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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein, Trial Judge
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2016-002401

Romeo Brown,Petitioner,

v.

State of South Carolina,Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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PETITIONER' S QUESTION PRESENTED

Did trial counsel provide ineffective assistance of counsel by failing to object when the trial judge ordered Petitioner to wear shackles during his jury trial without making a determination that their use was justified by a specific state interest in violation of Petitioner's state and federal constitutional rights to a presumption of innocence, to the assistance of counsel, to dignified and decorous judicial proceedings, and to not place his character in evidence?

RESPONDENT'S ISSUES PRESENTED

1. Certiorari must be denied where the PCR court denial was a reasonable application of Strickland v. Washington, 466 U.S. 668 (1984) and Deck v. Missouri, 544 U.S. 622 (2005) where the trial court allowed the use on non-visible restraints in Petitioner's trial for murder and counsel did not object to their use.
2. Certiorari is not warranted when there is probative evidence to support the PCR court's conclusion that counsel was not deficient in failing to request additional findings by the trial court where the intended use of shackles was to be not visible and Deck requirement has no application and there is no evidence that the shackles were visible.
3. Certiorari is not warranted when there is probative evidence supports the conclusion where a cautious judge and Solicitor insured that the possibility of the visible use of the leg restraints was removed that the use of restraints that were not visible, that the Petitioner was seated when the jurors entered the courtroom and there were times when the Petitioner did not have on the restraints. Counsel

unequivocal testimony found credible was that the restraints were not visible in his presence. Counsel was not deficient in failing to object to its use.

4. Certiorari is not warranted when the PCR Court also properly concluded that 6th Amendment prejudice was not shown where there was no evidence that the shackling was visible to the jury after a cautious trial judge sought to ameliorate the potential by having the Petitioner seated when the jury entered, that during his testimony he displayed injuries that impeded his ability to walk and testified that his legs would stiffen up if he was seated for a long time, and during the trial he was also without restraints, and counsel testified that Applicant was seated when the jury came in and that the jury did not see the restraints in his presence and that defense counsel never heard any sound from the use of the restraints before the jury. Further, prejudice is not shown where the Petitioner displayed his injuries to his right leg and difficulty in walking in support of his defense theory and the State presented overwhelming evidence.

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted at the March 2011 term of the Court of General Sessions for Orangeburg County for murder (2011-GS-38-0012) and at the April 2012 term for possession of firearm by a person convicted of a violent crime (2012-GS-38-0792). Petitioner was represented by Byron E. Gipson, Esq. On May 22, 2012, Petitioner proceeded to trial before the Honorable Diane Schafer Goodstein. The jury found Petitioner guilty as indicted. Judge Goodstein sentenced Petitioner to life for murder and five years' imprisonment on the possession of a firearm by a person convicted of a violent crime charge, to be served concurrently.

Direct Appeal

Petitioner filed a timely notice of appeal. Kathrine Hudgins, Esquire, (Appellate Counsel) of the Office of Appellate Defense represented Petitioner on appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction on January 21, 2015. State v. Brown, Op. No. 2015-UP-040 (S.C. Ct. App. filed Jan. 21, 2015). The remittitur was returned to the circuit court on March 09, 2015.

Present PCR Proceeding

Petitioner filed an application for post-conviction relief (PCR) on March 16, 2015. The State filed its return on October 1, 2015. Jonathan D. Waller, Esquire, was appointed to Petitioner and represented him at the PCR hearing. The State was represented by J. Clayton Mitchell, Esquire. An evidentiary hearing took place on May 17, 2016. Following the hearing, the PCR court denied Petitioner's application and filed an order of dismissal dismissing the

application with prejudice on November 7, 2016.

Statement of the State's Version of the Crime

The victim, Alexander Harrison (hereinafter "victim" or "Alex"), was shot to death in the front yard of Randy Ryant's home on Wednesday, October 27, 2010 at approximately 8:30 pm.

