IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS

PAUL M. BURCH, CIRCUIT COURT JUDGE

2014-CP-40-4139

RECEIVED

JUL 11 2019

S.C. SUPREME COURT

Henry L. Gray,.....Petitioner.

vs

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Henry Gray appeals the Honorable Paul M. Burch's June 25, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on July 1, 2019. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Anna R Browder

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July 11, 2019

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PROOF OF SERVICE

I, Anna Browder, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, William Edgar Salter, III, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 20 day of September 2018.

Respectfully submitted,

Anna R Browder

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Columbia, South Carolina 29202

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Henry L. Gray, #162134, Applicant, vs. State of South Carolina, Respondent.	2014-CP-40-4139 **ORDER OF DISMISSAL**

This matter is before the Court by way of a Post-Conviction Relief (PCR) Application filed on July 1, 2014, and an Amended Application filed on July 10, 2017. Respondent made its Return on November 19, 2014. The Court held an evidentiary hearing into the matter on August 30, 2017, at the Richland County Courthouse. Applicant (Gray) was present at the hearing and Anna Rawl Browder, Esquire, represented him. Assistant Attorney General Jessica E. Kinard represented Respondent.

Gray testified on his own behalf at the evidentiary hearing, while the State presented testimony from trial counsel, Mathias Chaplin, Esquire. The Court also had before it a copy of the trial transcript; the records of the Richland County Clerk of Court regarding Gray's convictions; the records from Gray's direct appeal; and Gray's South Carolina Department of Corrections (SCDC) records. The Court now denies relief and makes the following findings:

I. PROCEDURAL HISTORY

Gray is presently confined in the McCormick Correctional Institution of SCDC, as the result of his Richland County convictions and sentence. The Richland County Grand Jury indicted him on March 10, 2010, for lynching in the first degree. The Richland County Grand Jury

thereafter indicted him on October 5, 2011 for murder. The Richland County Grand Jury similarly indicted his sister, Robin Reese (Reese), in March 2010 for lynching in the first degree (2010-GS-40-0040), and for murder in October 2011 (2011-GS-40-4916).

On February 28-March 2, 2012, Gray and Reese received a joint jury trial before the Honorable G. Thomas Cooper.[1] At trial, Mathias Chaplin, Esquire, represented Gray and Andrew Farley, Esquire, represented Reese. Fifth Circuit Deputy Solicitor K. Luck Campbell, and Assistant Solicitors April Sampson and Nicole Simpson prosecuted the case. The jury convicted both defendants, as charged. Judge Cooper imposed concurrent sentences of thirty years imprisonment for each conviction, on each defendant.

Gray timely served and filed a notice of appeal. Assistant Appellate Defender David Alexander represented him on appeal. On October 21, 2013, Gray filed a Final Brief of Appellant, in which he presented two issues to the South Carolina Court of Appeals:

1. Whether the trial court erred in admitting gruesome autopsy photographs that were unnecessary to prove any contested fact and which unduly prejudiced appellant?

2. Whether the trial court erred in refusing to give an involuntary manslaughter charge because evidence showed that the decedent's death could have been the result of a trivial fight?

The State filed a Final Brief of Respondent on October 4, 2013. The South Carolina Court of Appeals affirmed Gray's convictions and sentence on June 11, 2014. *State v. Gray*, 2014-UP-5240 (S.C. Ct.App., June 11, 2014). It sent the Remittitur to the Richland County Clerk of Court on June 27, 2014.

II. ALLEGATIONS

Gray alleged the following grounds for relief in his original Application:

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

1. Ineffective Assistance of Counsel:

   a. but for counsel Mathias Chaplin's unprofessional errors, the result of my trial would have been different;

   b. "[Counsel failed] to properly research and investigate the facts, laws and or "any" reasonable sound trial strategy(ies) surrounding the entitlement of my case with prejudiced my trial and appeal. (Sic).

