No. _____

20-5265

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Hazhar A. Sayed — PETITIONER
(Your Name)

vs.

THE STATE OF COLORADO — RESPONDENT(S) ON

PETITION FOR A WRIT OF CERTIORARI TO

Colorado Supreme Court

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Hazhar A. Sayed, #133608
Limon Correctional Facility
49030 State Hwy. 71
Limon, CO. 80826
(Pro-Se)

ISSUES PRESENTED FOR REVIEW

I. Whether the trial court violated Sayed's constitutional right to remain silent and reversibly erred when it allowed the government to question a DOC investigator about Sayed's post-arrest silence because Sayed's post-arrest silence had no evidentiary value other than to imply guilt based on Sayed exercising his constitutional right to remain silent?

II. Whether the trial court violated Sayed's due process right to have the government prove his guilt beyond a reasonable doubt and reversibly erred when it failed to—sua sponte—instruct the jury on self-defense because the evidence at trial unequivocally provided more than a scintilla of evidence establishing that Sayed acted in self-defense?

III. Whether the trial court violated Sayed's due process rights, abused its discretion, and reversibly erred when it failed to order a competency evaluation for Sayed because substantial evidence was presented that demonstrated that (1) Sayed may not have understood the nature and course of the proceedings and (2) Sayed could not cooperate with defense counsel?

JURISDICTION AND OPINION BELOW

The court of appeals announced its unpublished opinion on February 13, 2020. *See People v. Sayed,* No. 17CA847 (2020). A copy of the opinion is

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Colorado Court of Appeals court appears at Appendix A to the petition and is

[X] reported at 2020 Colo. App. Lexis 367; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was June 29, 2020. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Five

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment Fourteen

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Colorado Revised Statutes

§ 18-3-203 C.R.S.
§ 18-3-204 C.R.S.

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attached as Appendix A. Neither party has filed a petition for rehearing. Thus, pursuant to C.A.R. 52, the time for filing this petition expires on ~~March~~ Sept. 26, 2020.

~~NATURE OF THE CASE, RELEVANT FACTS, PROCEDURAL HISTORY,~~ AND RULING/JUDGMENT/ORDER PRESENTED FOR REVIEW

On June 2, 2015, the government, in Logan County, Colorado, in case number 15CR120, charged Sayed with the following: (count one) first degree assault in violation of C.R.S. § 18-3-202(1)(e) and; (count two) first degree assault in violation of C.R.S. § 18-3-202(1)(a)[1] (CF, pp1, 6-7).

On July 21, 2015, Garen Gervey—from the public defender's office—entered his appearance as counsel for Sayed (CF, p25). On October 15, 2015, Mr. Gervey filed a "Motion to Withdraw Because of a Total Breakdown in Communication Between Counsel and Sayed" (CF, pp56-57). On October 15, 2015, the trial court granted Mr. Gervey's request to withdraw and appointed Thor Bauer—from Alternate Defense Counsel ("ADC")—to represent Sayed (CF, p58).

On April 6, 2016, the government filed a "Motion to Amend Complaint and Information" and an "Amended Complaint and Information" (CF, pp119-24). Specifically, the government requested to amend the complaint and information as follows: (1) for count one, the government sought to amend the complaint and information so that Sayed was charged with first degree assault pursuant to C.R.S.

[1] Both class three felonies pursuant to C.R.S. § 18-3-202(2)(b).

§ 18-3-202(1)(f)[2] (2) for count two, the government sought to amend the complaint and information so that Sayed was charged with second degree assault pursuant to C.R.S. § 18-3-203(1)(f)[3] and (3) the government sought to add count three to the complaint and information, which charged Sayed with second degree assault pursuant to C.R.S. § 18-3-203(1)(b)[4] (CF, pp119-24). The court granted the government's request to amend the complaint and information on that same date (CF, p117).

On June 1, 2016, Sayed filed a pro se "Motion to Dismiss Assigned Counsel and Request for Appointed New Counsel, Ineffective Assistance" (CF, pp178-80). On June 23, 2016, Mr. Bauer filed a "Motion to Withdraw" wherein he requested to withdraw as counsel for Sayed (CF, pp175-76). On June 24, 2016, the trial court issued an "Order to Withdraw" wherein the court allowed Mr. Bauer to withdraw and stated that it would appoint substitute ADC counsel (CF, p181). On August 1, 2016, the court appointed ADC counsel Stephanie Stout to represent Sayed (CF, p208). On August 4, 2016, Ms. Stout entered her appearance as counsel for Sayed (CF, p209).

Sayed tried his case to a jury over the course of three days, January 23-25, 2017. At trial, the government alleged that Sayed assaulted Captain Michael

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[2] A class three felony pursuant to C.R.S. § 18-3-202(2)(b).
[3] A class four felony pursuant to C.R.S. § 18-3-203(2)(b).
[4] A class four felony pursuant to C.R.S. § 18-3-203(2)(b).

Tidwell while incarcerated in the Sterling Correctional Facility (e.g. TR. 1/24/17, pp217, 227-32). After the presentation of the evidence, the defense requested that, for count three, the court instruct the jury on the lesser-included offense of third degree assault (TR. 1/24/17, pp392-93). The court instructed the jury on the lesser-included offense of third degree assault for count three pursuant to defense counsel's request (CF, 417).

After deliberation, the jury found Sayed not guilty of count one, guilty of count two, and guilty of the lesser-included offense for count three, third degree assault (CF, pp415-17).

On May 5, 2017, the court sentenced Sayed to: (1) three years of incarceration in the Department of Corrections ("DOC") for his conviction on count two and (2) six months incarceration for his misdemeanor conviction on count three (TR. 5/5/17, pp615-16). Further, the court ordered that Sayed's sentence would (1) run consecutive to his sentence in Broomfield case 05CR70 for count two and (2) run concurrently with his sentence in Broomfield case 05CR70 for count three (CF, pp615-16).

