an Unreasonable Application of Clearly Established Supreme Court Law

Because petitioner can point to no Supreme Court precedent requiring the rule he seeks, his claim must fail. The Appellate Division's denial of petitioner's claim was not an unreasonable application of Supreme Court precedent because, applying clearly established Supreme Court law, the state court made the objectively reasonable determination that, under these circumstances, petitioner's confrontation rights were not violated. Petitioner intentionally disrupted the trial in an effort to achieve his ouster, and adamantly refused to allow his legal advisor to act as his counsel upon his removal from the courtroom. As the Appellate Division correctly held, petitioner alone was responsible for his inability to cross-examine three of the prosecution's twelve witnesses. Indeed, petitioner achieved his desired result. As a result, habeas corpus relief is unavailable for this claim. See Kane v. Espita, 546 U.S. 9, __, 126 S. Ct. 407, 408 (2006).

Petitioner reliance on Clark v. Perez, 450 F. Supp.2d 396 (S.D.N.Y. 2006) is misplaced. (Petitioner's Brief at 30-34). Neither the district court decision in Clark nor this Court's decision in Cotto v. Herbert, 331 F.3d 217 (2d Cir. 2003) mandates the granting of habeas relief here.

Cotto held that a state trial court violated a habeas petitioner's confrontation rights when it concluded that a defendant who threatened an eyewitness prior to trial had not only forfeited any hearsay objection to the introduction of the eyewitness's statements made to police officers and the prosecutor, but also had forfeited the right to cross-examine the eyewitness at trial. The trial court had found that "no truth-serving function would be served" by allowing the cross-examination of the eyewitness. Cotto v. Herbert, 331 F.3d 217, 225-27 (2d Cir. 2003). This case differs from Cotto in at least two critical respects. First, in Cotto, the petitioner forfeited his confrontation rights by pretrial misconduct, while, in this case, petitioner knowingly and intentionally brought about his exclusion and his loss of the right to cross-examine three prosecution witnesses after being warned repeatedly by the court during the trial that any outbursts would lead to that very result. Also, in Cotto, the limitation on cross-examination went beyond what was required by the petitioner's misconduct; the petitioner was not only subjected to the hearsay testimony that had been disavowed by the witness he threatened, but also was precluded from cross-examining that witness at trial. In this case, by contrast, the limitation was no greater than required by petitioner's misconduct; he was excluded from the courtroom.

Nor does petitioner's claim find support in Clark v. Perez, 450 F. Supp. 2d

396 (S.D.N.Y. 2006) (Scheindlin, J.). In Clark, the court held that the state trial court should not have permitted the petitioner to proceed pro se because it was evident from the outset that she would not abide by the rules of procedure and courtroom protocol; that, in any event, the trial court should have appointed standby counsel to represent the petitioner when her exclusion from the courtroom became necessary; and that her right to counsel was denied during her seven-day absence from the trial, including the government's opening statement and its entire direct case. Clark, 450 F. Supp. 2d at 430-32. The holding of the habeas court in Clark is questionable, and the respondent's appeal to this Court is pending. Docket No. 06-5340-pr.

Moreover, in this case, unlike Clark, petitioner did not display from the outset "an obvious unwillingness to abide by the rules of procedure and courtroom protocol," 450 F. Supp. 2d at 430; rather, he made motions, participated in voir dire, and cross-examined other prosecution witnesses before his outburst resulted in his removal from the courtroom. Moreover, he was absent for only three of twelve prosecution witnesses and, after he returned to the courtroom, he again followed the court's rules, made motions, conducted cross-examinations of remaining witnesses, and gave a summation. Thus, even if Clark were correct in finding a constitutional deprivation due to the exclusion of a pro se defendant

from most of her trial, under circumstances which made that exclusion predictable from the outset, that holding would have no application to the facts of this case.

In any event, even if this Court finds that the Appellate Division's holding that petitioner's rights to confrontation was not violated is an unreasonable application of Supreme Court law, any resulting error was harmless.

POINT II

IF PETITIONER'S CONFRONTATION CLAUSE RIGHTS WERE VIOLATED, ANY SUCH ERROR WAS HARMLESS.

