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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Trial Judge
The Honorable Paul M. Burch, Post-Conviction Relief Judge

Appellate Case No. 2019-001127

Henry L. Gray, #162134,

Petitioner,

v.

State of South Carolina,

Respondent,

BRIEF OF RESPONDENT

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STATEMENTS OF ISSUE ON CERTIORARI

Petitioner's Statement of Issue Presented

The PCR court erred where it found counsel provided effective assistance where counsel failed to object to Petitioner being visibly shackled during trial, where the routine use of physical restraints visible to the jury is forbidden by the Due Process Clause, since visible shackling is "inherently prejudicial."

Respondent's Counterstatement of Issue Presented

The post-conviction relief court correctly found Trial Counsel deficient for failing to preserve Petitioner being shackled at trial; however, Petitioner failed to establish prejudice because the record shows: Trial Counsel raised the objection in chambers; the trial court stated shackling "was required in this particular matter;" the trial court would have made the same ruling had the objection been placed on the record; and the trial court's ruling would have been upheld on appeal; further, the evidence was overwhelming that Petitioner beat Mack after the first beating and the crux of the case was which beating caused Mack's death.

STATEMENT OF THE CASE

Petitioner Henry Gray and his sister, Robin Reese (Reese), were indicted for first-degree lynching and murder. (App. pp. 1419–22). Petitioner and Reese's charges stemmed from the beating and resulting death of Kenneth Mack (Mack). Petitioner was represented by Mathias Chaplin, Esquire (Trial Counsel). Assistant Solicitors Kathryn Luck Campbell, April Sampson, and Nicole Simpson prosecuted the case. (App. p. 1).

On February 28–March 2, 2012, Petitioner and Reese received a joint jury trial before the Honorable G. Thomas Cooper.[1] (App. p. 1). The jury convicted Petitioner and Reese as indicted. Judge Cooper sentenced Petitioner to serve concurrent terms of thirty years imprisonment. (App. pp. 1423–24). Petitioner appealed.

Appellate Defender David Alexander represented petitioner on appeal. (App. p. 1186). Petitioner, through appellate counsel, briefed the following issues to the Court of Appeals:

> 1. Whether the trial court erred in admitting gruesome autopsy photographs that were unnecessary to prove any contested fact and which unduly prejudiced appellant?
>
> 2. Whether the trial court erred in refusing to give an involuntary manslaughter charge because evidence showed that the decedent's death could have been the result of a trivial fight?

(App. pp. 1186–1210). After briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) (App. p. 1257). The Remittitur was returned on June 27, 2014. (App. p. 1272).

Petitioner commenced the underlying PCR action on July 1, 2014. (App. p. 1273). The State made its return on November 19, 2014. (App. p. 1287). Petitioner amended his allegations

[1] Judge Cooper denied the defendants' pretrial motions for a severance.

on July 10, 2017. (App. p. 1292). Petitioner presented the following allegations at the PCR hearing:

1. Ineffective assistance of counsel:
   a. Failure to investigate and prepare for trial;
   b. Failure to object to Petitioner being shackled during trial;
   c. Failure to object to the same jury pool being used after a Batson motion was granted;
   d. Failure to object to witnesses testifying they were scared to testify;
   e. Failure to object to information regarding gangs being introduced and/or opening the door to such testimony;
   f. Failure to object to burden shifting in the State's closing argument;
   g. Counsel forced Petitioner to not testify regarding his defense; and
   h. Failure to obtain a ruling on the record regarding a lesser-included charge on lynching.

(App. pp. 1292–93; p. 1357). This appeal deals with allegation b.

An evidentiary hearing into the matter convened on August 30, 2017, before the Honorable Paul M. Burch. Petitioner was present and represented by Anna R. Browder, Esquire. Assistant Attorney General Jessica Kinard represented the State. (App. p. 1295). After a full evidentiary hearing and record review, the PCR court denied relief on July 1, 2019. (App. p. 1355). Petitioner appealed.

