Exhibit A

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
County of Greenville	)	
	)	
Freddie Eugene Owens, #5065,	)	Case No.: 09-CP-23-0741
Applicant,	)	
	)	
vs.	)	**MOTION FOR SUMMARY JUDGMENT**
	)	
State of South Carolina,	)	
Respondent.	)	

I. INTRODUCTION

Applicant, Freddie E. Owens, is a death-sentenced inmate. His Second Amended Application for Post-Conviction Relief is pending before this Court.[1] An evidentiary hearing on the grounds for relief presented in that application is scheduled to begin on July 19, 2010. For the reasons set forth below, however, an evidentiary hearing on all of the grounds set forth in the application is unnecessary because applicant is entitled to summary judgment with respect to Ground 10(b), subsection 11(b)(7) and 10(c).[2]

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[1] Applicant's Second Amended Application for Post-Conviction Relief has been filed and served on counsel for respondent in conjunction with this motion.

[2] Ground 10(b), subsection 11(b)(7) of the Second Amended Application for Post-Conviction Relief alleges as follows:

> 10(b): **Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution, during his 2006 capital sentencing proceeding.**
>
> 11(b): **Supporting facts:** Trial counsel's performance during the sentencing phase was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included the following:
>
> . . .
>
> (7) Counsel failed to ensure that jurors did not see Applicant in restraints.

Second Amended Application at 3-4.

II. RELEVANT FACTS

Applicant was convicted and sentenced to death in connection with the November 1, 1997, armed robbery of a convenience store and the fatal shooting of the store's clerk, Ms. Irene Graves. *State v Owens*, 552 S.E.2d 745 (S.C. 2001). On direct appeal, the South Carolina Supreme Court affirmed Mr. Owens's conviction, but reversed his death sentence and remanded for resentencing. *Id.* After a bench re-sentencing proceeding, Mr. Owens received another death sentence, which the South Carolina Supreme Court again reversed. *State v Owens*, 607 S.E.2d 78 (S.C. 2004). At applicant's second re-sentencing in November 2006, a jury returned a third death verdict. *State v Owens*, 664 S.E.2d 80 (S.C. 2008).

After completion of the direct appeal process, Mr. Owens moved for a stay of execution in order to pursue post-conviction relief. On March 5, 2009, the Supreme Court of South Carolina issued a stay of execution and assigned the post-conviction relief proceedings to this Court. This Court convened a hearing on March 24, 2009, and appointed the undersigned counsel to represent Mr. Owens.

Post-conviction counsel's investigation has revealed that members of the 2006 jury saw Mr. Owens in restraints during his re-sentencing proceeding. Specifically, Mr. Randy Mathena and Mr. Scott Merriam, who both served as jurors during the 2006 capital sentencing proceedings, have executed affidavits stating that they saw applicant in shackles. *See Mathena Affidavit and Merriam Affidavit, attached as Exhibit A.* In addition, a newspaper article from

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Ground 10(c) of the Second Amended Application alleges:

> 10(c): **Applicant's death sentence was obtained in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of South Carolina law, because the jurors saw Applicant in restraints.**

Second Amended Application at 5.

The Greenville News describes applicant as wearing "handcuffs and shackles" during the trial. *See "Killer gets death sentence again," attached as Exhibit B.* The record reveals no discussion of a specific, essential state interest for shackling applicant.

III. RELEVANT LEGAL PRINCIPLES

In *Deck v. Missouri*, 544 U.S. 622 (2005), the United States Supreme Court held that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." *Id.* at 633. A trial judge is permitted, in the exercise of his or her discretion, to take account of special circumstances that may call for shackling. "But any such determination must be case specific; that is to say, it should reflect particular concerns . . . related to the defendant on trial." *Id.* Shackling a defendant at the penalty phase of a capital trial "inevitably undermines the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death." *Id.* Thus, the use of shackles can be a "'thumb [on] death's side of the scale.'" *Id.* (quoting *Sochor v. Florida*, 504 U.S. 527, 532 (1992)). For these reasons, the Due Process Clause prohibits "the use of visible shackles during the penalty phase . . . unless that use is 'justified by an essential state interest' . . . specific to the defendant on trial." *Id.* at 624 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)).

Moreover, the Court has recognized that shackling is "inherently prejudicial." *Holbrook*, 475 U.S. at 568. This inherent prejudice stems from the Court's "belief that the practice will often have negative effects [that] cannot be shown from a trial transcript." *Deck*, 544 U.S. at 635 (internal quotation omitted). Thus, the defendant "need not demonstrate actual prejudice to make out a due process violation" where he has been forced to wear visible shackles without adequate justification specific to his case. *Id.*

IV. APPLICANT IS ENTITLED TO SUMMARY JUDGMENT

South Carolina Rule of Civil Procedure 56(c) provides, in pertinent part, that upon a motion for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Additionally, upon the filing of this motion for summary judgment and the supporting documentation, respondent "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." SCRCP 56(e). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

There is no genuine issue of fact concerning Ground 10(b), subsection 11(b)(7) and Ground 10(c) of applicant's second amended application for post-conviction relief. Two jurors have testified, in affidavit form, that they specifically remember seeing applicant in shackles. News coverage from the re-sentencing proceeding corroborates this fact. There was no specific finding on the record by the trial court that restraints were necessary in applicant's particular case to meet a specific, essential state interest. In such a case, the shackling is inherently prejudicial. *Deck*, 544 U.S. at 635; *Holbrook*, 475 U.S. at 568. Even viewing "the evidence and its reasonable inferences" in favor of respondent, *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1992), applicant has met his burden of

"clearly establishing by the record properly before the Court the absence of a triable issue of fact," *Owens v. Magill*, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992), and has done so with "plain, palpable and indisputable facts . . . on which reasonable minds cannot differ." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 367-88 (1991); *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). Thus, "inquiry into the facts is not desirable to clarify the application of the law." *Standard Fire Ins. Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418, 421-22, 392 S.E.2d 460, 462 (1990).

