STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Fairfield County
Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

v.

DEREKEE JOHNSON,

Appellant.

Appellate Case No. 2014-000920

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Derekee Johnson, was indicted at the July 2012 term of the court of General Sessions for Fairfield County for murder (2012-GS-20-214), possession or display of a firearm during the commission of a violent crime (2012-GS-20-215), and possession of a firearm by a person convicted of a felony violent crime (2012-GS-20-216). ROA 3-8. The Appellant was represented by Geoffrey Dunn of the South Carolina Bar. On April 14, 2014, the case was called to trial before the Hon. R. Knox McMahon, presiding judge. The prosecution was represented by Assistant Solicitor Riley Maxwell. On April 21, 2014 the jury convicted the appellant of the charges. R.p. 198-201, Tr.p. 942-945. Judge McMahon sentence the appellant to life without the possibility of parole for murder, no sentence on the charge of the possession of a weapon during the commission of a violent crime, and five (5) years concurrent for possession of a firearm by a person convicted of a felony violent crime. R.p. 202-03, Tr. p. 952-953.

The Appellant served his notice of appeal on April 23, 2014 and filed the notice with the court on April 28, 2014. The initial brief of appellant was filed February 6, 2015. This briefing follows.

RESPONDENT'S VERSION OF THE FACTS

This appeal concerns charges arising from the death of Bobby "Clyde" McCloud on May 18, 2012 by the Appellant Derekee Johnson. Between 4:30 and 5:00 PM on May 18 McCloud was found down the hill in the Zion Hill neighborhood. R.p. 23, Tr. 366. At the time James Lawson came upon him the victim was still breathing but was unable to say anything. R.p. 23, Tr. 366. EMS arrived at the scene shortly thereafter but the victim was not responsive. R.p. 19-20, 24-25, Tr. 348-349, 378-379.

At the scene the police recovered his cellphone, a plastic bag later determined to contain crack cocaine, and a .25 caliber Lorcin handgun. R.p. 21-22, 39, Tr. 358-359, 400. Several spent cartridges were also found. R.p. 21, Tr.p. 358. A total of nine casings were ultimately found. R.p. 26-27, 38, Tr.p. 386-387, 398.

Derekee Johnson was later apprehended at a friend's house in Blythewood South Carolina after he attempted to flee through the back door. R.p. 28-29, Tr.p. 388-389.

Quinton Adams testified that he was with the victim on May 18 with a decided to go to Zion Hill to purchase marijuana from Charles Bouknight. R.p. 40-41, Tr.p. 404-405. While they were at balk nights, he saw Derekee Johnson and the victim told the appellant that Carl McDaniel wanted to talk to him about a problem they had. R.p. 44, Tr. 408. Adams testified he did not know what the situation was and did not see any threats or words between the appellant and the victim at that time. R.p. 44-45, Tr. 408-409. Adams testified that he later heard gunshots. R.p. 50, Tr. 414. He testified he had never seen the victim with a gun. R.p. 52, Tr. 416.

Yolanda Hill testified that she saw the victim walk up the hill that afternoon while he was talking on his cellphone. R.p. 56, Tr. 438. She said about 5 to 10 minutes later she saw the appellant walk up the same path. R.p. 56-57, Tr. 438-439. She said she and her friend got nosey and walked up the hill too. R.p. 57, Tr.p. 439. When she got to the top of the hill she saw Derekee running aiming his gun and shooting. R.p. 58-59, Tr. 440-441. She initially did not see Clyde when she first heard the shots and saw Johnson running towards the abandoned house. R.p. 59-60, Tr. 441-442. She thought she heard 5 or 6 shots. She then saw Clyde after he was apparently shot and was trying to run to the back of the abandoned house to go across the fence. She described saying the victim getting weak unable to make it across the fence and fall. R.p. 60-61, Tr.p. 442-443. She said that the appellant later was seen by her and she told him "I seen what

you did don't run off this way don't run this way. I seen what you did." R.p. 62, Tr.p. 444.

Shatenette Sampson testified that she was with Yolanda and saw the victim pacing back and forth on the telephone sounding angry and then left and walked up the hill. R.p. 63-65, Tr. 459-461. She stated she went up the hill with Yolanda and she saw Derekee pull up the gun and start shooting. R.p. 62, Tr. 462. She recalled him firing 7 shots. R.p. 67-68, Tr. 463-464. She claimed that she saw the appellant pointing towards the abandoned house, but she did not see the victim. R.p. 68, Tr. 464. She next recalled saying the appellant running away claiming "that wasn't me" but she saw his gun in his back pocket. R.p. 70, Tr. 466.