STATEMENT OF THE FACTS

Petitioner and Reese were jointly tried for murdering and lynching Mack. On February 13, 2010, Mack suffered two beatings at Gonzales Gardens[2] (the Gardens). Mack was twice beaten because he allegedly assaulted Reese's thirteen-year-old daughter, M.S. a/k/a "Lucy." Petitioner and Reese were charged in connection to the second beating, where they both beat Mack with a metal chair and kicked him until he was unconscious. Several witnesses observed both beatings. Mack died.

FIRST BEATING

On February 13, 2010, Marcellius "Bloom" Brooks (Brooks) and Angelo "Ricky" Boyd (Boyd) walked up McDuffie Avenue to Cousins Mini Mart on Forest Drive. (App. pp. 242–45; p. 254; pp. 523–25). Brooks and Boyd both testified at trial. As they walked, they saw Mack grabbing Lucy's arm. Lucy was yelling at Mack to "stop." Mack persisted and threw Lucy to the ground. Brooks and Boyd intervened. Brooks tackled Mack, punched him twice in the face, and held him down while Boyd kicked him. Brooks and Boyd also encouraged Lucy to "get her licks in." A crowd watched the beating. Eventually, Boyd pulled Brooks off Mack, and Mack fled "towards the bottom of [the Gardens]." (App. pp. 245–48; pp. 254–55; pp. 260–63).

Issac Weathers (Weathers) lived in the Gardens in 2010 and witnessed the first fight on February 13. Weathers saw Lucy and Mack arguing but thought they were playing when Lucy and Mack got tangled up and fell to the ground. Then, "a bunch of guys just went and jumped on him." According to Weathers, Brooks hit Mack first, then encouraged Lucy to "get [her] licks in." (App. pp. 656–58; p. 662; p. 664). Mack tried to convince his attackers that he and Lucy were just

[2] Gonzales Gardens was Columbia's oldest public housing complex and has since been razed. The complex was bordered by Forest Drive to the North, Washington Street to the South, McDuffie Avenue to the East, and Lyon Street to the West. http://www.chasc.org/gonzales-gardens.html.

playing and tried to defend himself. After the beating, Mack "jumped up and ran." The attackers went to the store. Weathers heard Brooks say that he did not get the man good enough. (App. pp. 655–59; p. 665; pp. 669–70).

Amber Hardy managed the nearby CVS on Forest Drive and witnessed the first fight. On February 13, Hardy followed a shoplifter in her car while on the phone with the police. While following the shoplifter, Hardy described seeing four black men and a black woman beating a black man (Mack) on McDuffie Avenue. Hardy testified Mack was trying to defend himself, and the beating lasted about five minutes. (App. pp. 474–78; pp. 480–83; p. 490). After the attack, Mack could stand, but he was very unsteady on his feet. (App. pp. 477–78; pp. 489–90).

When the first fight ended, Brooks and Boyd took Lucy to Cousins Mini Mart, where Reese played video poker. The crowd followed. Brooks and Boyd told Reese about the incident and assured her "it was already good." (App. p. 256). Brooks and Boyd then left the store, and Reese and Lucy left a short time later. As she was leaving, Reese made a phone call. Reese left and walked down Forest Drive. Brooks took McDuffie Avenue to the apartment of a woman named Valerie Goodwin. (App. pp. 565–70).

SECOND BEATING

Petitioner's father lived in the Gardens across the hall from Donetti Perry (Perry) and near Sanovia Thompson (Thompson). (App. p. 277; p. 640). Thompson, Perry, Kara Chase (Chase), and Mary Anderson (Anderson) all witnessed the second beating.

Thompson saw Mack walking down Forest Drive "with his hand over his head," and "[h]e appeared to be intoxicated . . . ." (App. pp. 636–37). Mack had a bleeding knot on his head and was staggering. (App. p. 638). Thompson heard Petitioner ask Mack what happened, and Mack "said something about some young b-i-t-c-h up the street." (App. pp. 638–40). Then, Petitioner's

phone rang, and he entered his father's apartment to answer it. (App. p. 640). Shortly after that, Petitioner exited his father's apartment and said, "you put your hands on my niece," grabbed Mack by the collar, and said, "we're going to talk to my sister." (App. p. 640; p. 642). Thompson followed from a distance and stopped in front of Perry's apartment, where Perry and Kara Chase were standing. (App. pp. 643–44). When Thompson saw Petitioner and Mack again, Mack was on the ground. At this time, Reese arrived and "looked like she was upset, maybe crying." (App. pp. 643–44). Thompson briefly walked away from the confrontation. (App. p. 644). When she returned, Thompson heard Reese ask Mack, "Why did you put your hand on my baby[?]" and then saw Reese kick Mack in the leg. Thompson called 911. (App. pp. 644–46; p. 649).