Sayed appealed his convictions to the court of appeals in case number 17CA847. On February 13, 2020, the court of appeals issued its opinion affirming Sayed's convictions.

Sayed now submits this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The trial court violated Sayed's constitutional right to remain silent and reversibly erred when it allowed the government to question a DOC investigator about Sayed's post-arrest silence because Sayed's post-arrest silence had no evidentiary value other than to imply guilt based on Sayed exercising his constitutional right to remain silent.

A. Standard of Review

This issue was preserved when defense counsel objected to the prosecutor asking a DOC investigator about Sayed's post-arrest invocation of his right to remain silent (TR. 1/24/17, p382). This issue was further preserved when defense counsel supplemented her argument with reference to legal authority on the third day of trial, January 25, 2017 (TR. 1/25/17, pp528-29).

Because the facts applicable to this issue are undisputed, the legal effect of those facts constitutes a question of law which is subject to de novo review. *People v. Valdez*, 969 P.2d 208, 211 (Colo. 1998). Moreover, when preserved, the erroneous admission of evidence concerning a defendant's silence is reviewed for constitutional harmless error. *People v. Davis*, 312 P.3d 193, 199 (Colo. App. 2010).

B. Applicable Facts

On October 27, 2016, the court held a motions hearing (TR. 10/27/16, p506). At that hearing, the court, among others, addressed Sayed's motion to suppress statements and engaged in the following colloquy:

[COURT]: As far as the motions...there was a Motion to Suppress. I don't know that there were any statements that are out there.

[DEFENSE COUNSEL]: I'm not aware of any statements that are going to be used.

[PROSECUTOR]: The only statements by the Defendant were prior to the assault, something to the effect of, Let's fight. No statements were made after the fight. He refused to talk to investigators.

[COURT]: which, obviously, the silence will not be mentioned. Clearly, everybody knows that one.

(TR. 10/27/16, p508).

On the second day of trial, January 24, 2017, Sayed testified in his own defense (TR. 1/24/17, pp323-74). After Sayed testified, the government called one rebuttal witness, Larry Frese, an investigator with DOC (TR. 1/24/17, p375). During the government's direct-examination of Mr. Frese, the following colloquy occurred:

[PROSECUTOR]: Okay. You heard all of the defendant's testimony today?

[MR. FRESE]: Yes.

[PROSECUTOR]: Did he tell you everything today that he told you back on May 2nd when you saw him.

[MR. FRESE]: No.

[DEFENSE COUNSEL]: May we approach?

[COURT]: You may.

....

[DEFENSE COUNSEL]: Judge, on May 2nd he immediately invoked and said he was not going to make any statement about this. This is an improper inquiry and infringes on his right to remain silent. Asking if he said everything then as he did now, this is an improper inquiry.

[PROSECUTOR]: I have case law for the Court if the Court wants to see it. If a defendant tells versions of the story and previously did not tell law enforcement, this is the first time the statement has been made....*People v. Davis*.

[COURT]: The objection is overruled. I'm going to allow the questions based on the authority cited to me.

[DEFENSE COUNSEL]: Can I look through that...Because he invoked his right to remain silent and for me to be able to cross-examine I now have to cross-examine and say he invoked his right to remain silent, which could be more prejudicial than helpful. It puts me in an untenable position.

....

[COURT]: The objection is overruled.

....

[PROSECUTOR]: Allow me to state the question again, Investigator. You heard everything the defendant testified to in court today?

[MR. FRESE]: Yes.

[PROSECUTOR]: Did he tell you the same account back on May 2, 2015, when you met with him?

[MR. FRESE]: No.

(TR. 1/24/17, pp. 381-83).

Then, during defense counsel's cross-examination of Mr. Frese, the following colloquy occurred:

> [DEFENSE COUNSEL]: When you met with him he actually said I have nothing to say to you, turned around, and walked away; right?
>
> [MR. FRESE]: Correct.
>
> [DEFENSE COUNSEL]: He didn't make any statement at all, did he?
>
> [MR. FRESE]: Correct.
>
> [DEFENSE COUNSEL]: Yeah. So it's not that he made a different statement –
>
> [PROSECUTOR]: Your Honor, it's been asked and answered twice now.
>
> [COURT]: Overruled. You can ask.
>
> [DEFENSE COUNSEL]: It's not that he made a different statement, it's that he didn't make any statement as is his right, right?
>
> [MR. FRESE]: Correct.

(TR. 1/24/17, p384).

A short while later, out of the presence of the jury, defense counsel requested the opportunity to make an additional record on the prosecution's questions regarding Sayed's silence and stated, "I just want to make sure that it's considered contemporaneous." (TR. 1/24/17, p388-89). In response, the court stated "The Court has no objection to that. That would be entirely appropriate." (TR. 1/24/17, p389).

On the third day of trial, January 25, 2017, defense counsel supplemented her objection to the government's testimony on Sayed's constitutional right to remain silent by distinguishing the facts in *People v. Davis*, 312 P.3d 193 (Colo. App. 2010)—which the court relied upon to overrule defense counsel's objection—from the facts in Sayed's case (TR. 1/25/17, pp528-29).

In response, the court stated "All right. Thank you. I always welcome guidance from the court of appeals." (TR. 1/25/17, p529). The prosecutor then stated "just to note that the defendant was never arrested in this case on these charges. He was served a summons. He was never in custody. So *Miranda* was never implicated." (TR. 1/25/17, p530). In response, defense counsel stated "I wasn't arguing *Miranda*....This case says it's Fifth Amendment and so I'm making a Fifth Amendment argument." (TR. 1/25/17, p530). Defense counsel then requested leave to file a copy of Sayed's statement as a special exhibit. The court, however, never ruled on counsel's request to file a special exhibit that contained Sayed's statement and the special exhibit does not appear in the appellate record.