Margaret Smith testified that she knew Derekee through her son before for this happened. R.p. 71, Tr. 474. She stated that afternoon she was watching TV and heard a gunshot and looked out the window. She saw the appellant standing in an area shooting a gun and saying something that she could not understand although she recognized his voice. R.p. 73, Tr. 476. She saw the appellant shooting the gun and saw Clyde standing behind the house after she had heard 2 shots. She recalled seeing the appellant shoot the victim when it appeared the victim was going to try to jump the fence to get away. R.p. 75, Tr. 478. He was shot one time and he fell to the ground face first "and then that's when Derekee shot him 3 more times." R.p. 75, Tr. 478. She testified she did not see Bobby McCloud with a gun and that the appellant was the only one she saw with a gun. Tr. 479. She also stated that her house was struck by one of the bullets. R.p. 76-77, Tr. 479-480.

Lynetta Mitchell testified that she heard gunshots after she saw Clyde go up the hill. R.p. 78-79, Tr. 493-494. After she heard the gunshots she saw the appellant coming down the hill then walked by her house very fast. R.p. 80-81, Tr. 495-496. She testified that she saw the appellant holding something with his left hand on his hip. R.p. 80-82, Tr. 495-497.

Sheretta Davis testified that she saw Clyde talking with the appellant earlier but that they did not seem to be arguing. R.p. 83-84, Tr. 505-506. She later saw Clyde walking up the hill and then saw the 2 friends go up the hill following Clyde. When she was on the porch she heard gunshots not long after Clyde had gone up the hill. R.p. 86-87, Tr. 508-509. After the shots she saw the appellant running by and looking nervous with his hand on something on his hip. R.p. 86-88, Tr. page 508-510.

Maxine Mobley testified that she heard a gunshot and came out on her porch. R.p. 89-90, Tr. 517-518. She saw the appellant running and shooting towards the abandoned house. R.p. 91-92, Tr. 519-520. It appeared that the appellant was chasing Clyde when she saw him. She saw Clyde get to the fence and the appellant kept shooting and Clyde fell to the ground. R.p. 92-94, Tr. 520-522. She stated that she did not see Clyde with a gun and did not see anyone else shooting. R.p. 93, Tr. 521. He testified she was able to identify the appellant when he turned around and showed her his face. R.p. 94, Tr. 522. She claimed prior to hearing the gunshots that she did not hear any arguing outside. R.p. 95, Tr. 523.

Charles Bouknight testified that he recalled the victim talking with the appellant and telling him that "Carl wanted to holler at you" in a nonthreatening way. R.p. 96-97, Tr. 530-531. He denied that there were any threats made during the discussion. R.p. 97, Tr. 531. The next thing he recalled happening later was hearing gunshots when he was standing on his back porch. R.p. 99, Tr. 533. He went up to the scene and saw the victim trying to be resuscitated by James Lawson. R.p.100-01, Tr. 534-535.

Antonio Hollins also known as Taz testifies that he was on Spring Street and saw the appellant standing next to a tree in the dirt area. R.p. 107-08, Tr. 543-544. He then saw Clyde coming from behind a building and say: "Cuz, we're straight we're straight." R.p. 108-09, Tr.p.

544-545. At that point he described seeing the appellant started shooting. R.p. 109, 110, Tr. 545, 546. He did not see anything in the victim's hands. Id. Hollins testified he heard multiple shots and guest that when the appellant started shooting the victim fell to the ground. Hollins stated that he started running after the shooting. R.p. 110, Tr. 546.

Brittany Sanders testified that she knew the appellant as a friend. She described on May 18, 2012, the appellant came by her apartment. R.p. 111, Tr. 555. He described him as breathing heavily and asked her to give him a ride home. When she ask him what happened, he would not tell her but said something like "you'll hear about it in the streets." R.p. 112, Tr. 556. She took the appellant to his sister's house. When she dropped him off he told her "you probably won't see me no more." R.p. 113, Tr. 557. She did not see a gun on the appellant. R.p. 113, Tr. 557.

It was reported that all the cartridge casings found around the crime scene were .40 caliber casings and that no casings for a .25 caliber weapon were located. R.p. 114-16, Tr. 580-582. It was reported that a GSR test on the victim from the right palm evidence no gunshot residue found for the right back the result was inconclusive because only one round gunshot residue particle was found. R.p. 117-18, Tr. 611-612. It was reported that there were many possibilities and that the fact that a person has gunshot residue on a part of their body does not mean they fired a weapon, especially if they were a victim of a gunshot wound. R.p. 118, Tr. 612.