Additionally, he raised eight claims in his Amended Application:

a. Ineffective assistance of counsel - counsel failed to adequately prepare for trial with Applicant;

b. Ineffective assistance of trial counsel—counsel failed to object and allowed Applicant to be shackled during entirety of trial;

c. Ineffective assistance of trial counsel—counsel failed to object to the same jury pool being used after a *Batson* motion was granted;

d. Ineffective assistance of trial counsel—counsel failed to object to witnesses testifying they were scared to testify;

e. Ineffective assistance of trial counsel—counsel failed to object to information regarding gangs being introduced and/or opening the door to such testimony;

f. Ineffective assistance of trial counsel—counsel failed to object to burden shifting in the State's closing argument;

g. Ineffective assistance of trial counsel—counsel forced the Applicant to not testify regarding his defense; and

h. Ineffective assistance of trial counsel —counsel failed to obtain a ruling on the record regarding a lesser-included charge on lynching.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and

conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Evidence Presented At Trial

1. The prosecution's case.

On the afternoon of February 13, 2010, two officers with the Columbia Police Department were dispatched to a fight involving several people on McDuffie St. in Columbia.[2] They were told that one person involved in the altercation was wearing a red hoodie or hat, and that another person involved in it had on a black sweat shirt or hoodie and was carrying a red backpack or satchel. ***Tr. 175; 177-78; 192-96; 206.***

The officers did not find a fight when they first arrived at McDuffie St. However, one officer saw an individual with a red backpack enter an apartment, as they drove through an apartment complex near this street. So, after notifying the other officer of what he was going to do, this officer went to that apartment and spoke with Ms. Valerie Goodwin. She told him that that "Bloom," Marcellius Brooks, had come into her apartment but was no longer there. ***Tr. 178-79; 182; 189-90; 196-98; 205-07.***

The officers then received a call that there was a person on the ground between two buildings in the apartment complex. When they investigated the call, they found an unconscious man, later identified as Kenneth Mack, lying on the ground. Mr. Mack looked like he had fallen and he had injuries to his nose and lip. Also, he did not respond to a sternum rub and it appeared that he was having a seizure.[3] So, the officers immediately called EMS, and Mr. Mack was

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[2] All locations referred to in this Order are in Richland County, unless otherwise specified.

[3] Mr. Kevin Thomas, a Richland County EMT who responded to the call testified that Mr. Mack "was having some posturing signs." He explained that this is an involuntary response that is similar to a seizure "but it is more indicative of a brain injury. It's a different part of the brain than a seizure." ***Tr. 386, lines 9-18.***

transported to Richland Memorial Hospital shortly before 3:30 p.m. ***Tr. 179-81; 184; 198-200; 382-88; 678-80***. Mr. Mack was pronounced brain dead shortly after he arrived at the hospital. ***Tr. 679-80; 760.***

A number of witnesses testified at trial to the attacks that ultimately resulted in Mr. Mack's death. As can be expected, these eyewitnesses gave varying accounts of the attacks. The first eyewitness called by the State was Angelo "Ricky" Boyd. Boyd testified that he was sixteen years old when the beatings occurred and that he lives on McDuffie St. On the afternoon of February 13, 2010, Boyd met up with his friend, Marcellius Brooks, and the two started walking to Cousins Mini Mart, on Forest Dr., which was a very short distance from where the victim was later found. ***Tr. 242-45; 254; 523-25.***

As they were walking, they saw a man grabbing on the arm of Melquanna S., a/k/a "Lucy," Robin Reese's thirteen year old daughter. "She was yelling 'Stop.'" The man, Mr. Mack, did not stop and, eventually, he "threw her to the ground." Boyd is a friend of Lucy and her brother. So, he and Brooks intervened. Brooks tackled the victim and held him down. Boyd kicked the victim's face or body with his Timberland boots and, at the insistence of Brooks and Boyd, Lucy hit the victim "a couple" of times while Brooks held the victim down. ***Tr. 245-48; 254-55; 260-63.***

By this time, a crowd had gathered. After this beating, Brooks and Boyd took Lucy to Cousins Mini Mart, to let Reese know about what had happened. They also let her know that "it was already good." Reese looked as if she was going to finish her video poker game.[4] Boyd and Brooks then both left the store. ***Tr. 248-54; 256-57.***

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[4] While Boyd testified that he did not recall doing so, he admitted that he could have told police that upon hearing that the man was harassing her daughter, Reese "jumped up and said, 'Hell, no.'"