There is no indication in the record whether Mr. Frese or any other officers did or did not read Sayed—an inmate at the Sterling Correctional Facility—his *Miranda* rights before he invoked his right to remain silent.

C. Law and Analysis

Both the Fifth Amendment to the United States Constitution and the Article II, § 18 of the Colorado Constitution provide that no person shall be compelled to testify against himself or herself in any criminal proceedings. The Fifth Amendment not only protects the individual from being involuntarily called as a witness against himself or herself, "but also grants a privilege not to answer official questions put to him or her in any other proceedings, civil or criminal, formal or informal, where the answers might incriminate him or her in future criminal proceedings." *Welsh*, 58 P.3d at 1069 (citing *Lefkowitz v. Turley*, 414 U.S. 70 (1973)).

1. Post-*Miranda* Invocation of Silence

In *Doyle v. Ohio*, 426 U.S. 610, 617-19 (1976), the United States Supreme Court made it clear that a defendant's invocation of silence pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and the Fifth Amendment to the U.S. constitution cannot be used to impeach a defendant's testimony. Specifically, the Supreme Court held that when a defendant is mirandized, it would be fundamentally unfair for the government to use the defendant's invocation of his right to remain silent against him at trial. *Id.*; *Combs v. People*, 205 F.3d 269, 279-80 (6th Cir. 2000). Thus, the Court in *Doyle* held that the government's use of the defendant's post-*Miranda* silence violated the Due Process Clause of the Fourteenth Amendment. *Doyle*, 426 U.S. at 617-19.

Here, the record is not clear whether Frese read Sayed his *Miranda* rights prior to Sayed invoking his constitutional right to remain silent. If Frese did read Sayed his *Miranda* rights prior to Sayed invoking his constitutional right to remain silent, the government's questions at trial regarding Sayed's invocation of his right to remain silent constituted a violation of Sayed's constitutional rights. Specifically, when the government asked Frese whether Sayed's in-court testimony was identical to his remarks on May 2, 2015—when Sayed invoked his constitutional right to remain silent—the government impermissibly commented on Sayed's constitutional right to remain silent if Frese had, in fact, mirandized Sayed prior to the invocation of the constitutional right to remain silent. *Doyle*, 426 U.S. at 617-19.

2. Post-Arrest Silence without *Miranda* Warnings

In *Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982), the United States Supreme Court held that not all uses of a defendant's post-arrest silence violates due process of law. Specifically, the Supreme Court in *Weir* held that, where a defendant was not mirandized, "we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* at 607.

In Colorado, the supreme court—citing *U.S. v. Hale*, 422 U.S. 171 (1975)—has stated that before post-arrest silence can be used as a form of impeachment, the

trial court must verify, as a threshold matter, that the post-arrest silence is indeed inconsistent with the later exculpatory testimony of the defendant at trial. *People v. Cole*, 584 P.2d 71, 72-73 (Colo. 1978). "If the Government fails to establish a threshold inconsistency between silence and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded." *Id.* (quoting *Hale*, 422 U.S. at 176).

The court in *Cole* further noted that post-arrest silence is inherently untrustworthy because an arrestee is under no duty to speak and:

> [a]t the time of the arrest and during custodial interrogation, innocent and guilty alike perhaps particularly the innocent may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply....He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention.

Id. (quoting *Hale*, 422 U.S. at 177).

Further, in *People v. Quintana*, 665 P.2d 605, 609-11 (Colo. 1983), the Colorado Supreme Court held that that government improperly used the defendant's post-arrest silence because such evidence was irrelevant. Indeed, the supreme court noted that "silence generally is thought to lack probative value of the question of whether a person has expressed agreement or disagreement with contemporaneous statements of others." *Quintana*, 665 P.2d at 609-11.

An example of how a defendant's post-arrest silence can become relevant can be found in *People v. Davis*, 312 P.3d 193, 199-201. There, the defendant testified at trial that he had "told [the detective] everything that happened." *Id.* In response, the prosecution impeached the defendant with his omissions when discussing the case with the detective, thereby utilizing the defendant's post-arrest silence against him. *Id.* Under these circumstances, it was proper for the prosecution to use the defendant's post-arrest silence because the defendant's silence was indeed contrary to his trial testimony, thereby giving his silence probative value. *Id.*

Here, Frese—a DOC investigator—attempted to question Sayed about the allegations in this case on May 2, 2015 while Sayed was incarcerated in the Sterling Correctional Facility. This interaction, thus, constituted a custodial interrogation. In response to Frese's attempts to question him, Sayed invoked his constitutional right to remain silent.

During the government's direct-examination of Frese at trial, the following colloquy occurred:

> [PROSECUTOR]: Okay. You heard all of the defendant's testimony today?
>
> [FRESE]: Yes.
>
> [PROSECUTOR]: Did he tell you everything today that he told you back on May 2nd when you saw him.

[FRESE]: No.

(TR. 1/24/17, p381). Because Sayed was questioned by a DOC investigator while he was in custody, the government's testimony on Sayed's silence is properly considered remarks by the government on Sayed's post-arrest silence.

In response to the government's testimony on Sayed's post-arrest silence, defense counsel objected stating that such questioning violated Sayed's constitutional right to remain silent. The court, however, allowed the government to question Frese on Sayed's post-arrest silence. Indeed, after defense counsel's objection, the following colloquy occurred:

> [PROSECUTOR]: Allow me to state the question again, Investigator. You heard everything the defendant testified to in court today?
>
> [FRESE]: Yes.
>
> [PROSECUTOR]: Did he tell you the same account back on May 2, 2015, when you met with him?
>
> [FRESE]: No.