In November 2012 a .40 caliber weapon was turned into Winnsboro Public Safety Department. R.p. 119-121, Tr. 615-617. The gun was located in an area on Zion Hill. However, forensic testing on the weapon was not consistent with the casings located at the crime scene. It is reported that there was a continuing interest at the time of the trial to locate a .40 caliber

weapon. R.p. 123-24, Tr. 619-620.

SLED Agent Michelle Eichenmiller testified that all 9 of the shell casings recovered around the crime scene were .40 caliber cases. R.p. 125-26, Tr. 625-626. She testified that these casings could only be used in a firearm chambered for .40 S and W calibers. R.p. 126, Tr. 626. She stated that a .25 caliber handgun could not fire these cartridge casings and the particular .25 caliber handgun recovered at the scene near the victim could not have fired the cartridges. R.p. 127, 132-33, Tr. 627, 632-633. She opined that all of the cartridge cases that were submitted in the case were fired by the same firearm which would be a 40 caliber handgun. R.p. 130-31, Tr. 630-631. Concerning the bullet that was recovered, she opined that she can't tell if it was the same firearm, but it was a 40 caliber firearm that fired the bullet. R.p. 131, Tr. 631. The .40 caliber handgun that was later turned in did not match the recovered casings. R.p. 134-35, Tr. 634-635.

Dr. Janice Ross, the forensic pathologist who performed the autopsy, described that manner of death and cause of death. She described finding a total of 4 gunshot wounds, one that went into the back and came out the front chest, one of the left forearm the went through and through, and 2 in the left leg that went through and through. R.p. 138, Tr. 647. She stated there were no bullets in the body when she performed the autopsy. Concerning the fatal wound she described that the victim could then bent over while he was being shot from the back from somebody who was standing in the back of him. R.p. 140, Tr. 649. She described the wounds as "distant wounds". R.p. 141, Tr. 650. The cause of death was a cardiac tamponade, which is bleeding out around the heart due to a laceration of the heart due to the gunshot wound in the back. R.p. 141-42, Tr. 650-651.

Maj. John Seibles testified that they had no information that the 25 caliber weapon found

in the yard of the abandoned house belonged to Bobby McLoud. R.p. 143-44, Tr. 661-662. He also testified that Derekee Johnson had been previously convicted of a violent crime of armed robbery. R.p. 144-45, Tr. 662-663. Seibles testified that the appellant gave a statement in the presence of his then attorney William Frick on May 24, 2012. In his written statement, Quinton Adams was the person who fired the weapon at Clyde. R.p. 160-62, Tr. 678- 680.

In rebuttal to the defense case, the State called that Appellant's prior counsel William Frick. William Frick testified that he became the appellant's lawyer in May 2012. He stated he had an understanding of the law of self-defense and had utilized it in trials prior to May 2012. R.p. 191-92, Tr. 855-856. He denied that he had ever told the appellant that self-defense does not exist in South Carolina contrary to the appellant's testimony. R.p. 192, Tr. 856. Mr. Frick testified that the appellant had a hesitation in talking about the situation with Carl McDaniel due to some legal liability, but did not express hesitation about having a gun. Mr. Frick specifically denied ever telling Derekee Johnson that when he was going to tell his story not to put a gun in his hand. R.p. 195, Tr. 859.

ARGUMENT

I. The trial court did not abuse its discretion in denying a *pro se* motion for mistrial after Appellant reported that a juror may have briefly seen him shackled when he was entering the courthouse and defense counsel did not seek the motion for mistrial and Appellant *pro se* rejected a request for a curative instruction.

This is not a case of a criminal defendant being visibly shackled inside of the courtroom during the trial. Instead, this is a case where a criminal defendant may have been inadvertently seen by a juror while that defendant was coming up stairs and entering the courthouse when he was shackled for transport to the courthouse. R.p. 169-170, Tr.p. 730-731. In his brief before this Court, the Appellant contends that he is entitled to a new trial and the reversal of his convictions because on the morning of April 18, 2014 when he was being brought to the courthouse with his arms and legs shackled that a juror saw him coming up the stairs. He contends the trial judge's denial of his *pro se* motion for a mistrial denied him his right to a fair trial under the 6th and 14th amendments to the United States Constitution. He complains in his brief - for the first time - that there was no hearing or questioning of any of the jurors to decide whether seeing him in shackles destroyed the presumption of innocence and the ability of that juror to decide the case on the evidence.[1] Respondents respectfully submit that the trial judge did not abuse his discretion in denying the *pro se* motion. Accord State v. Plath, 277 S.C. 126, 141, 284 S.E.2d 221, 229 (1981). See also State v. Moore 257 S.C. 147, 184 S.E.2d 546 (1971) (where defendants did not request trial court to admonish jury to disregard view of male defendants in shackles and to draw no inferences from fact that they were in custody and had been handcuffed on their trip to and from the courtroom and trial court did instruct jury that its duty was to decide the case solely on basis of sworn testimony in the courtroom, trial court did not abuse its discretion by refusing