Mr. Ryant's front yard had developed into a gathering place for people to mingle, play cards, socialize and drink. Mr. Ryant is married to Petitioner's sister, Tammy Ryant. Petitioner was often at the Ryant home to visit his sister and her children, but did not generally stay outside. App. 116. Mr. Ryant testified that on the night of the murder, he saw "Bernie, Vandy, Ricco, Brandy, Eric, Alex," and several others, but he did not recall seeing Petitioner in the yard. Mr. Ryant was absent from the home at the time of the murder having left to go to a local store for more beer. App. 121.

Joe Thomas, Sr., testified he knew victim and had seen Petitioner several times at the Ryant's home. App. 140. At the time, he did not know Petitioner by name, but recognized his face. App. 141 - 142. Mr. Thomas testified victim was at his table in the yard when he heard a shot. He looked toward victim. Petitioner "was kneeling on top of him with the gun pointed" at him. Mr. Thomas testified, "Alex said, please don't shoot me again. And he shot him and got up and ran." App. 151 - 152. Mr. Thomas was positive that the shooter was Petitioner. App. 152. He also identified Petitioner in a photo lineup and in court. App. 156 - 157.

Vandy Morgan testified he saw Petitioner approach the yard as he was walking to his car, and subsequently heard a shot. He did not, however, see the actual shooting. App. 189 - 191. Mr. Morgan did hear, however, victim say, "you shot me one time, please don't shoot me no more,"

then Mr. Morgan heard a second shot. App. 200 – 201.

Issac Morgan (son to Joe Thomas and cousin to Vandy Morgan) also testified that he was in the yard with victim and several friends. Morgan testified he had known the victim for years and had known Petitioner for a “couple of months” before the shooting. App. 225 - 227. He heard the two shots, and eventually ran to his friend, Alex, but Alex was already gone. App. 229 – 230.

Ulysses Daniels testified that while sitting at a table in the Ryants’ front yard, he noticed Petitioner at a short distance, standing, with a gun clearly visible. App. 252. The people at the table scattered. Alex ran toward Petitioner. Mr. Daniels did not see but heard the first shot. Mr. Daniels looked back and saw Petitioner “standing over Alex and [he] fired the last shot.” App. 252 - 253. Mr. Daniels recalled that, when Petitioner initially approached, he asked Donell Ryant “what was he doing over there,” referencing victim. App. 252 - 254.

Brandy Mack testified that she was also at the Ryant’s house on the night of the murder. She did not know Petitioner by name, but did recognize him from seeing him earlier. App. 286. She also casually “knew of” Alex and saw him arrive that evening. App. 288. She subsequently heard a gunshot and fell to the ground. She looked up and saw Petitioner fire the second shot. App. 291. She also identified Petitioner from a photographic lineup and in court. App. 293.

Shawn Guinyard similarly testified to Petitioner’s expressed animosity. Mr. Guinyard testified that he noticed Petitioner approaching and spoke to him. Petitioner “said, what is he doing over here? He said, ain’t I told you? That’s when Alex stood up” and “[w]hen Alex stood up he shot him. App. 318. (See also App. 333, ll. 9-21, Petitioner stated “I’m going to show you,” just before shooting victim).

Investigators recovered two bullet casings from the yard near victim's body. App. 350. Subsequent testing indicated they were both fired from the same gun. App. 417. Forensic pathologist Dr. Janice Edwards Ross testified that Alex died due to loss of blood from two gunshot wounds, one to the back and one to the abdomen. App. 404. One bullet entered the right back area and traveled through the left side of the chest. The other entered the abdomen and lodged in the backbone. App. 397. The abdominal wound was a contact wound. App. 400.

The State presented testimony from Petitioner's cousin, Dennis Jones, that Petitioner left the Orangeburg area on the night of the murder, October 27, 2010. Mr. Jones testified that Petitioner called him and requested a ride at approximately 9:30 pm. Mr. Jones was cleaning an office and waited to that was completed. Mr. Jones testified he picked Petitioner up at the "Four Way" at approximately 10:30 pm App. 438.¹ Mr. Jones further testified that Petitioner asked to be taken to a rest area on Interstate 26 toward Columbia, and that Mr. Jones dropped him off as requested. App. 442 - 443.