Because the facts relevant to Ground 10(b), subsection 11(b)(7) and Ground 10(c) are beyond dispute, and because those facts warrant relief under *Deck v. Missouri*, 544 U.S. 622 (2005), applicant is "entitled to judgment as a matter of law." *Sullivan Company, Inc. v. New Swirl, Inc.*, 313 S.C. 34, 36, 437 S.E.2d 30, 31 (1993).

V. CONCLUSION

WHEREFORE, for the foregoing reasons, applicant respectfully submits that he is entitled to summary judgment on Ground 10(b), subsection 11(b)(7) and Ground 10(c) of his second amended application for post-conviction relief.

Respectfully submitted,

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Counsel for Applicant

June 15, 2010

Exhibit

A

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF GREENVILLE)

Mr. Randy R. Mathena, who appeared personally before me, affirms and states the following:

1. My name is Randy Mathena. My address is 10 Rutledge Lake Road, Greenville, South Carolina.

2. I served as a juror during the 2006 capital sentencing proceeding of Freddie Owens. I remember seeing Freddie Owens in shackles at the defense table.

3. I have had previously served as a juror in another case before my service in the Freddie Owens case.

Further affiant sayeth naught.

RANDY MATHENA

Sworn to and subscribed before me
This 1st day of July, 2009

Notary Public for the State of South Carolina
My commission expires: 6/19/16

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF GREENVILLE)

Mr. Scott J. Merriam, who appeared personally before me, affirms and states the following:

1. My name is Scott Merriam. My address is 925 Cleveland Street, Apartment 120, Greenville, South Carolina.

2. I served as a juror during the 2006 capital sentencing proceeding of Freddie Owens. ~~I remember that~~ Freddie Owens was shackled during the trial, and he was ~~always~~ sitting when the jury came in.

3. ~~After the jury recommended the death penalty~~, the judge told us that we had made the right decision.

Further affiant sayeth naught.

Scott Merriam
SCOTT MERRIAM

Sworn to and subscribed before me
This 1st day of July, 2009

Notary Public for the State of South Carolina
My commission expires: 12-19-16

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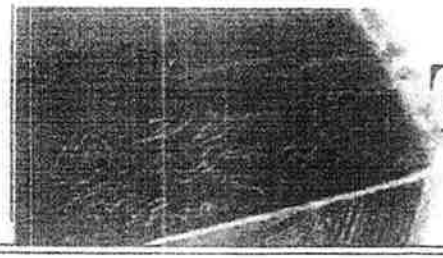

LIFESTYLE ARTS, 1D

THROUGH THE MAZE

Family finds new ways
to keep farm culture alive

USA WEEKEND

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The Greenville News

Greenville, South Carolina

SUNDAY, NOVEMBER 12, 2006 ■ STATE EDITION

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Killer gets death sentence again

Solicitor calls Owens 'worst of worst'; defense blames impulsivity disorder

By Mike Foley
STAFF WRITER
mfoley@greenvillenews.com

Freddie Eugene Owens was sentenced to die Saturday.

Again.

A six-man, six-woman jury found "statutory aggravating circumstances" in the 1997 murder Owens was convicted of in February 1999. Barring an appeal within 10 days, Owens will be put to death May 15.

The 28-year-old Greenville native had been sentenced to death twice for the murder. Both times the state Supreme Court overturned the penalties, citing judges' errors.

After deliberating for about 90 minutes Saturday afternoon, the jury reached a unanimous verdict.

Sitting passively at the defense table, wearing an orange jumpsuit, a Department of Corrections-issued green parka, handcuffs and shackles, Owens listened as the court clerk read the death sentence. He then hung his head, tucking his chin to his chest.

HEIDI HEILBRUNN / Staff

Facing execution: Freddie Eugene Owens, left, talks to his lawyers after he was sentenced to death Saturday.

His defense attorney, Kent Gibson, after leaning forward to hear the sentence, sat back hearing [illegible] ting out an audible sigh.

No one was in [illegible] ence when the [illegible] was delivered.

Throughout the [illegible] day hearing, Owens [illegible] fastly refused to speak [illegible] his own behalf. When given one last chance by Judge Larry [illegible] Saturday afternoon, again refused.

Owens was [illegible] killing [illegible] Graves during [illegible] 1997 holiday.

In his closing [illegible] Solicitor [illegible] Owens deserved [illegible] There are mean and evil people in this world who [illegible] no matter [illegible] jurors, Arnal said. [illegible] death penalty is for [illegible] that is Freddie Owens."

In his closing, Gibson cited [illegible] disorder [illegible] [illegible] and pe- [illegible] [illegible] [illegible]

(803) 734-1343

Appointed second resentencing counsel were:

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Godfrey Law Firm, LLC
10 East Ave.
Greenville, SC 29601

Kenneth C. Gibson
The Law Office of Kenneth Gibson
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On appeal, Applicant was represented by:

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Chief Appellate Defender
South Carolina Commission on Indigent Defense
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19. Applicant seeks relief from his convictions and sentence.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

By: Emily C. Paavola

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