If, contrary to respondent's argument above, petitioner's confrontation rights were violated by allowing three prosecution witnesses to testify in his absence, without cross-examination by his legal advisor, any such error was harmless.

Petitioner argues that the court's failure to appoint standby counsel upon his removal from the courtroom deprived him of his right to counsel, and the resulting error is not subject to harmless error analysis. (Petitioner's Brief at 34). However, the certificate of appealability in this case does not encompass petitioner's claim that he was deprived his Sixth Amendment right to counsel; the court granted a limited certificate of appealability to address the issue of whether petitioner "was denied the right to confront witnesses when removed from the courtroom and the

trial counsel did not appoint standby counsel to represent him." (A: 395-96, 399, 400). Because the certificate of appealability was limited to the confrontation claim, this Court lacks jurisdiction to address the right to counsel claim. Hines v. Miller, 318 F.3d 157, 162 (2d Cir. 2003). The only question before this Court, therefore, is whether petitioner was deprived of his right to confront witnesses and, if so, whether that error was harmless.

The denial of a defendant's rights under the Confrontation Clause is unquestionably subject to harmless error analysis. See Delaware v. Van Arsdall, 475 U.S. 673, 685 (1986) ("the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case"); Henry v. Speckard, 22 F.3d 1209, 1215 (2d Cir. 1994). When a reviewing court concludes that the trial judge has improperly curtailed cross-examination, in violation of a defendant's confrontation rights, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless." Delaware v. Van Arsdall, 475 U.S. at 684. In Van Arsdall, the Court also outlined a series of factors to consider in evaluation the potential harm of a Confrontation Clause violation, including: "the importance of the witness' testimony in the prosecution's case, whether the testimony was

cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." 475 U.S. at 684.

In instances where, as here, the state court did not engage in harmless error analysis, this Court has not determined whether to apply the standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (error is harmless if it did not result in "actual prejudice," that is, it did not have "a substantial and injurious effect or influence in determining the jury's verdict"), or the standard set forth in Chapman v. California, 386 U.S. 18, 24 (1967) (error is harmless if it was "harmless beyond a reasonable doubt").

Under either test, any error here was harmless. The verdict could not possibly have been affected by the cross-examination of police officers Smith-Dixon, Keane, and Ramos. Their testimony was entirely cumulative, and supported by the testimony of numerous additional witnesses whom petitioner cross-examined; thus, even if the jury had decided to ignore them, it would have reached the same result. Furthermore, the transcripts of their testimony were promptly provided to petitioner for his use at trial (T: 299-300, 334-35), (A: 178-79, 213-14); thus, the deprivation caused by his absence during their testimony

was minimized. Finally, the evidence of petitioner's guilt was overwhelming.

Police officer Crystal Smith-Dixon testified that, along with officer Alexandra Baez, she was flagged down by the victim, Andres Blanco, shortly after petitioner stole his livery cab. In her testimony, Smith-Dixon described Blanco's initial reporting of the theft and her and Baez's fruitless pursuit of petitioner, with Blanco in their patrol car. (T: 236-48), (A: 115-27). Precisely the same events were described by officer Baez (T: 182-210), (A: 61-89), and Andres Blanco (T: 303-26), (A: 182-205), both of whom were cross-examined by petitioner. Thus, Smith-Dixon's testimony was cumulative and the failure to cross-examine her was harmless.

Police lieutenant Thomas Keane testified about his pursuit of petitioner after receiving a radio run describing the stolen cab, as well as the cab's collision with another patrol car, Keane's pursuit of petitioner, and his assistance in apprehending petitioner. (T: 248-58), (A: 127-37). Officer Edwin Ramos was in the patrol car with Keane, and briefly testified to the same events. (T: 260-63), (A: 139-42). While petitioner did not cross-examine Keane and Ramos, six additional police officers also testified about the pursuit of petitioner and his apprehension; petitioner cross-examined each of them.