Perry recalled the events differently. According to her, on February 13, Thompson came to Perry's door and told her something was happening outside. Perry looked outside and saw Petitioner and Mack talking. Petitioner asked Mack what had happened to him. Petitioner then entered his father's house because the phone rang. When Petitioner returned, he used his feet to "clip" or undercut Mack's feet from underneath him. Perry testified Mack immediately fell to the ground and struck his head. (App. pp. 279–81). Mack did not get up, and Petitioner repeatedly kicked Mack. Petitioner also repeatedly cussed Mack and asked what Mack had done to Petitioner's niece.

According to Perry, Reese came from her apartment and joined the beating, and Mack never got off the ground or defended himself. Even so, Reese retrieved a metal chair from a nearby porch, and she and Petitioner beat Mack with the chair "two or three times."[3] (App. pp. 281–87;

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[3] The bottom of the chair presumptively tested positive for blood, and a partial DNA profile was developed. The partial DNA profile matched Mack, and "The probability of randomly selecting an unrelated individual having a DNA profile matching . . . [was] one in approximately twenty-five million." (App. pp. 605–12).

p. 301; pp. 303–06). By then, a crowd had gathered around the beating. Eventually, Petitioner and Reese stopped beating Mack and returned to their respective apartments. Perry stated Mack was injured all over, and blood was coming from his mouth. (App. pp. 287–90).

Kara Chase (Chase) saw Mack walking down a street through the Gardens. According to Chase, Mack and Petitioner had a disagreement over something Mack said. Petitioner grabbed Mack and said, "you're gonna talk to me." (App. pp. 393–99). Chase stated the grab was not forceful, but Mack did not want to go with Petitioner. Petitioner then hit Mack hard enough to take Mack's feet out from under him. Mack fell to the ground and never got up. (App. pp. 399–401; p. 403). Chase recalled Petitioner walked off after Mack hit the ground. She recalled Reese hitting Mack and recalled Petitioner continuing to kick and stomp Mack in the face after Reese stopped. Chase recalled Petitioner hitting Mack with a chair, and Petitioner was wearing construction boots. (App. pp. 407–08). However, Chase claimed she could not remember Reese ever picking up or hitting Mack with a chair. (App. pp. 401–07; p. 410; pp. 412–13; pp. 422–24).

Chase's trial testimony differed from what she initially told the police. Chase told the police:

> I saw the victim in between … [two] buildings of [the Gardens] having a conversation with another man. The other man grabbed the victim and went to walk him down the sidewalk. The victim snatched back and the other man swept the victim from [off] his feet causing the victim to hit his head on the pavement . . . . A few seconds later a female runs up the street saying "That's him." She begins kicking the man repeatedly, picking up an old metal chair, throwing it on top of the victim. The other man continued to kick and stomp the man in his face. Once [she] stopped, the victim laid on the ground the whole time this was occurring.

(App. p. 748).[4]

Anderson testified that her now-deceased sister lived in the Gardens in February 2010, and she visited her sister on the afternoon of February 13. (App. pp. 347–53). As Anderson left her sister's apartment, she saw Reese and Petitioner beating Mack while he was on the ground, stomping him, kicking him, and beating him with a metal chair; however, Mack was not moving. (App. pp. 353–53; p. 360). Anderson could not recall who was beating Mack with the chair at trial; however, she told the police that Reese and Petitioner both did. (App. pp. 353–55).

As Reese was attacking Mack, Anderson heard Reese say, "[M]otherfucker, why [did] you approach my 13-year-old?" (App. p. 354). This attack "[l]asted for a while" and was so intense that Anderson momentarily turned away from it and eventually had to leave. (App. p. 355). She was concerned that Reese and Petitioner were going to kill the man. (App. p. 353). After Reese and Petitioner stopped their attack, they walked to their father's apartment. (App. p. 368). Mack was left for dead.