Petitioner presented a defense. Petitioner called his nephew, Tedriks Green, who testified that on the night in question the two went to a local restaurant, then watched baseball at Mr. Green's house. Mr. Green testified that he took Petitioner to Petitioner's home at approximately 11:00 pm. App. 617. Petitioner also called his neighbor, Erica Smith, who testified Petitioner came by her house late at night, somewhere around ten or eleven o'clock, on the night of the murder. Ms. Smith testified she heard a car door shut just prior to his arrival. She also testified that they played cards. App. 643 - 646. Petitioner testified similarly, adding that he went home

¹ In his testimony, Petitioner admitted the "Four Way" convenience store was within walking distance from his trailer. App. 703. Further, his trailer was just beyond the Ryant home, and the Ryant home could be seen from his neighborhood. App. 658.

after leaving Ms. Smith's trailer, and went to bed. App. 442 – 449.

Petitioner admitted he had gone to Anderson shortly after the murder, but testified that he returned upon hearing about a warrant for his arrest on October 29, 2013. App. 714. Petitioner also admitted he did not turn himself in (though he testified he was in the process of getting money together for a lawyer before doing so). App. 715. Petitioner was arrested on November 4, 2013, hiding in a friend's home. App. 716 – 717.

STANDARD OF REVIEW

“In a PCR proceeding, the burden is on the applicant to prove the allegations in his application.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). “*Any evidence of probative value* to support the PCR court's factual findings is sufficient to uphold those findings on appeal.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). Lee v. State, 396 S.C. 314, 320, 721 S.E.2d 442, 446 (Ct.App.2011). Thus, an appellate court “gives great deference to the PCR court's findings of fact and conclusions of law.” Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). “If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses.” Lee, 396 S.C. at 319, 721 S.E.2d at 445. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

However, 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).

Pertinent Substantive Law

Ineffective Assistance of Counsel

In a PCR action, an applicant has the burden of proving the allegations in his or her application. 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 upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984). 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). An applicant must overcome this presumption to receive relief. State v. Cherry, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300

S.C. at 117, 385 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

In essence, "[t]he benchmark for judging any claim of ineffectiveness must be whether 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, 466 U.S. at 686. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485 (2010).

Law Regarding Use of Restraints

"[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." Deck v. Missouri, 544 U.S. 622, 626 (2005) (emphasis added). Because visible courtroom shackling is "inherently prejudicial" and its negative effects ordinarily "cannot be shown from a trial transcript," the Supreme Court has held that "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice"; rather, "[t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" Id. Under Deck, therefore, the burden shifts to the State only when unjustified courtroom shackles are visible to the jury.

ARGUMENT

Certiorari is not warranted where there is probative evidence to support the PCR court's finding Petitioner failed to meet his burden of proving trial counsel was ineffective for allowing him to proceed to trial while wearing non-visible shackles during a portion of the trial without objecting to the failure of the trial court to make specific findings concerning a state interest of need where the requirement does not apply to non-visible restraints.

It is uncontested that Petitioner was not wearing visible shackles at any time during his trial. In fact, the Petitioner specifically concedes in his Petition that "Petitioner never alleged at any time that the shackles were visible to the jury." Petition, p. 9. The issue presented on certiorari by Petitioner is whether trial counsel was ineffective in failing to object when the trial judge ordered Petitioner to wear shackles during his jury trial without the trial judge making a determination that the use was justified under a specific state interest. The Petitioner suggests that this is a due process requirement under Deck v. Missouri, 544 U.S. 622, 626 (2005). His argument before this Court continues based upon the caselaw related solely to *visible* shackles. Petition, p. 6-9