(TR. 1/24/17, pp. 381-83).

Thus, the court allowed the government, on two occasions, to question Frese on Sayed's post-arrest silence. The court failed, however, to determine whether a valid evidentiary purpose existed to justify the government's use of Sayed's post-arrest silence. Indeed, the court, before infringing on Sayed's constitutional right

to remain silent, had an obligation to ascertain whether Sayed's post-arrest silence was indeed inconsistent with his exculpatory trial testimony. *People v. Cole*, 584 P.2d 71, 72-73 (Colo. 1978). "If the Government fails to establish a threshold inconsistency between silence and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded." *Id.* (quoting *Hale*, 422 U.S. at 176).

Had the court engaged in such an analysis, it would not have permitted the government to utilize Sayed's post-arrest silence at trial. Specifically, unlike in *Davis*, *supra*—where the prosecution properly used the defendant's post-arrest silence because the defendant's silence was indeed contrary to his trial testimony—Sayed's silence was not relevant to his testimony or the case. Indeed, the government used Sayed's post-arrest silence only to create an implication that Sayed was guilty because he refused to speak with the DOC investigator on May 2, 2015—Frese—i.e. the government used Sayed's post-arrest silence to punish the exercise of his constitutional right to remain silent. This was wholly improper because (1) silence, in and of itself, has little to no probative value and (2) there are countless reasons why a defendant may choose not to speak with the government. *Cole*, 584 P.2d at 72-73; *Quintana*, 665 P.2d at 609-11.

In light of the above, the court violated Sayed's constitutional right to remain silent and reversibly erred when it permitted the government to ask Frese

about Sayed's post-arrest silence without a valid evidentiary purpose that warranted such an infringement on his constitutional right to remain silent.

3. Conclusion

Pursuant to Argument I.C.2. above, Sayed requests that this Court reverse his convictions because the trial court allowed the government to improperly infringe upon his constitutional right to remain silent. Indeed, the evidence against Sayed was not overwhelming—or even particularly strong—as the jury acquitted him on count one and found him guilty of a lesser-included offense for count three (CF, pp415-17). Moreover, a real possibility exists that the jury convicted Sayed because he invoked his constitutional right to remain silent. Simply put, no other valid evidentiary reason existed that justified admission of evidence regarding Sayed's post-arrest silence and the jury possibly used such evidence to infer guilt. Thus, it cannot be said that the jury's guilty verdict was surely unattributable to the error and reversal, therefore, is required. *Davis*, 312 P.3d at 199.

Alternatively, pursuant to Argument I.C.1. above, Sayed requests that this Court remand the case to the trial court for additional evidentiary proceedings to determine whether Frese mirandized Sayed before Sayed invoked his constitutional right to remain silent.

II. The trial court violated Sayed's due process right to have the government prove his guilt beyond a reasonable doubt and reversibly erred when it failed to—sua sponte—instruct the jury on self-defense because the evidence at trial unequivocally provided more than a scintilla of evidence

establishing that Sayed acted in self-defense.

A. Standard of Review

This issue was not preserved. Appellate courts review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). Appellate courts further review unpreserved instructional errors for plain error. *People v. Miller*, 113 P.3d 743, 751 (Colo. 2005).

B. Applicable Facts

At trial, Sayed testified to the following:

- on May 2, 2015, an Officer contacted him through the intercom in his cell to discuss a grievance he had filed (TR. 1/24/17, p327);
- then, he was escorted by Captain Tidwell and Lieutenant Page to the case manager's office (TR. 1/24/17, p332);
- en route to the case manager's office, Captain Tidwell punched him on his right eye (TR. 1/24/17, p333);
- then Captain Tidwell threw down his notepad and punched him several times (TR. 1/24/17, p334);
- he tried to talk to Captain Tidwell, but then Captain Tidwell "tried to punch [him] again. And [he] raised [his] hand trying to block the punches because he was hurting [him] really bad" (TR. 1/24/17, pp334-35);

- Captain Tidwell punched him, and he raised his hand to try to block the punches (TR. 1/24/17, p335);
- Captain Tidwell was punching him and pushing him back (TR. 1/24/17, p335);
- Captain Tidwell kicked him four or five times, and then Captain Tidwell slipped and fell (TR. 1/24/17, p337);
- after Captain Tidwell slipped, other officers began to grab him, and he pushed them back to get them off of him (TR. 1/24/17, p338);
- when Captain Tidwell was punching him, he put up both of his hands to block the punches (TR. 1/24/17, p348);
- after he was restrained, Captain Tidwell broke his finger and said, "we are even now" (TR. 1/24/17, p349);
- when Captain Tidwell was punching him, he raised his hands to block the punches, but didn't know if his hands/arms were "waiving" around (TR. 1/24/17, p352); and
- although the video showed Sayed's hands coming toward Captain Tidwell, he was only trying to "block his punches to protect [himself] as a self-defense" (TR. 1/24/17, p353).

After the presentation of evidence at trial, defense counsel never requested a self-defense instruction and the court never provided the jury with an instruction

on self-defense.

C. Law and Analysis

The Due Process Clause requires the prosecution to prove each element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). When instructed on self-defense, disproving the existence of self-defense becomes an additional element of the offense that the prosecution must disprove beyond a reasonable doubt. *Castillo v. People*, 421 P.3d 1141, 1148 (Colo. 2018).