Officers Matthew Buck (Buck) and Harry Delage (Delage) responded to a reported fight involving several people at the Gardens. There was no fight when they arrived. However, dispatch informed Buck and Delage that one person involved in the fight wore a red hoodie or hat, and another wore a black sweatshirt and carried a red bag. (App. p. 175; pp. 177–78; pp. 192–96; p. 206). While they did not find a fight, Delage saw a man with a red backpack enter a nearby apartment. Delage spoke to Valerie Goodwin (Goodwin) at that apartment. Goodwin informed Delage that Brooks had entered her apartment but was no longer there. (App. p. 178–79; p. 182; pp. 189–90; pp. 196–98; pp. 205–07).

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[4] When interviewed by the Fifth Circuit Solicitor's Office investigation the day before the trial started, Chase confirmed that her February 16, 2010, statement was correct. (App. pp. 730–34; p. 743).

Delage and Buck then learned a man (Mack) was on the ground between two buildings in the Gardens. When they found Mack, he was unconscious and seemed to be having a seizure. Mack was transported to the hospital, where he died shortly after arriving. (App. pp. 179–81; p. 184; pp. 198–200; pp. 382–88; pp. 678–80; p. 760).

GANG INVOLVEMENT

The joint defense, Reese and Petitioner, moved pretrial to bar the introduction of evidence of gang affiliation, and the prosecution agreed to do so unless the defense opened the door to its admission. (App. p. 108). In Trial Counsel's opening statement, he stated that a third defendant should be tried for the murder, Marcellius Brooks (Brooks), but that the State had not mentioned him. (App. pp. 163–64). Trial Counsel suggested that "Brooks and his thugs beat the life out of the deceased" and then did "a celebratory dance acknowledging that." (App. p. 164). Trial Counsel, therefore, agreed with the State that others were involved in Mack's murder but not Petitioner, who was innocent. (App. pp. 164–67).

Trial Counsel did not mention either gang affiliation or the Bloods in his opening statement, and no such mention was made during the parties' examination of the first four prosecution witnesses, including Angelo Boyd, one of the individuals involved in the first attack on Mack. Likewise, there was no mention of gangs in the State's direct examination or Reese's cross-examination of Perry. (App. pp. 274–303). However, Reese did elicit that Perry was friends with Brooks' brother. (App. pp. 305–06). Perry testified that he learned later in the day of the murder that Brooks was involved in the earlier attack on Mack. (App. p. 313). When Trial Counsel thereafter questioned Perry as to whether she gave a statement that she saw Brooks' brother Lamar, a/k/a Big Baby, wearing a t-shirt with pictures of Reese and Petitioner on the front and the word

"innocent" on the back of it, the trial judge excused the jury and heard further testimony in camera. (App. p. 318).

Outside the jury's presence, she claimed that she could not recall anyone wearing a shirt as the one described. (App. pp. 320–21). On further in-camera examination, she admitted she told police that she had heard the Bloods of McDuffie Avenue had beaten up Mack. She also admitted that the apartment complex supervisor came to her residence and told her that members of the Bloods were in her house and that she would be evicted if they were caught in her house. However, she denied telling the private investigator that the Bloods "would be at the young girl's house who stayed around the corner," that she had identified Brooks a/k/a "Bloom" as a Blood, or that members of the Bloods went to her residence. (App. pp. 321–23).

When she denied she was testifying because she was afraid of what gang members might do to her, Trial Counsel informed the trial judge that he had a signed statement that contradicted her testimony. The trial judge ruled that Trial Counsel could not present hearsay but could question Perry about whether she knew who the Bloods were and whether they had been to her residence. The State indicated that if Trial Counsel opened the door to gang affiliation, it would go into Petitioner's gang affiliation. (App. pp. 323–24). In response to the State's questioning regarding the relevancy of testimony about the t-shirt with pictures of Reese and Petitioner on it and the word "innocent" on the back, Trial Counsel stated that contrary to Perry's claim she only knew Brooks casually, "I think that she knows a great deal more, and I do believe that I would like to examine her more thoroughly in front of the jury to determine whether or not there is a bias here[,] [o]r if maybe she is fearful or something [is] going on as to why her statements are so contradictory." (App. pp. 324–25).