The Petitioner's reliance upon Deck for *visible* shackling is misplaced where this was only a non-visible restraint. As has been stated by other courts, visibility to the jury is the key inquiry, because a claim based on Deck rises or falls on the question of whether the restraints were visible to the jury. Deck's facts and holding, therefore, concerned only *visible* restraints at trial. The Supreme Court was careful to repeat this limitation throughout its opinion. See *id.* at 630, 125 S.Ct. 2007 ("[v]isible shackling undermines the presumption of innocence") (emphasis added); *id.* at 632, 125 S.Ct. 2007 ("[d]ue process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case") (emphasis

added); *id.* at 633, 125 S.Ct. 2007 (“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 635, 125 S.Ct. 2007 (“[w]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation”) (emphasis added). See Leonard v. Warden, Ohio State Penitentiary, 846 F.3d 832, 842 (6th Cir. 2017) (citing Earhart v. Konteh, 589 F.3d 337, 349 (6th Cir. 2009). denying relief where the petitioner's shackles were rendered invisible to the jury by brown paper surrounding counsel table). Earhart reasoned that if the stun belt were “a visible restraint, due process mandates an individualized finding of necessity before the state courts could require” its use, but if it were not visible, “there is not a violation of clearly established federal law sufficient to grant the writ.” 589 F.3d at 349 (citing Mendoza, 544 F.3d at 654). Earhart rejected the petitioner's assertion that the stun belt had been visible to the jury where the state appellate court had found as a factual matter that the belt was not visible, and denied relief on this claim. *Id.* Mendoza v. Berghuis, 544 F.3d 650 (6th Cir. 2008) (denying relief where the petitioner's shackles were rendered invisible to the jury by brown paper surrounding counsel table). Where the restraint was not visible, there is no violation of due process. *Id.*

Thus, the Petitioner’s ineffective assistance claim ends before it begins as a matter of constitutional law. The PCR court was correct to reject it.

The PCR Court’s Order

In denying post-conviction relief the PCR Court on this issue made the following conclusions:

Failing to object to Applicant’s shackles allegedly being visible to the jury

Finally, Applicant alleges Counsel was ineffective in failing to object to Applicant's shackles allegedly being visible to the jury. The Court has examined the trial record and notes that the solicitor brought it to Judge Goodstein's attention that some of the jurors may have seen Applicant walk into the courtroom in an unnatural way because he was wearing leg shackles. (Trial Tr. p. 177-78). The solicitor was concerned, not that the shackles were visible, but that Counsel would use this to support his argument that Applicant could not have physically committed the crime. (Trial Tr. p. 177). At the hearing, Applicant testified that there was a clicking sound when he was walking into the courtroom and that the jurors may have noticed his unnatural gait. Counsel explained that Judge Goodstein wanted Applicant shackled but that the shackles were not visible because they were underneath his pants. Counsel was confident that the jurors never saw the restraints.

Applicant relies on Deck v. Missouri, 544 U.S. 622 (2005) in support of his allegation. Deck held that a criminal defendant has a right to remain free of physical restraints that are visible to the jury absent a trial court determination that they are justified by a state interest specific to a particular trial. This Court finds Applicant's testimony not credible on the issue. Applicant's testimony is self-serving and unsupported by any evidence before the Court. Applicant has failed to present any probative evidence that his shackles were ever visible to the jury. Even if Applicant was seen by the jurors with his movement restricted by the shackles, this worked to his advantage to support the argument that Applicant could not have physically fought the victim nor committed the crime. This Court finds Applicant failed to meet his burden.

Applicant has also failed to show how he was prejudiced in any manner. In Humbert v. State, 345 S.C. 332 (2001), the Supreme Court faced the issue of whether the PCR court erred in finding no prejudice where the applicant was wearing a jail uniform and shackles during his trial. The court held that there was not a reasonable probability that the outcome of the trial would have been different had he not been dressed in a jail uniform. Humbert v. State, 345 S.C. at 338. See Byers v. Basinger, 610 F.3d 980, 989 n.6 (7th Cir. 2010) (finding that even if a defendant proceeds to a jury trial while wearing ankle restraints, he must still prove his appearance affected the outcome of his trial); Whitman v. Bartow, 434 F.3d 968, 971-72 (7th Cir. 2006) (finding any error in having the defendant proceed to a jury trial while wearing a prison jumpsuit was harmless because the State presented overwhelming evidence of the defendant's guilt); see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Applicant has failed to prove any prejudice. This allegation is denied and dismissed.