A trial court must provide the jury with an instruction on self-defense when the defendant presents "some credible evidence" on that issue. *People v. Newell*, 395 P.3d 1203, 1207 (Colo. App. 2017). A defendant satisfies his burden to present "some credible evidence" on self-defense—thereby warranting an instruction on self-defense—when he presents just a "scintilla of evidence," which means some evidence when viewed most favorably to the defendant that could support a jury finding in his favor. *Id.*

Trial courts have a duty to correctly instruct juries on all matters of law. *People v. Garcia*, 28 P.3d 340, 343 (Colo. 2001). In *People v. Pickering*, 276 P.3d 553 (Colo. App. 2011), the Colorado Supreme Court held that, if self-defense applies *as an affirmative defense*, "the prosecution bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, and the trial court must instruct the jury accordingly."

In Colorado, the issue of whether a trial court must sua sponte provide the jury with a self-defense instruction when the defense failed to request such an instruction, but the evidence was sufficient to warrant a self-defense instruction, has not been decided. In *People v. Lankford,* 524 P.2d 1382, 1385 (Colo. 1974), the Colorado Supreme Court held that the trial court did not have to provide the jury with a self-defense instruction—sua sponte—because the evidence in that case did not warrant such an instruction. *See also People v. Jacobson*, 2017 WL 2981807 (Colo. App. 2017) (declining to determine whether trial court's failure to instruct the jury on an affirmative defense without a request from the defense to do so constituted plain error because trial court did not err in failing to provide the statutory affirmative defense instruction).

The following cases from other jurisdictions, however, have held that a trial court has a duty to provide a jury with a self-defense instruction—sua sponte—when the issue is raised by the evidence presented at trial: *King v. Commonwealth*, 220 S.W. 755 (KY. 1920); *State v. Bidstrup*, 140 S.W. 904 (MO. 1911); *State v. Ford*, 130 S.W.2d 635 (MO. 1939); *State v. Browers*, 205 S.W.2d 721 (MO. 1947); *State v. Bryant*, 197 S.E. 530 (NC. 1938); *State v. Greer*, 12 S.E. 2d 238 (NC. 1940); *State v. Goodson*, 69 S.E.2d 242 (N.C. 1952); *Collegenia v. State*, 132 P. 375 (OK. 1913); *Owens v. State*, 225 P.2d 812 (OK. 1950); *State v. Brice*, 2 S.E.2d 391 (SC. 1939).

These courts have held that a court must—sua sponte—instruct a jury on self-defense when the issue is raised by the evidence presented at trial because the trial court has a duty to correctly instruct the jury on all matters of law.

Here, Sayed testified at trial and repeatedly stated that Captain Tidwell assaulted him which prompted him to try to block the punches and defend himself. Without a doubt, such testimony constituted a scintilla of evidence that he acted in self-defense; thus, the trial court had an obligation to instruct the jury on self-defense. *Newell*, 395 P.3d at 1207.

Indeed, a trial court has a duty to correctly instruct juries on all matters of law. *Garcia*, 28 P.3d at 343. To fulfill this duty, the trial court must instruct the jury on self-defense when the issue is raised by the evidence presented at trial. The evidence in this case unequivocally raised the issue of self-defense as an affirmative defense, and, therefore, the trial court had a duty to instruct the jury on self-defense to fulfill its duty to correctly instruct the jury on all matters of law. *Pickering*, 276 P.3d at 556; *Garcia*, 28 P.3d at 343; *Newell*, 395 P.3d at 1207; *see also King*, 220 S.W. 755; *Bidstrup*, 140 S.W. 904; *Ford*, 130 S.W.2d 635; *Browers*, 205 S.W.2d 721; *Bryant*, 197 S.E. 530; *Greer*, 12 S.E. 2d 238; *Goodson*, 69 S.E.2d 242; *Collegenia*, 132 P. 375; *Owens*, 225 P.2d 812; *Brice*, 2 S.E.2d 391.

Because the trial failed to fulfill its duty to correctly instruct the jury on all

matters of law when it failed to provide the jury with a self-defense instruction, and because there was a reasonable possibility that the jury would have acquitted Sayed of all charges had it been instructed on self-defense, Sayed requests that this Court reverse his convictions. *Miller*, 113 P.3d at 751.

Indeed, the evidence against Sayed was not overwhelming—or even particularly strong—as the jury acquitted him on count one and found him guilty of a lesser-included offense for count three. Moreover, had the jury been instructed on self-defense, the jury might have concluded that the officer was the aggressor and that Sayed merely acted in self-defense, just as Sayed testified. Without a self-defense instruction, the jury had no way of applying that concept to the evidence in Sayed's case. Lastly, by failing to instruct the jury on the affirmative defense of self-defense, the trial court lowered the government's burden of proof. *E.g. Pickering*, 276 P.3d at 556. Thus, there was a reasonable possibility that the trial court's error contributed to Sayed's convictions. *Miller*, 113 P.3d at 751. Sayed, therefore, requests that this Court reverse his convictions.

III. The trial court violated Sayed's due process rights, abused its discretion, and reversibly erred when it failed to order a competency evaluation for Sayed because substantial evidence was presented that demonstrated that (1) Sayed may not have understood the nature and course of the proceedings and (2) Sayed could not cooperate with defense counsel.

A. Standard of Review

This issue was preserved when counsel asked the court whether it believed

that Sayed was incompetent to proceed (TR. 1/23/17, pp23-24). A trial court's competency determinations will be upheld absent an abuse of discretion. *People v. Stephenson*, 165 P.3d 860, 866 (Colo. App. 2007) (internal citations omitted).

If a trial court abused its discretion in making its competency determination, appellate courts further employ the constitutional harmless error analysis. *People v. Matthews*, 662 P.2d 1108, 1111 (Colo.App.1983); *People v. Wingfield*, 411 P.3d 869, 874 (Colo. App. 2014).