[1] Appellant's counsel wanted nothing to be done and did not request questioning of the jurors. No particular juror was named during the proceedings. The Petitioner pro se only asked for a mistrial and did not want the court to tell the jurors anything. R.p. 172-73, Tr.p. 733-734.

mistrial sought on ground that jurors had viewed defendants being shackled and being prepared to be taken to the county jail).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only" and is "bound by the trial court's factual findings unless they are clearly erroneous." State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citation omitted). "The decision to grant or deny a mistrial is within the sound discretion of the trial court." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct.App.2009). The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court. Id. ("The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law."); id. ("A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.") "In order to receive a mistrial, the defendant must show error and resulting prejudice." State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998); see also State v. Galbreath, 359 S.C. 398, 402, 597 S.E.2d 845, 847 (Ct.App.2004) (requiring the defendant to show a prejudicial abuse of discretion (citing State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69–70 (Ct.App.2000)). The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way. State v. Harris, supra.

"All criminal defendants have the right to a trial by an impartial jury." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (citing U.S. Const. amends. VI and XIV). To that end, the jury must render its verdict free from outside influences of all kinds. Kelly, 331 S.C. at 141, 502 S.E.2d at 105 (quoting State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12

(Ct.App.1993)).

HOW THE SHACKLING ISSUE WAS PRESENTED AT TRIAL

The record reflects on the morning of April 18, 2014 before the 4th day of the trial, defense counsel Dunn brought to the trial court's attention that while the appellant was being brought into the courthouse that morning, his feet and arms were shackled and a juror saw him coming up the stairs in shackles. R.p. 169, Tr.p. 730, ll. 16-23.[2] Counsel Dunn stated that he was not asking for a curative instruction and preferred not to make the entire jury panel aware of the shackling if it was just one person. Counsel Dunn noted that the jurors had been told not to discuss the case and is hoping they haven't discussed the case. R.p. 169-170, Tr. p. 730, l. 16 – p. 731, l. 2.[3] Judge McMahon inquired of counsel Dunn concerning the observation of the shackles issue in counsel Dunn stated: "there's nothing I want you to do about it, Your Honor, my client is disagreeing with me." R.p. 171-72, Tr.p. 732, l. 20-p. 733, l. 1.

The Appellant, *pro se*, stated that it was his opinion this was an important issue dealing with his right to a fair trial and that he was asking for a mistrial.[4] Judge McMahon initially stated

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[2] Earlier in the trial, after a lunch break, counsel Dunn noted that Appellant had not had leg irons on in court during the morning session. R.p. 54, Tr.p. 430, ll. 18-25. He expressed concern that he had leg irons on now and feared that one of the jurors saw it that it would give him a concern about a fair trial. Counsel Dunn asked to make the hallway clear before they moved the Appellant in the future which the sheriff agreed. Counsel initially requested "out of an abundance of caution" to ask the juror something. However, when Judge McMahan asked counsel what to ask the juror such as "did you see led irons on Mr. Johnson?", counsel Dunn stated to leave it alone because he did not want to bring more attention to it because it would create another issue. Judge McMahon noted that this was standard procedure when moving defendants around the courthouse, not just Mr. Johnson. Counsel closed by stating that he realized the deputies and a tough job, but wanted them to take precautions. R.p. 54-55, Tr.p.430, l. 18 – p. 431, l. 18.

[3] Counsel was correct about the trial court's numerous admonitions to the jury prior to this incident. Judge McMahon had advised the jury in his interim charges at opening breaks and recesses concerning not discussing the case, watching or viewing media or the internet. SuppR.p. 1-4, Tr.p. 50-53, R.p. 10-17, 18, 53-54, 96-106, 129-130, 162, 163, 164-65, 166-68, Tr. pp. 316-323, 341, pp. 429, l. 5 – 430, 530-540, 629-630, 680, 697, 706-707, 724-725, 726.