The trial judge inquired as to how Trial Counsel could impeach her with hearsay, and Trial Counsel noted that she admitted being a "person of interest as far as affiliating with gang members and that the Gang Task Force has been to her house." Also, Trial Counsel stated the Bloods occupy the apartment complex where the murder occurred, and he believed that was the reason she had testified as she did. (App. p. 325). Perry then responded, "No" to Trial Counsel's question as to whether she was afraid of the Bloods. The State again warned that Trial Counsel was opening the door to evidence of prior bad acts by Petitioner and why Perry "would be scared of him." (App. p. 326).

After the jury returned to the courtroom, Trial Counsel elicited that Perry was questioned by the City of Columbia Police Department's Gang Task Force but denied being affiliated with or a member of a gang. Although she admitted that she knew Brooks' brother and that she later learned Brooks was involved in the initial attack, she denied knowing whether he was a Blood, and denied she was testifying "out of fear of reprisal when [she] get[s] back to [the apartment complex]." (App. pp. 327–30).

The State thereafter presented testimony from Sgt. William Pegram (Sgt. Pegram), the supervisor for the City of Columbia Police Department's Violent Crimes Unit and the chief investigating officer in this case. (App. pp. 756–62; pp. 768–97). He testified it was not unusual for no one to come forward with information about an assault in the apartment complex where the murder occurred. He explained he had been assigned to the FBI in 2006 and was responsible for investigating the Gangster Killer Bloods (GKB). According to Sgt. Pegram, the FBI identified the apartment complex where the murder occurred "as a hot spot for the Bloods street gang. People in that neighborhood generally will not talk to the police, because … [if they do], there is a very good likelihood that [they] will be killed." So, residents there "are not going to be seen talking to

the police." (App. pp. 762–64). He later testified that Lucy was affiliated with the GKB. Trial Counsel did not object to this testimony. (App. pp. 797–98).

Following Trial Counsel's cross-examination of Sgt. Pegram, in which Trial Counsel elicited that Sgt. Pegram had seen a video of one of the men doing the "Bloods bounce" and that he was aware of the Bloods forcing people to make statements, the State asked, "Who is affiliated with Marcellius Brooks, the Blood in this case?" (App. pp. 824–25).[5] Sgt. Pegram responded, Petitioner and Robin Reese. The State also elicited that if a witness was afraid of anyone in the case, it would be Petitioner and Reese. (App. p. 825).

PCR TESTIMONY

Petitioner does not dispute that he and Reese beat Mack. Indeed, at the PCR hearing, Petitioner testified he wanted to take the stand at trial to tell his side of the story. Petitioner wanted to tell the jury, "That it was a freak accident." (App. p. 1316). Petitioner testified he exited his father's home and saw Mack talking to a man. Petitioner noticed Mack was bleeding, explaining, "He all bust up (sic), head knot and stuff on his head, bleeding." Petitioner asked Mack what happened, and Mack replied, "Just beat." (App. p. 1317). Petitioner walked back into his father's home and answered the phone. His sister, Reese, told Petitioner that Lucy had been attacked, saying, "Dude slam (sic) her [and] was on top of her." (App. p. 1317). Reese described the man to Petitioner, and Petitioner responded, "Well, he around here," and hung up the phone. (App. p. 1317). Petitioner exited his father's home and asked Mack, "Yo, what you did (sic) to my niece?" (App. p. 1317). Then, Petitioner:

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[5] Earlier, Trial Counsel had elicited that Brooks was the first person charged with Mack's murder and that Sgt. Pegram felt that Brooks had minimized his involvement in the case and that some of what he told police was inaccurate. (App. pp. 816-17; pp. 824-25). Trial Counsel also established that Sgt. Pegram's investigation "assaulted the victim. I don't know how many [times] he struck [the victim]." (App. p. 826).