B. Law and Analysis

Due process prohibits the trial of an incompetent defendant. *Dusky v. U.S.*, 362 U.S. 402, 403 (1960); *Bloom v. People*, 185 P.3d 797, 808 (Colo. 2008). A defendant is incompetent if he or she is suffering from a mental disease or defect which renders the defendant incapable of understanding the nature and course of the proceedings against him or her or of participating or assisting in the defense or cooperating with defense counsel. *Wingfield*, 411 P.3d at 874-75; *Dusky*, 362 U.S. at 402 (holding that the test for competence is whether 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."). If a "sufficient doubt" of competency has been raised, a trial court's failure to make a competency determination violates a defendant's right to due process. *People v. Kilgore*, 992 P.2d 661, 663 (Colo. App. 1999).

Similarly, a defendant's right to due process is violated if a trial court does not afford an accused an adequate hearing concerning his or her competency. *Wingfield*, 411 P.3d at 875.

The statutory procedures governing competency determinations are contained in C.R.S. § 16-8.5-101 through C.R.S. § 16-8.5-118. C.R.S. § 16-8.5-102(2)(a) provides that "if the judge has reason to believe that the defendant is incompetent to proceed, it is the judge's duty to suspend the proceeding and determine competency or incompetency of the defendant pursuant to section 16-8.5-103." C.R.S. § 16-8.5-103, in turn, provides the procedures the court must follow once the court has reason to believe that the defendant may be incompetent to proceed to trial. A court's non-compliance with the competency statutory procedures, which provide the safeguards necessary to insure against the prosecution of an incompetent defendant, constitutes error so prejudicial as to be characterized as one of constitutional deprivation. *Matthews*, 662 P.2d at 1111.

Here, sufficient doubt as to Sayed's competency existed. *Kilgore*, 992 P.2d at 663. Specifically, evidence existed that Sayed was suffering from a mental disease or defect which rendered him incapable of (1) understanding the nature and course of the proceedings against him and (2) participating or assisting in the defense or cooperating with defense counsel. *Wingfield*, 411 P.3d at 874-75; *Dusky*, 362 U.S. at 402 (holding that the test for competence is whether 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."). The trial court's decision to not have Sayed undergo a competency examination, therefore, violated Sayed's due process rights and warrants reversal of his convictions.

1. Understanding the Nature and Course of the Proceedings

On the first day of trial, January 23, 2017, defense counsel informed the court that:

- Mr. Sayed believed that additional investigation needed to be completed (TR. 1/23/17, pp2-3);
- Mr. Sayed believed "there to be witnesses who could testify that he was not responsible for the assault that took place in this case....[but] the entire assault in this case is on videotape and that videotape is probably the key piece of evidence...." (TR. 1/23/17, p9); and
- Mr. Sayed believed "there to be tampering on the videotape itself....Mr. Sayed believes there to be obvious evidence of tampering. He believes his previous counsel believes this, although previous counsel indicated to me that he hasn't looked into that particular issue to the extent that Mr. Sayed thinks that maybe he did. I don't think that he had looked into that really at all...." (TR. 1/23/17, p10).

Further, Mr. Sayed stated that (1) further investigation needed to be completed—interviewing 120 DOC inmates about what they saw on the date of the alleged incident—and (2) the video footage of the assault had been tampered with (TR. 1/23/17, pp19-20).

The prosecutor also stated "[t]he defendant simply – I don't know if he's playing games or if he truly thinks he's innocent and just looks at the world a bit off kilter. But his request is not reasonable. The position is not reasonable. There are no other witnesses that he alleges." (TR. 1/23/17, pp3-6).

Due to Mr. Sayed's conduct, defense counsel asked the court to look at Mr. Sayed's competency, noting that Mr. Sayed's conduct made her "question whether...we have any issues with competency to proceed based on some of the more fantastic ideas that Mr. Sayed has about how this all unfolded." (TR. 1/23/17, p24). Thus, defense counsel stated "So I guess I'm asking if we could have a very short discussion as to whether or not the Court believes that some of these more fantastic claims, do they rise to [the level of possible incompetency]." (TR. 1/23/17, p24).

These remarks about Mr. Sayed's fantastical beliefs raised sufficient doubt as to whether Mr. Sayed had a sufficient grasp of reality to understand the nature and course of the proceedings. *Wingfield*, 411 P.3d at 874-75; *Dusky*, 362 U.S. at 402; *Kilgore*, 992 P.2d at 663. Put another way, the remarks by defense counsel, the

prosecution, and Mr. Sayed gave the judge "reason to believe that [Mr. Sayed was] incompetent to proceed"; thus, the judge had a duty to suspend the proceedings and determine competency or incompetency of the defendant pursuant to section 16-8.5-103. C.R.S. § 16-8.5-102.

The court failed to fulfill this duty. Instead of having Mr. Sayed submit to a competency evaluation, the court stated that, "[e]ven though I refer to his theories as somewhat fantastical or conspiratorial, nothing that Mr. Sayed has presented to me, either in writing or in his presence today, suggested to me that I would raise competency." (TR. 1/23/17, pp24-25). Thus, the court, after having only met Mr. Sayed one time—at the pretrial hearing—concluded that the statements demonstrating Mr. Sayed's possible incompetence were of no import and that there was no need to have his competency assessed by an evaluator (TR. 1/23/17, pp24-25).

Because the weight of the evidence presented during the first day of trial demonstrated that sufficient doubt existed as to Mr. Sayed's competency and ability to understand the nature and course of the proceedings, and because the court disregarded such evidence, the trial court's competency determination was manifestly arbitrary, unreasonable, and unfair. *Stephenson*, 165 P.3d at 866.

2. Participating or Assisting in the Defense or Cooperating with Defense Counsel

Throughout the proceedings in this case, Mr. Sayed demonstrated that he could not cooperate with defense counsel. *Wingfield*, 411 P.3d at 874-75; *Dusky*, 362 U.S. at 402.