[4] At the outset of the trial, Appellant had asked to represent himself *pro se* at the conclusion of the pre-trial motions. SuppR.p. 5-12, Tr.p. 300-307. Appellant resolved that since hybrid representation was not allowed, that he desired to have counsel Dunn represent him. SuppR.p. 12, Tr.p. 307. However, a review of the record reveals that Appellant

"denied" concerning the *pro se* mistrial motion and advised the Appellant that he would give a curative instruction to the jury if the appellant wanted him to concerning being shackled but that "I'm not going to grant a mistrial based on the fact that a juror may or may not have seen you shackled." R.p. 172, Tr.p. 733, ll. 2-12. The Appellant stated he did not know what it is you can tell them and then declared he did not want the judge to tell the jurors anything about his being shackled. R.p. 172, Tr. p. 733, ll. 15-17. Judge McMahon concluded that the motion for mistrial based on being shackled is denied and further there is no curative instruction requested so there will be no curative instruction. R.p. 172, Tr. p. 733, ll. 18-21.

After the conclusion of the presentation of evidence, counsel Dunn made a non-specific renewal of all motions. R.p. 196, Tr. p. 863, ll. 11-14. Judge McMahon denied the motions summarily. R.p. 196, Tr. 863, ll. 15-21.

ANALYSIS

It has been stated that prejudice is not inherent in shackling outside the courtroom because " '[i]t is a normal and regular as well as a highly desirable and necessary practice to handcuff prisoners when they are being taken from one place to another, and the jury is aware of this .' " U.S. v. Halliburton, 870 F.2d at 561 (9th Cir. 1989) (quoting United States v. Leach, 429 F.2d 956, 962 (8th Cir.1970)).[5] The Fifth Circuit has recognized that "brief and inadvertent exposure to jurors of defendants in handcuffs is not so inherently prejudicial as to require a mistrial, and defendants bear the burden of affirmatively demonstrating prejudice." United States

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was actively engaged in in expressing his disagreement with counsel on the record about alleged failing to proceed with witnesses in a requested manner. See SuppR.p. 13-14, 15-17, 18-20, 21-27, Tr.p. 421, l. 10 – p. 422, l. 7; p. 589, l. 9 – p. 591, l. 20; p. 657, l. 5-p. 659, l. 14; p. 732-736, p. 736-738.

[5] In U.S. v. Jackson, 423 Fed.Appx. 329, 331, 2011 WL 1376793, 2 (4th Cir. 2011) (unpublished), the Fourth Circuit Court held when three or four members of the jury observed the defendant in his jail jumpsuit and shackles when he was being transported to the courthouse on the second day of trial, the jurors' brief and inadvertent observation of the defendant in this condition does not amount to prejudice requiring reversal of his convictions, citing United States v. Lattner, 385 F.3d 947, 959–60 (6th Cir.2004); United States v. Halliburton, 870 F.2d 557, 560–61 (9th Cir.1989).

v. Diecidue, 603 F.2d 535, 549–50 (5th Cir.1979). As the Fifth Circuit has explained, the potential for prejudice is much less in this context because "[t]he possible awareness that a defendant in a violent-crime case awaits trial in jail is not the same type of prejudice faced by a defendant who sits in shackles or leg irons in front of the jury that will decide his fate." United States v. Turner, 674 F.3d 420, 2012 WL 716885, *8 (5th Cir. March 7, 2012).[6]

In the argument before this Court, the Appellant emphasizes general law concerning the right to a fair trial and that a jury should be free from outside influences, citing Estelle v. Williams, 425 U.S. 501 (1976), Irvin v. Dowd, 366 U.S. 717 (1961) and State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993). Respondent does not question the correctness of these principles of law of entitlement to a fair trial by impartial and indifferent jurors. However, under the discrete circumstance within this case, the Appellant failed to show that he was deprived of the right by any showing of actual juror prejudice by the incidental viewing as Appellant entered the courthouse.

The Appellant also recognizes that it is his burden to show "actual prejudice" from being seen in shackles outside of the courtroom, but fails to recognize that he failed to satisfy the showing in any manner. For the first time, he claims that he should have had a hearing or questioning of the jurors. *Initial Brief of Appellant*, p. 5. However, his counsel and the Appellant pro se failed to make such a request. To the contrary, counsel did not want anything to be done and the Appellant decided that he did not need the jurors to be questioned. R.p. 171-72, Tr.p. 732-733. See also R.p. 54-55, Tr.p. 430-431 (refusing an earlier request by the court to inquire of

[6] In State v. Payne, 233 Ariz. 484, 505, 314 P.3d 1239, 1260 (2013), the Arizona court found that "brief and inadvertent exposure" outside the courtroom was not inherently prejudicial, citing State v. Apelt, 176 Ariz. 349, 361, 861 P.2d 634, 646 (1993) (affirming denial of new trial where four jurors saw defendant in shackles and handcuffs being escorted from courthouse). The Arizona court found that Payne has not pointed to any evidence that jurors were prejudiced. And, as the Arizona trial court observed, it is highly unlikely that any juror would have been surprised that Payne was in custody and thus Payne has not established actual prejudice.

the jurors concerning whether the defense wanted the court to ask if they had seen leg irons or to fashion a question to ask the jurors). The mistrial was properly rejected because he had failed to show a manifest necessity for the court to grant it.