> [G]rabbed [Mack] from the - - by like, back of the shirt on around the collar. And we was - - proceeded to walk down the sidewalk. We were going to meet my sister and my niece. [Mack] snatch away; startle me (sic). I clipped him up. . . .
>
> [Mack] hit the ground. He was laying on the ground with his hand over his face. I walked to the edge of the building to see - - if I could see my sister and my niece coming.
>
> So they came around and . . . we roughed him up a little bit and then we went on about our way.

(App. p. 1318). Petitioner's version of events essentially corroborates Thompson, Perry, Chase, and Anderson's trial testimony.

Petitioner also testified he was shackled throughout the entire trial. (App. pp. 1309–11). Additionally, Petitioner testified he has never been a gang member, but the Bloods were affiliated with his father's neighborhood—the Gardens. (App. p. 1313).

Trial Counsel explained his trial strategy:

> [T]he theory of our case was that the beating that [Mack] received at the top of the hill was delivered by. . . gang members. And. . . that's how we presented it, is that [the first beating] was uncalled for . . . it was a very brutal beating; and [the gang] just jumped on [Mack] and beat the brakes off the guy, to be blunt.

(App. p. 1335). Trial Counsel explained he did not think the mention of gangs was harmful:

> I think that what we were trying to do [was] paint a picture in the jury's mind that this wasn't just a couple of random passerbys (sic) that interfered and - - and beat [Mack], but this was a brutal beating by the hand of gang members and that the cause of death was directly related to that brutal beating.

(App. p. 1336).

Counsel recalled an in-chambers discussion of Petitioner being shackled at trial. He recalled that he and Reese's attorney challenged Reese and Petitioner being shackled at trial in chambers:

> But we were told that was - - that was required in this particular matter. And - - and it was very obvious, and it was, I believe, somewhat prejudicial to both . . . defendants. However, there was

> nothing that I was able to accomplish with regards to having them removed.

(App. p. 1337). Counsel explained he referenced the shackles in his opening argument "to try to soften the blow a little bit." (App. p. 1338). As for failing to object to the State's closing argument comment, Counsel stated, "If . . . I didn't object, I probably should have." (App. p. 1348).

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STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court correctly found Trial Counsel deficient for failing to preserve Petitioner being shackled at trial; however, Petitioner failed to establish prejudice because the record shows: Trial Counsel raised the objection in chambers; the trial court stated shackling "was required in this particular matter;" the trial court would have made the same ruling had the objection been placed on the record; and the trial court's ruling would have been upheld on appeal.

Petitioner argues Trial Counsel was constitutionally ineffective for failing to object to Petitioner being physically restrained and calling the jury's attention to the restraints. Petitioner argues Trial Counsel was deficient for failing to preserve Petitioner's being shackled for appeal. Petitioner argues he was prejudiced because the shackles were visible; the trial court did not give its reason for supporting the use of shackles, and there was no reason to justify the shackling. Further, Petitioner argues that shackling is inherently prejudicial. Nevertheless, the PCR court correctly found Petitioner had not proven prejudice. Indeed, Petitioner was not prejudiced because the trial court did not abuse its discretion in requiring Petitioner to be shackled at trial, and the evidence overwhelmingly showed that Petitioner beat Mack and left him to die. Accordingly, this Court should deny certiorari as to this issue.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong

presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, counsel's performance is measured by its "reasonableness under professional norms." Id. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the Petitioner as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

A PCR applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue for appellate review. Milledge v. State, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018). In determining prejudice, "the PCR court must view the trial court's ruling through the same lens that would be applied on appeal." Id. at 380, 811 S.E.2d at 804.

In Deck v. Missouri, the United States Supreme Court held that visible restraints may be used if "justified by an essential state interest" such as security. 544 U.S. 622, 624 (2005) (quoting

Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986)). However, relying on precedent concerning the guilt phase of trials, the Court concluded that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court's determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial" including "potential security problems and the risk of escape at trial." Id. at 629. "But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." Id. at 632. If exceptional circumstances warrant the use of visible restraints, the trial judge must make on-the-record findings as to the circumstances that compel their use. Id. at 633-34 (emphasizing that the determination "should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial").