App.p. 1167-1168.

Relevant Facts From the Trial

Prior to the outset of the proceeding on May 21, 2012, defense counsel Gipson brought to Judge Goodstein's attention that there was an issue about the Petitioner's restraints. Judge Goodstein postponed *voir dire* and jury selection until the Petitioner was placed in an under the pants restrains that could not be seen or heard by the jury. She stated as follows:

For the record, the reason that I have postponed the jury selection is because of the constraint issue regarding the defendant. The detention facility in Orangeburg has a different system . . . and what I should have done yesterday and failed to do yesterday was to ascertain and find out whether or not the detention facility folks here, the security people here in Orangeburg had the, the **under the pant restraint** system, which they do not, and I did not realize that until, thank goodness, **Mr. Gipson [trial counsel] brought that to my attention just a few moments ago.** What I have done is, I have asked the Dorchester County detention folks to have the **under the pant restraint system** sent from Dorchester County which will allow us to use that restraint system on the defendant in this case. **It is unacceptable to me, obviously, I'm not going to have him in any kind of restraints which the jury could see or hear,** and I don't think it's prudent particularly in a courtroom of this size, but **there's got to be some restraint system in place.** Therefore, **I have sent the jury to lunch early, the jury panel, so that we can obtain and use the under the pant restraint system on the defendant.**

App. 9, 1. 3 - 10, 1. 1, p. 1076 (emphasis added). It is clear that Gipson opposed the use of visible restraints on the Petitioner prior to the court proceeding and Judge Goodstein corrected his concern by obtaining the non-visible restraints before the proceeding began. Petitioner is correct that counsel did not ask for a further basis beyond Judge Goodstein's statements that in a courtroom of this size there has to be some restraints system in place. App.p. 9-10.

At the conclusion of the **first day of trial on May 21,**² after some witness testimony, Judge Goosdtein stated: "We're going to, we'll keep the restraints and they've confirmed, see if you can please get Mr. Brown [Petitioner] up here and seated before the jury comes in." App. 176, 11. 22-24. In response to the judge's comment, the Deputy Solicitor Don Sorensen asked to put on the record "what [he] had pointed out" earlier. The solicitor stated:

And I know Mr. Gipson , I know he would not intentionally do this. I'm just afraid that **some of the jurors had the opportunity to observe Mr. Brown [Petitioner] walk in, and it was pretty obvious that there was something going on with his legs. I mean, it's clanking and he's walking like the tin man.** And my concern is that, you know, part of his defense I think is going to be that he had something wrong with his leg and couldn't have done this, and now we've got a bunch of jurors that have seen him, which obviously is not the condition that he is in. I mean, that bothers me a little bit now, I mean, you know, if he ultimately does start putting in stuff about his leg and couldn't have done this, that or the other, that **these jurors are going to have seen him walking and said, yeah, he does have something wrong with his legs, he's got braces on them or something.**

App. 177, 11. 3-20 (emphasis added). The prosecutor's concern was not about the restraint issue as much as the limited viewing of the jurors was supportive of a defense theory that he had a damaged leg and could not have done what the state was asserting that he did as a defense theory. Judge Goodstein recognized that defense counsel Gipson would not have pointed out to the jury that they saw him walking and that he had braces on his legs as supportive of the defense theory. App.p. 177. Defense counsel Gipson confirmed that he would not do that. App.p. 178. Judge Goodstein then declared "just make sure he's seated when the jury comes in ... " App.p. 178, l. 9-12.

²In the Petition, the Petitioner asserts that this occurred at the end of the second day of trial. Petition, p. However the record is clear that this colloquy occurred on May 22 the first day prior to recess. App.p. 178 (March 23, 2012 (sic)).