The Appellant also relies upon two cases U.S. v. Waldon, 206 F.3d 597 (6th Cir. 1999) and U.S. v. Pina, 844 F.2d 1 (1st Cir. 1988). However, in Waldon, the Sixth Circuit concluded that he was not entitled to a mistrial when a juror saw a defendant wearing shackles when he entered a police car after the first day of deliberations. Based upon the inquiry that was done with the juror after he revealed sighting the defendant, the district court concluded the observation did not require a mistrial. Contrary to the Appellant's apparent position here, the 6th Circuit concluded that the record failed to show inherent prejudice warranting a mistrial. The 6th Circuit relied upon Pina which similarly decided that the brief encounter in that case was not "inherently prejudicial." Although in those cases, the jurors were individually questioned by the trial court, it did not set that type of questioning as a constitutional predicate, implicitly leaving it to the discretion of the trial judge. Here, there was no request by the defense to question the juror and there was not request that any juror not discuss that matter. Instead the defense rejected a request to fashion a cautionary instruction.[7] To suggest error for the trial judge to do something that the trial court was never asked to do is not preserved for this Court's review.

Though not argued at trial or in his brief before this Court, the Court may be concerned about the reach of Deck v. Missouri, 544 U.S. 622, 624, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). As a general rule, the shackling of a criminal defendant in front of a jury is prohibited

[7] The Appellant may argue that there was no available cautionary instruction that could be given under the circumstances. To the contrary, the defense could have instructed any identified juror to not discuss the encounter with other jurors. The defense could have also requested an instruction that the shackling during movement and transportation of any defendant during a trial was standard protocol and should not be considered to remove the presumption of innocence.

unless "'justified by an essential state interest'—such as the interest in courtroom security." The Court in Deck was concerned with the need for a defendant to assist counsel, the formal dignity of the courtroom, and the presumption of innocence. Id. at 630–31. In the absence of a particularized determination that shackling is justified, visible shackling within the courtroom is inherently prejudicial. Id. at 635. However, occasional observations by some jurors of a defendant in shackles while being transported requires a showing of actual prejudice for relief. Wharton v. Chappell, 765 F.3d 953, 966–67 (9th Cir.2014) (collecting similar cases). See also Ghent v. Woodford, 279 F.3d 1121, 1133 (9th Cir.2002) (no prejudice from jury's brief view of shackles outside of courtroom while petitioner was being transported).

The Supreme Court has never held that shackling a prisoner for transport to and from the courtroom violates Due Process. In such cases, as possibly here, jurors have sometimes seen prisoners shackled on the way to or from the courtroom, and in such cases courts have required that the defendant establish actual prejudice. However, the Court's opinion in Deck applies to in courtroom setting, not inadvertent views outside of the courtroom.[8] The Appellant's setting is more akin to Mendoza v. Berghuis, 544 F.3d 650 (6th Cir.), cert. denied, —— U.S. ——, 129 S.Ct. 1996 (2008), where four jurors briefly observed the defendant wearing hand and foot shackles in the hallway as he was being transported from jail. The Sixth Circuit rejected a defense motion for mistrial, finding that the holding of Deck was limited to visible restraints seen by the jury at a trial (or courtroom) proceeding. The Mendoza court noted that there was a

[8] Accord, State v. Longoria, 301 Kan. 489, 343 P.3d 1128 (2015) citing State v. Dixon, 289 Kan. 46, 209 P.3d 675 (2009). The Kansas court stated that the rule for automatic reversal, holding that routine restraint of a defendant before the jury—absent specific justification—establishes a presumed due process violation without any showing of actual prejudice (quoting Deck v. Missouri, 544 U.S. 622, 635, 125 S.Ct. 2007, 161 L.Ed.2d 953 [2005]), it distinguished courtroom situations from those where jurors observed a handcuffed or shackled defendant outside the courtroom, noting that the "[s]hackling of a defendant while in transit through a public hallway is entirely different from shackling at the defense table during a jury trial. We think it highly unlikely that any juror in a double homicide case would be shocked or, for that matter, improperly influenced merely because the accused is transported securely.").