First, Mr. Gervey represented Mr. Sayed (CF, p25). On September 18, 2016, Mr. Sayed filed a pro se "Motion to Dismiss Counsel of Record and Appointment of the Office of Alternate Defense Counsel" wherein he alleged that (1) counsel was ineffective (2) counsel was "not vigorously acting in his best interest" and (3) a conflict with the public defender's office existed (CF, pp41-43). On October 1, 2015, at a dispositional hearing, the court addressed Mr. Sayed's pro se motion to dismiss the public defender's office and appoint ADC (TR. 10/1/15, pp434-41). Specifically, the court allowed Mr. Sayed to express why he believed that the public defender's office should be removed as court appointed counsel and Mr. Sayed stated that there were motions he believed to be meritorious that the public defender refused to file (TR. 10/1/15, pp434-41). The court, however, found that the motions Mr. Sayed sought to pursue had no merit and, therefore, concluded that no grounds existed for the appointment of ADC (TR. 10/1/15, pp434-41).

On October 15, 2015, Mr. Gervey filed a "Motion to Withdraw Because of a Total Breakdown in Communication Between Counsel and Mr. Sayed" (CF, pp56-57). In that motion, Mr. Gervey alleged that Mr. Sayed refused to visit with him

thus rendering representation "unreasonably difficult" for him (CF, pp56-57). On October 15, 2015, the trial court granted Mr. Gervey's request to withdraw and appointed Thor Bauer—from ADC—to represent Mr. Sayed (CF, p58).

On December 2, 2015, Mr. Bauer filed a "Motion to Withdraw" wherein he asked the court to issue an order permitting him to withdraw because no conflict existed between Mr. Sayed and the public defender's office (CF, pp73-74). On December 3, 2015, the trial court issued its "Order Re: Motion to Withdraw" wherein it denied Mr. Bauer's motion to withdraw because "the public defender's office determines whether such conflicts exist, subject to court review," not ADC attorneys (CF, p75).

On December 9, 2015, Mr. Sayed filed, pro se, "Defendant's Objection to Counsel's Motion to Withdraw" wherein he alleged that a conflict of interest existed between him and Mr. Bauer but objected to Mr. Bauer's statement that no conflict existed between him and the public defender's office (CF, pp76-79). Thus, Mr. Sayed requested that new ADC counsel be appointed (CF, p79).

On December 9, 2015, Mr. Sayed also filed a pro se "Response to Counsel's Motion to Withdraw and Motion for Appointment of Alternate Conflict Free Counsel" (CF, pp80-82). In that document, Mr. Sayed alleged that Mr. Bauer had a conflict of interest which prevented him from adequately and completely

representing him (CF, p81). Thus, Mr. Sayed again requested that the court appoint new ADC counsel (CF, p82).

On April 6, 2016, at the scheduled preliminary hearing, the court found that Mr. Sayed waived his preliminary hearing and pleaded not guilty (TR. 4/6/16, pp419-20). In response, Mr. Sayed stated that he did not knowingly, voluntarily, and intelligently waive his right to a preliminary hearing because he felt that he was coerced into doing so by the prosecutor's failure to turn over certain items of discovery (TR. 4/6/16, pp422-23). In response, Mr. Bauer stated that he was "in a very precarious position as [Mr. Sayed's] attorney" because Mr. Sayed waived his right to a preliminary hearing, but then stated that he did not do so voluntarily (TR. 4/6/16, pp423-24). Thus, Mr. Bauer asked to set Mr. Sayed's case for a preliminary hearing and stated, "if Mr. Sayed's not happy with that decision that I'm making then I have difficulties with my continued representation."

In response to Mr. Bauer's requests and statements, the court stated:

> I'm not going to allow the withdrawal of the not guilty plea because I feel like we are being whipsawed by your client. He's playing games. He's pretending to be an attorney and won't let you do your job as an attorney. His job is to help you in defense, but not be the attorney. He thinks he's an attorney. He's not. Not even close. And I don't mean to say that to insult him, but he's not an attorney....And Mr. Sayed is going to have to let you, Mr. Bauer, do your job as an attorney and let you be in charge of the law. You're the captain of the ship. He makes three decisions....All the other decisions are left to Mr. Bauer, who is perfectly capable of handling these things. Been practicing for 20 years, for crying out loud. So I'm very confident Mr. Bauer has a good handle on the law and what it requires. But I'm

> not going to let ourselves be played Mr. Sayed any further....I'm not delaying this thing anymore for this Defendant who thinks he's a lawyer and he's not. End of story and I don't want to hear anything more.

(TR. 4/6/16, pp425-26).

On June 1, 2016, Mr. Sayed filed a pro se "Motion to Dismiss Assigned Counsel and Request for Appointed New Counsel, Ineffective Assistance" (CF, pp178-80). In that motion, Mr. Sayed alleged that Mr. Bauer (1) failed to file the motions Mr. Sayed wanted to file (2) provided ineffective assistance of counsel and (3) had a conflict of interest (CF, pp178-80).

On June 23, 2016, Mr. Bauer filed a "Motion to Withdraw" wherein he stated that (1) he denied Mr. Sayed's ineffective assistance of counsel allegations (2) the court had previously dismissed the public defender's office due to a breakdown in communication with Mr. Sayed and (3) Mr. Sayed's actions in court demonstrated that he "[did] not wish to either have counsel or listen to the advice of counsel" (CF, pp175-76). Thus, Mr. Bauer requested to withdraw as counsel for Mr. Sayed (CF, pp175-76).

On June 24, 2016, the trial court issued an "Order to Withdraw" wherein the court allowed Mr. Bauer to withdraw and stated that it would appoint substitute ADC counsel (CF, p181). On August 1, 2016, the court appointed ADC counsel Stephanie Stout to represent Mr. Sayed (CF, p208). On August 4, 2016, Ms. Stout entered her appearance as counsel for Mr. Sayed (CF, p209).