Police officer Ronald Kelly (T: 269-75), (A: 148-54) and police officer

William Domenech (T: 285-92), (A: 164-71) observed the livery cab driving erratically and arrived at the scene after the crash, finding officer Bomsik Kim injured. Police officer Thomas Smith (T: 343-54), (A: 222-33) and Detective James Scanlon (T: 359-68), (A: 238-47) were in the same patrol car and testified about their pursuit of the stolen cab, their view of petitioner exiting and fleeing the car, and the difficulty officers had in subduing petitioner, resulting in an injury to Smith's ankle. Likewise, police officers Sean Harris and Bomsik Kim, who rode in the same police car, testified about their pursuit of the stolen cab, their collision with the cab and resulting injuries, petitioner's flight from the cab, and the difficulties subduing petitioner. (T: 373-99, 400-21), (A: 252-78, 279-300).

Multiple witnesses viewed the livery cab as it drove erratically, at a high rate of speed, in an attempt to evade the police. Additionally, multiple witnesses also saw the cab crash into Harris and Kim's patrol car, after which petitioner exited the car and fled. As the officers attempted to subdue petitioner, he reacted violently, requiring multiple officers to restrain him.

The three witnesses who were not cross-examined by petitioner gave testimony wholly duplicated by that of other witnesses who testified about the same events. Cross-examination of the three witnesses in question could not have undermined their credibility and, even if their testimony had been disregarded, the

verdict would have been unaffected because other witnesses testified to the same facts and circumstances. The evidence of petitioner's guilt was overwhelming, even without the testimony of the witnesses petitioner did not cross-examine. Petitioner's failure to cross-examine the three witnesses could not have altered the outcome of the trial.

* * *

In sum, the Appellate Division's denial of petitioner's claim that the New York County Supreme Court violated his rights under the Confrontation Clause was not "contrary to," and did not involve an "unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Even if this Court concludes that petitioner's Confrontation Clause rights were violated, any resulting error was harmless in light of the cumulative nature of the testimony given by the three witnesses petitioner did not cross-examine, along with the overwhelming evidence of petitioner's guilt.

Accordingly, this Court should affirm the decision of the district court and dismiss the petition for a writ of habeas corpus.

CONCLUSION

For all of these reasons, this Court should affirm the district court's order dismissing the writ of habeas corpus.

Dated: New York, New York
February 9, 2007

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Respondent-Appellee

By: ASHLYN DANNELLY
Assistant Attorney General
120 Broadway
New York, NY 10271
(212) 416-8624
Ashlyn.Dannelly@oag.state.ny.us

BARBARA D. UNDERWOOD
Solicitor General

LUKE MARTLAND
ASHLYN DANNELLY
Assistant Attorneys General
of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

CARL DAVIS,

Petitioner-Appellant,

-against-

LEROY GRANT, Warden,

Respondent-Appellee.

- X

CERTIFICATION PURSUANT TO RULE 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, according to the word count function of the word processing program used to prepare the accompanying brief, this brief contains 12,375 words, excluding the cover, table of contents and table of authorities.

2. This type complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared using WordPerfect Version 12 in 14 Point Times New Roman.

_____

ASHLYN DANNELLY
Counsel for Respondent-Appellee

Dated: February 9, 2007

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CERTIFICATION PURSUANT TO LOCAL RULE 32(a)(1)(E)

This brief complies with the virus protection requirement of Local Rule 32(a)(1)(E). The undersigned hereby certifies that the PDF brief sent via e-mail to this Court has been scanned for viruses, and no virus was detected.

_____

ASHLYN DANNELLY
Counsel for Respondent-Appellee

Dated: February 9, 2007

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DECLARATION OF SERVICE

ASHLYN DANNELLY, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury as follows: that on February 9, 2007, she served respondent-appellant's brief, by having it mailed via the United States Postal Service to counsel for petitioner-appellant at the following address:

Randa D. Maher
14 Bond Street, Suite 389
Great Neck, New York 11021

_____

ASHLYN DANNELLY
Assistant Attorney General
120 Broadway
New York, New York 10271
(212) 416-8624
Ashlyn.Dannelly@oag.state.ny.us

Executed on February 9, 2007