Importantly, the record suggests, consistent with Judge Goodstein's instruction that Brown was likely at the witness stand when the jury returned from recess. App.p. 673-674. During the testimony, Romeo Brown presented an alibi defense. App.p. 704-708. Brown testified that on September 15, 2010 through September 18, 2010, about six weeks before the shooting, he was hospitalized for a significant injury to his leg requiring seventeen staples to close the wound. Petitioner was released from wound care on October 19, 2010, but still required the use of a cane to walk. App. 684, l. 23 — 700, l. 18.³

The Petitioner showed the jury his leg injury when he stood up. App.p. 719, l. 13-25. He displayed on his leg the area where the wound was and where the surgery occurred. App.p. 719. He then returned to his seat. App.p. 720. He stated that if he sits in a position too long that his leg locks up on him. App.p. 720. [As noted before, Brown remained on the witness stand at the conclusion of his testimony. App.p. 781-782.]

When court resumed after the break of days due to the holiday, the Court asked the Petitioner to remain where he was and noted that he did not have restraints on at that time. App.p. 781, l. 16-20. Defense counsel Gipson declared "there are no restraints." App.p. 781, l. 21.

At that point, Judge Goodstein stated that Petitioner had come down off the witness stand when they finished on Friday, in response to Solicitor Sorenson's inquiry if Brown had come off the stand before. App.p. 781.

³ Petitioner's sister, Tammy Ryant, his neighbor, Erika Smith, and his nephew, Tedricks Green, all testified that in October 2010, Petitioner required the use of a cane. App. 599, l. 6 - 600, l. 23; App. 618, l. 22 - 619, l. 8; App. 645, l. 24 - 646, l. 6.

ANALYSIS

The Petitioner maintains that although he does not claim that the leg shackles were “visible,” he contends that it was obvious that he was wearing restraints because of the clanking or clicking noise when he walked or moved in the courtroom. See PCR Application, App.p. 1007-1010. Brown testified that that the shackles were metal braces on his legs “under his pants” and not visible to the jury. App.p. 1119, l. 7 – p. 1120, l. 23. He claimed that if he stretched his legs too far that they would lock and that there would be an audible click. He claimed that when he stepped on the witness stand that the shackles made a clicking sound and he walked funny. App.p. 1120, l. 6-8. He claimed after a couple days of that before the jury that the prosecutor claimed that they needed to bring him in before the jurors get in. App.p. 1119-1120. He claimed that jurors saw him have his legs straighten out and wondered whether they were thinking that he was planning and escape because it was strange. App.p. 1120.

There was no deficient performance in failing to request Deck findings for non-visible restraints

There is probative evidence to support the PCR court’s finding Petitioner failed to meet his burden to prove Counsel’s representation was defective because the jurors did not see Petitioner in restraints. Importantly, because non-visible restraints were used there was no due process requirement or Sixth Amendment requirement for counsel to seek further findings by Judge Goodstein.

First, counsel Gipson was successful in having visible restraints not used during the trial after he brought it to Judge Goodstein’s attention. App.p. 9. Since Deck does not require the

trial court to make the finding Petitioner currently requests for non-visible restraints, counsel could not be deficient.

Second, counsel never saw the Petitioner before the jury in visible restraints. Counsel testified Petitioner was placed in 'invisible restraints,' a type of restraint designed to go on underneath clothing, in order to prevent the restraints from prejudicing petitioner. App. 1140 – 1141. As counsel Gipson credibly testified: “[T]he major question, overarching question is whether or not, if he was not in the invisible restraints did the jury see him in other restraints? And the answer to that is no, not in my presence.” App. 1141, ll. 20 – 23.

Third, the record supports that Judge Goodstein’s intent was to have the use of restraints “not seen or heard.” App.p. 9-10. The parties, after Solicitor Sorenson’s concern was to insure that the Petitioner was not seen moving in court, arrangements were made to insure that he was seated.

Therefore, there is probative evidence to support the PCR court’s finding Petitioner’s shackles were not seen by the jury. The only PCR testimony that the jurors saw Petitioner in his restraints was provided by Petitioner. App. 1121. The PCR court found Petitioner’s testimony “not credible.” App. 1165; 1168. Counsel’s testimony, found credible by the PCR court, was presented in direct opposition to Applicant’s statement. App. 1141; 1164. “The PCR court’s findings on matters of credibility are given great deference by this Court.” Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014). Although petitioner presented testimony that contradicted trial counsel's testimony, the appellate court has consistently given great deference to PCR judges' findings and conclusions when matters of credibility are involved. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517, cert. denied, 510 U.S. 1014, 114 S.Ct. 607, 126 L.Ed.2d 572

(1993).