On the first day of trial, January 23, 2017, defense counsel—Ms. Stout—began the proceedings by stating:

> Judge I was discussing with Mr. Sayed this morning issues and Mr. Sayed has asked me to bring to the Court's attention on his behalf that while I believe that I am ready to proceed to trial he does not believe that he is prepared to proceed today. He believes that there is investigation that is remaining. He believes that there are potential witnesses who he believes are necessary. I have prepared the case and made certain strategic decisions, as are my responsibilities pursuant to the statute and the Rules of Professional Conduct, and believe [sic] that I have complied with what I need to comply with. However, Mr. Sayed is not comfortable proceeding today and he is requesting that this Court continue the trial. He is not comfortable with the way that I have prepared the case at this point....I think the record is sufficient that I have prepared the case making strategic decisions based upon my experience and expertise and the way that I believe that the case needs to proceed. But my life is not the one that is impacted and Mr. Sayed's life is. And he is not satisfied with proceeding today in the manner that I have determined is how I would proceed.

(TR. 1/23/17, pp2-3).

In response, the prosecutor stated:

> Your Honor, the People object to any further continuance of this case....This case has been delayed mostly because – well, not mostly, almost entirely because of the defendant's actions....
>
> The defendant has filed no complaints about Ms. Stout or anything to that degree. But at this point even if he had he's complaining about how she's preparing for trial.
>
> The defendant has now had three attorneys, neither [sic] of which he apparently finds satisfactory. I think that reflects more on his inability to know what he's talking about than on the defense attorney's capability to prepare for trial...[H]e's filed numerous frivolous motions. Other motions to dismiss, a couple dozen pro se motions, even though he's been represented by an attorney the entire time. All of those motions have been denied or dealt with by Judge

Singer leading up to trial.

The defendant simply – I don't know if he's playing games or if he truly thinks he's innocent and just looks at the world a bit off kilter. But his request is not reasonable. The position is not reasonable. There are no other witnesses that he alleges....

(TR. 1/23/17, pp3-6).

The court then held a *Bergerud* hearing out of the presence of the prosecution (TR. 1/23/17, pp7-25). During the *Bergerud*, hearing, Mr. Sayid stated that he believed that (1) further investigation needed to be completed— interviewing 120 DOC inmates about what they saw on the date of the alleged incident— (2) the video footage of the assault had been tampered with and (3) counsel had failed to visit and communicate with him (TR. 1/23/17, pp19-20).

This evidence demonstrated that there was sufficient doubt as to whether Mr. Sayed could cooperate with defense counsel. *Wingfield*, 411 P.3d at 874-75; *Dusky*, 362 U.S. at 402; *Kilgore*, 992 P.2d at 663. Put another way, Mr. Sayed's continuous inability to (1) work with defense counsel (2) communicate with defense counsel (3) allow defense counsel to prepare the case based on their skill and experience demonstrated that there was "reason to believe that [Mr. Sayed was] incompetent to proceed"; thus, the judge had a duty to suspend the proceedings and determine competency or incompetency of the defendant pursuant to section 16-8.5-103. C.R.S. § 16-8.5-102; *Wingfield*, 411 P.3d at 874-75; *Dusky*, 362 U.S. at 402; *Kilgore*, 992 P.2d at 663.

The court failed to fulfill this duty. Instead of ordering Mr. Sayed to submit to a competency evaluation, the court stated that, based upon reviewing the court file and meeting Mr. Sayed one time, it did not have concern about Mr. Sayed's competency (TR. 1/23/17, pp24-25). Thus, the court, after having only met Mr. Sayed one time—at the pretrial hearing—concluded that Mr. Sayed's continuous inability to cooperate with defense counsel was of no import and that there was no need to have his competency assessed by an evaluator.

Because the weight of the demonstrated that sufficient doubt existed as to Mr. Sayed's competency and ability cooperate with defense counsel, and because the court disregarded such evidence, the trial court's competency determination was manifestly arbitrary, unreasonable, and unfair. *Stephenson*, 165 P.3d at 866.

3. Conclusion

Because the trial court abused its discretion by making a competency determination that was manifestly arbitrary, unreasonable, and unfair, reversal of Mr. Sayed's convictions is warranted. *Stephenson*, 165 P.3d at 866; *Matthews*, 662 P.2d at 1111; *Wingfield*, 411 P.3d at 874; *Blecha*, 962 P.2d at 942. Indeed, because there was substantial evidence that demonstrated Mr. Sayed's potential incompetence, the trial court's failure to afford Mr. Sayed a competency evaluation violated his due process rights. *Dusky*, 362 U.S. at 403; *Bloom*, 185 P.3d at 808; *Matthews*, 662 P.2d at 1111.

Moreover, because the proceedings were not delayed to conduct a competency hearing, Mr. Sayed was permitted to testify in his defense, during which he relayed his conspiratorial and fantastical theories to the jury, which likely prejudiced him. *Blecha*, 962 P.2d at 942 ("If there is a reasonable probability that [the defendant] could have been prejudiced by the error, the error cannot be harmless."). Also, because the proceedings were not delayed to conduct a competency hearing, counsel had to proceed to trial without Mr. Sayed's competent assistance[5], which likely substantially prejudiced the defense. *Id.*

CONCLUSION

For the reasons and authorities presented in arguments I. and II. above, Sayed requests that this Court grant his petition for writ of certiorari.

[5] E.g. on January 23, 2017, defense counsel stated that Mr. Sayed would not agree to certain defenses she thought to be potentially meritorious (TR. 1/23/17, p14)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Hazel Greyeat

Date: July 1, 2020.