difference between restraining a defendant in the courtroom and restraining him during transport. "... [J]urors may well expect criminal defendants—at least ones charged with the kind of conduct at issue here—to be restrained during transport to the courtroom. That several jurors may have seen Mendoza shackled during transport, therefore, would not necessarily suggest to them that he was shackled in the courtroom as well." Id. at. 655. See also Parker v. Booker, 2012 WL 3150822, at *8 (E.D.Mich. Aug. 2, 2012) (Limiting the holding of Deck to visible restraints being viewed at trial and not to prisoners being transported); and, Woodyard v. Runnels, 2006 WL 462485, at *7 (E.D.Cal., Feb. 27, 2006) (Jury's brief or inadvertent glimpse of a defendant in physical restraints outside the courtroom does not warrant habeas relief). See United States v. Chrzanowski, 502 F.2d 573, 576 (3d Cir.1974) (noting "[t]he fact that jurors may briefly see a defendant in handcuffs is not so inherently prejudicial as to require a mistrial" and holding a mistrial was not required based on the jury having "briefly glimpsed" a defendant being brought into the courtroom in handcuffs); State v. Creech, 18 N.E.3d 523, 532-33 (Ohio App. 7 Dist.,2014) (same); People v. Studier , 2015 WL 447408, 5 (Mich.App.) (Mich.App.,2015) (Even if a juror did observe defendant in handcuffs, however, because the incident was brief and inadvertent, occurred outside the courtroom setting and involved only four jurors who all stated that they did not observe anything that concerned them, defendant was not prejudiced by the brief encounter).[9]

The reasons for the distinction between shackling in open court and shackling during transportation are easily explained. "[E]ven the 'most unsophisticated juror' knows that defendants may have to post bail and that some lack the resources to do this." Halliburton, 870

[9] See also State v. Addison, 8 So. 3d 707 (La. Ct. App. 5th Cir. 2009) (even if juror saw defendant in handcuffs as he was escorted from courtroom during lunch break, that brief incident did not prejudice defendant, who was not handcuffed during the trial, so as to warrant relief on appeal of conviction for attempted manslaughter);

F.2d at 561 (quoting Dupont v. Hall, 555 F.2d 15, 17 (1st Cir.1977)). " 'Under these circumstances we cannot think that the emotional impact of seeing the defendant in custody is necessarily hostile-it may be quite the reverse.' " Id. (alteration omitted) (quoting Dupont, 555 F.2d at 17). " 'It is a normal and regular as well as a highly desirable and necessary practice to handcuff prisoners when they are being taken from one place to another, and the jury is aware of this.' " Id. (alteration omitted) (quoting United States v. Leach, 429 F.2d 956, 962 (8th Cir.1970)).

The distinction is also consistent with the Supreme Court's reasoning in Deck, 544 U.S. at 630–31, 125 S.Ct. 2007. Unlike shackling in the courtroom, shackling during transport does not affect the defendant's ability to assist counsel during trial. Id. at 631, 125 S.Ct. 2007. Nor does it have any effect on the dignity of the courtroom; indeed, it could be perceived as increasing the dignity of the courtroom because a prisoner's shackles are removed for open-court proceedings. Id. Admittedly, visible shackling during transportation might affect the jury's perception of the presumption of innocence, id. at 630, 125 S.Ct. 2007, but that concern is mitigated greatly by the reasons discussed above—jurors know that, as a matter of routine, some defendants are in custody during trial and that security needs during transport demand restraints.

The pre-Deck South Carolina cases are consistent with the requirement that the defendant show actual prejudice. State v. Plath , 277 S.C. 126, 141, 284 S.E.2d 221, 229 (1981) (No prejudice was shown and thus no instruction was necessary). In State v. Moore, 257 S.C. 147, 152-153, 184 S.E.2d 546, 548 - 549 (1971), the Court addressed a similar situation and its reasoning is equally applicable here. In Moore, it was reported that the jury viewed the defendants being shackled and being prepared to be taken to the county jail and that one day were being returned to the courtroom from lunch that 2 or 3 jurors had seen the defendants and

chains. The Moore court cited opinions from the Arizona (State v. Sherron, 105 Ariz. 277, 463 P.2d 533 (1970); and Wisconsin (State v. Cassel, 48 Wis.2d 619, 180 N.W.2d 607 (1970)) and Wisconsin appellate courts in supporting their decision that there was no abuse of discretion in denying a motion for mistrial due to this inadvertent viewing of the defendant's being shackled outside of the courthouse. In particular, the State asserts the following is applicable to Johnson's denial:

> We quote the following from the Sherron case, above cited, as follows:
> 'Appellant next contends his rights were prejudiced because he was handcuffed when he was brought to the courtroom and that the jury panel, standing out in the hallway, saw him with the handcuffs on. Neither appellant nor his counsel contends that he remained shackled during the course of the trial. So far as the record shows he was not manacled inside the courtroom, and what he complains of is the fact that he was moved from the jail to the courtroom with handcuffs on. It has long been recognized that a prisoner coming into court for trial is entitled to make his appearance free of shackles or bonds. However, exceptions to this rule have been made, and in such matters the conduct of the trial rests in the sound discretion of the court. * * *'
>
> In State v. Cassel, above cited, we find the following:
> 'We think that when a jury or members thereof see an accused outside the courtroom in chains or handcuffs the *153 situation is psychologically different and less likely to create prejudice in the minds of the jurors. Whether an accused should be in chains and handcuffs outside the courtroom is a matter for the sheriff or the police to determine since such custodian is responsible for the safekeeping and safe transportation of the accused. The record need not show restrains were warranted before and after the accused's appearance in the courtroom. People normally expect to see a prisoner under some restraints in situations where he is able to escape if not in restraints. * **'

State v. Moore, supra.

Like Moore, apart from the statement of the appellant's appellate counsel and Appellant *pro se*, the record contains no proof that the inadvertent incident prejudiced the minds of the jurors against the Appellant. Like Moore, the Appellant did not request the trial judge to admonish the jury to disregard the incident and draw no inferences from courtroom and had been handcuffed on their trip to and from the courtroom. Like Moore, the trial judge did instruct the

jury it was the jurors duty as jurors to decide this case solely on the basis of the sworn testimony in the courtroom. See R.p. 12, Tr.p. 318, l. 13 ("You determine the facts of the case, and using your good judgment and your common sense from the testimony that you hear from this witness stand – you determine the facts from the testimony you hear from the witnesses testifying under oath from this witness chair and any other evidence that may be introduced; photographs, diagrams, charts, exhibits, I don't know what may be introduced"); R.p. 15, Tr.p. 321, l. 10-21 ("You have the right to consider anything that is in the record that will help you evaluate the believability and the testimony of the witnesses. That means that it is your duty to pay close attention to these witnesses, to observe them, to listen to them, to pay close attention to the attorneys and to the Court. Don't let your thoughts wonder but give strict attention to the testimony in the case so that **at the end of all of the testimony after the closing arguments by the attorneys and the instructions on the law by the Court you will then be in that position to determine what the true facts are, to apply the law to those facts and thus render true and just verdicts in this case**.") (emphasis added); R.p. 105-06, Tr. p. 539, l. 25 – p. 540, l. 2 ("You have to decide the case based on the evidence and the testimony you hear in the courtroom and the facts as you find them to be and the law as I tell you the law is."); R.p. 136-37, Tr.p. 639, l. 20 – p. 640, l. 2 ("Please remember, do not discuss the case with anyone during this recess. Do not read, watch, or listen to any news reports. Do not do any independent research or any research on the Internet. Remember to keep an open mind, do not begin your deliberations until you have heard all of the evidence, all of the testimony, closing arguments by the attorneys and instructions on the law by the Court to begin your deliberations with your fellow jurors in your jury room."); R.p. 167, Tr.p. 725, ll. 19- 25 ("Do not discuss the case with anyone, don't read, watch or listen to any TV or radio, or Internet. Don't do any independent

research or any research on the Internet and let's start back at 8:30 in the morning. After all of the evidence and testimony we will be in a position for the closing arguments by the attorneys and the instructions on the law by the Court."). During the final instructions to the jury, Judge McMahon emphasized that "You are to consider only the testimony which had been presented to you from the witness stand and any exhibits which have been made part of the record and any inferences that you think may properly be drawn from the evidence." R.p. 197, Tr.p. 909, ll. 1-5.

Here, the Appellant has made no showing of actual juror prejudice at trial or on appeal. Like Plath and Moore, there was no abuse of discretion in denying the pro se motion for a mistrial. His assertions are without merit.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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October 1, 2015

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THE STATE,

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Appellant.

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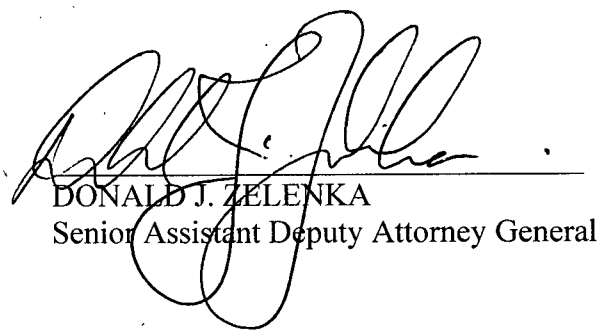
CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Final Brief of Respondent in the foregoing action by depositing two copies of same in the United States Mail to R. Morrison Payne, Esquire, P.O. Box 315, Walterboro, SC 29488 and by InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201 this 1st day of October, 2015.

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