And, in denying Petitioner's application for PCR, the PCR court found "[Petitioner]'s testimony not credible on the issue. [Petitioner]'s testimony is self-serving and unsupported by any evidence before the Court. [Petitioner] has failed to present any probative evidence that his shackles were ever visible to the jury. Even if [Petitioner] was seen by the jurors with his movement restricted by the shackles, this worked to his advantage to support the argument that [Petitioner] could not have physically fought the victim nor committed the crime. This Court finds [Petitioner] failed to meet his burden." App.1168.

Defense counsel was not deficient in failing to object where:

1. Judge Goodstein postponed jury selection in order to secure non-visible restraints so he would not be seen in visible restraints prompted by defense counsel's requests. App.p. 9-10.
2. Judge Goodstein had the Petitioner seated before the jury returned to the courtroom.
3. Defense counsel Gipson testified that he was seated when the jury came in and it was not something they could see when they were looking at him. App.p. 1140, l. 19-24. Counsel Gipson stated that he did not hear the clicking so that he did not remember the clicking. App.p. 1147, l. 14-25.
4. The Solicitor's cautionary comments at the end of the first day of the trial about the walking and noise were ameliorated by the instructions by the trial judge to have Petitioner seated before the jury enters.
5. Contrary to the claim of the Petitioner, the record reflects that Petitioner

remained on the witness stand at the conclusion of his testimony. App.p. 781.

6. Petitioner was not in any restraints at the start of the last day of the trial. App.p. 781.

All these factors reveal that counsel was not under an additional duty to request the trial court to make any additional findings pursuant to Deck. There has been no expansion of Deck to non-visible restraints. Deficient performance was not shown.

The PCR Court reasonably applied Strickland in finding that Petitioner had failed to show prejudice.

The PCR court also found Petitioner failed to prove his appearance affected the outcome of his trial. AS stated above, the PCR Court concluded “[Petitioner] failed to show how he was prejudiced in any manner. In Humbert v. State, 345 S.C. 332 (2001), the Supreme Court faced the issue of whether the PCR court erred in finding no prejudice where the applicant was wearing a jail uniform and shackles during his trial. The court held that there was not a reasonable probability that the outcome of the trial would have been different had he not been dressed in a jail uniform.” App. 1168.

But again, there were no visible restraints. In fact, these restraints are apparently of the kind referenced with approval in Deck. The Supreme Court noted there that “state authorities required Deck to wear leg braces that apparently were not visible to the jury” in his first trial. Deck, 544 U.S. at 624. An appellate court granted a new sentencing proceeding. In the second proceeding, Deck was required to wear “leg irons, handcuffs, and a belly chain.” Deck, 544 U.S. at 625. The Supreme Court questioned “why, if shackles were necessary, [... the re-sentencing judge...] chose not to provide for shackles that the jury could not see - - apparently the

arrangement used at trial.” Deck, 544 U.S. at 634-35. These are exactly the kind of shackles approved of by our State Court in State v. Tucker, 320 S.C. 206, 464 S.E.2d 105 (1995).

Moreover, in Tucker, the Supreme Court of South Carolina also noted that the decision to order the use of restraints during trial is a matter soundly left to the discretion of the trial judge. 320 S.C. at 209. Likewise, here, the judge also took great care to minimize any prejudice from the necessary restraints. There could be no prejudice. Id. See also Williams v. Woodford, 384 F.3d 567, 592 (9th Cir. 2004)(“When the jury never saw the defendant’s shackles in the courtroom, we have held that the shackles did not prejudice the defendant’s right to a fair trial.”); State v. Chambers, 589 N.W.2d 466, 475 (Minn. 1999)(approving use of leg brace worn under pants finding “the trial court ordered an inconspicuous and unobtrusive means of restraint that may have been undetected by the jury”); State v. Miller, 955 P.2d 603, 608 (Idaho 1997)(“because the jury did not see the locking leg restraints, Miller was not prejudiced by the presence of the restraints.”); State v. Bracy, 703 P.2d 464, 476 (Ariz. 1985)(In view of defendant’s background, we do not think the trial court abused its discretion in ordering defendant to wear restraints the jury could not see.”); 21A Am. Jur. 2d Criminal Law § 1019 (“The court should pursue the least restrictive means available, and make reasonable efforts prevent jurors from seeing the restraints.”)