Here, the PCR court made a factual finding, based on Trial Counsel's testimony, that the trial court ruled in chambers that shackling "was required in this particular matter." (App. p. 1337). The trial court's ruling implies that the shackles were justified in this case. Petitioner failed to offer any support for the proposition that if Trial Counsel had objected to the shackling on the record, the trial court would have changed its ruling. Further, had Trial Counsel objected at trial, the trial court likely would have stated its reasoning for requiring shackling—a justifiable essential State interest.

The record establishes security was a concern at trial, which creates a justifiable State interest. First, the underlying facts of the case were that Petitioner and Reese, who were tried together, brutally beat Mack to death to teach him a lesson—to warn him from ever coming near Lucy again. Second, while Petitioner refuted being a Blood gang member, he acknowledged the Bloods were affiliated with the Gardens. (App. p. 1313). Finally, State witnesses feared

cooperating with law enforcement, "Because you don't talk to the police in the hood like that." (App. p. 414; see also App. p. 763) ("Gonzales Gardens was actually identified by the FBI as a hot spot for the Bloods street gang. People in that neighborhood generally will not talk to the police. . . . You[] talk to the police in [the Gardens], there is a very good likelihood that you will be killed."); (App. p. 797) (stating Lucy is affiliated with the GKB); (App. p. 825) (stating Petitioner and Reese are affiliated with Marcellius Brooks, the Blood in this case).

The record establishes that the trial court had a legitimate reason for requiring shackling at trial. The trial involved two associated Blood gang members; a State's witness who was a known Blood; and State witnesses were scared to cooperate with law enforcement because, as Chase stated, "You don't talk to the police in the hood like that." Even if the trial court's decision to require shackling had been objected to, the court's ruling would have been the same—Petitioner would have still been shackled—and Petitioner cannot show prejudice.

Further, the PCR court did not err in finding overwhelming evidence of guilt such that Petitioner being shackled was not reasonably likely to have affected the outcome at trial. "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." Smalls v. State, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Overwhelming evidence of guilt "is one significant factor the court must consider—along with the specific impact of counsel's error and other relevant considerations—in determining whether the applicant has met his burden of proving prejudice." Id. at 190, 810 S.E.2d at 844. "However, for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be

met." Id. at 191, 810 S.E.2d at 845.

This case presents a combination of something conclusive and physical and corroborating evidence Smalls provides that can categorically preclude prejudice. First, the evidence includes something conclusive: Petitioner admits he beat Mack; Mack's DNA was on the bottom of the chair; and several eyewitnesses claimed Petitioner and Reese brutally beat Mack with the chair, even after Mack was unconscious and motionless on the ground, then simply walked away and left him to die in the snow. The only evidence contradicting the eyewitnesses' testimony Reese and Petitioner beat Mack with the chair was Reese's self-serving statement that she swung the chair at Mack but did not hit him. However, Mack's DNA was found on the bottom of the chair, clearly indicating the chair hit him. This case has a combination of physical evidence—Mack's DNA on the chair—and corroborating evidence—several eyewitnesses who saw Petitioner and Reese beat Mack with the chair—"so strong that the Strickland standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." Smalls, 422 S.C. at 191, 810 S.E.2d at 845.

Therefore, the PCR court correctly concluded while Trial Counsel's performance was deficient under Strickland, there was no resulting prejudice from the failure to object to the shackling, and it did not contribute to the jury's verdict in light of the overwhelming evidence of Petitioner's guilt. Accordingly, this Court should affirm the PCR court's decision.

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CONCLUSION

Trial Counsel was not constitutionally ineffective. Petitioner failed to show prejudice resulting from being shackled at trial because the trial court stated in chambers that shackling was required in this case. Had Counsel objected on the record, the trial court would have elaborated on its ruling to protect an essential state interest—courtroom security. Therefore, this Court should affirm the decision of the PCR court.

Respectfully submitted,

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November 2, 2022

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Good Afternoon –

Please find attached the Brief of Respondent in appellate case no. 2019-001127 to be filed with the Court of Appeals shortly.

Respectfully,

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