In sum, since the restraints here were not visible, there could be no constitutional error. To be sure, courts have found that a jury's brief or inadvertent glimpse of a defendant in physical restraints outside the courtroom is not inherently or presumptively prejudicial. See United States v. Olano, 62 F.3d 1180, 1190 (9th Cir. 1995) (holding that habeas relief is not warranted when a jury sees a defendant in handcuffs outside the courtroom unless he can demonstrate “actual

prejudice”); see also United States v. Halliburton, 870 F.2d 557, 560-61 (9th Cir. 1989) (holding that jurors' inadvertent observation of defendant in handcuffs outside the courtroom did not prejudice him where the court carefully explained that shackling had no bearing on guilt); Ghent v. Woodford, 279 F.3d 1121, 1133 (9th Cir. 2002) (as amended) (no prejudice from jury's brief glance of shackles outside of courtroom while petitioner was being transported); Further, Petitioner has failed to show that there is a reasonable probability that the motion would have been granted and the results of the trial would have been different if trial counsel had cited courtroom shackling cases. Thus, the PCR court's determination that trial counsel was not ineffective in her handling of the shackling issue was not an unreasonable determination of the facts, nor an objectively unreasonable application of Strickland.⁴

The PCR judge also did not err in finding Petitioner failed to meet his burden of proving he was prejudiced by his appearance because the PCR court found the State produced overwhelming evidence of Petitioner's guilt. “Numerous people who attended the gathering at Ryant's property witnessed the shooting and identified Applicant as the assailant. These witnesses knew Applicant by name and face.” App. 1164. Even if Petitioner's restraints were seen by the jury, Petitioner cannot demonstrate a reasonable probability the outcome of his case would have been any different had he not been seen in restraints. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of

⁴ We may look to the due process shackling cases as illustrative of the degree of prejudice assigned to different restraints. The knee restraint in this case was significantly less obtrusive and restrictive than the kinds of shackles that the Supreme Court has considered. See Deck, 544 U.S. at 625, 125 S.Ct. 2007 (leg irons, handcuffs, and a belly chain); Holbrook v. Flynn, 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (shackled and gagged); Illinois v. Allen, 397 U.S. 337,

defendant's trial). See Bvers v. Basinger, 610 F.3d 980, 989 n.6 (7th Cir. 2010) (finding that even if a defendant proceeds to a jury trial while wearing visible ankle restraints, he must still prove his appearance affected the outcome of his trial); See also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, there is probative evidence to support the PCR court's finding Petitioner failed to prove Counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, there is probative evidence to support the PCR court's finding Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Therefore, this petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the petition for writ of certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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December 8, 2017

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari from Orangeburg County
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2016-002401

ROMEO BROWN,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

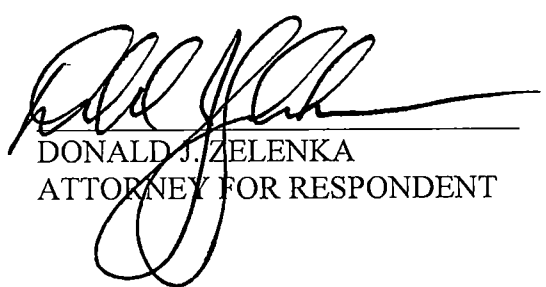
RESPONDENT,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Lara Mary Caudy, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
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This 8th day of December, 2017


DONALD J. ZELENKA
ATTORNEY FOR RESPONDENT