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Police reviewed the store's surveillance video and could see that several men came into the store and approach a woman who was playing video poker. The men then left and headed back towards the apartment complex. ***Tr. 457-58; 523-28; 798-99***; State's Exhibit 78. Malik Akbar, one of the store's co-owners at the time, testified that he ran the store's restaurant. He was familiar with Reese, Gray and Brooks. He testified that Reese would come into the store and play video poker. ***Tr. 523-25; 530-31.***

Mr. Akbar saw Reese playing video poker there on the afternoon of February 13th. At some point, a group came into the store and Mr. Akbar saw the group, including Lucy and Brooks, talking to Reese and "dancing around" where Reese sat. Also, there was "quiet fussing." Lucy and Reese left a short time later. ***Tr. 532-39; 541-42.***

Police also reviewed a video of a nearby fish market. State's Exhibit 93. This video "corroborated that Brooks went to the store after the attack, "told Ms. Reese about the assault with her daughter and that she had left with her daughter and that she was on the cell phone at the time when she walked out the door." However, there were technical problems when police tried to seize the video. ***Tr. 773-75.***

Donetti Perry lived across the hall from Gray's father in the Columbia apartment complex where the crimes occurred. Her friend, Sanovia Thompson, came to her door about mid-afternoon on February 13, 2010, and told her that something was happening outside. When Ms. Perry went to her door and looked outside, she saw Mr. Mack having a conversation with "Six," or Gray.[5] ***Tr. 274-79.***

He also could have told police that Reese stayed in the store and finished her video poker game. ***Tr. 250-51; 253.***

[5] Ms. Perry did not know Mr. Mack at the time and she was unaware of the first assault. ***Tr. 295-96.***

Gray was apparently unaware of the previous difficulty at that time and asked Mr. Mack what had happened to him because Mr. Mack looked like he had been in a fight. As soon as Gray received a phone call, however, Gray returned and used his feet to "clip" or undercut Mr. Mack's feet from under Mr. Mack. This caused Mr. Mack to immediately fall to the ground and strike his head. ***Tr. 279-81.***

Even though Mr. Mack stayed on the ground, Gray repeatedly kicked him "all over." Gray also cussed him and asked him what he had done to Gray's niece. At some point, Reese came from her apartment and joined the assault. Reese said, "'yes, that's him' and started kicking him [while] saying ... 'I'm going to teach you for messing with my daughter' ... [or] something similar to that." Mr. Mack never got off of the ground or "put up a fight." Nevertheless, Reese got a metal chair off of a nearby porch, and both she and Gray hit Mr. Mack with it "two or three times." ***Tr. 281-87; 301; 303-06.***[6]

By then, a crowd had gathered. Eventually, the sibling co-defendants stopped their savage onslaught and walked back to their respective apartments. Ms. Perry could see that Mr. Mack was injured "all over," and that blood was coming from his mouth. Thompson called the police. ***Tr. 287-90.***

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[6] Police seized the chair (State's Exhibit 72) and it was swabbed for DNA. ***Tr. 444-46; 448-49.*** Subsequent testing of these swabs by SLED DNA analyst Katie Ukra revealed that a presumptive test for the presence of blood was positive on several swabs. More importantly, a partial DNA profile was developed from the bottom seat of the chair and this partial profile matched the DNA profile of Mr. Mack, the victim. "The probability of randomly selecting an unrelated individual having a DNA profile matching this item is one in approximately twenty-five million." ***Tr. 605-12.***

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Mary Anderson testified that her deceased sister also lived in the same apartment complex in February 2010, and that she had visited her sister on the afternoon of February 13th. As she was leaving, she saw Reese and Gray[7] "beating the boy down [on] the ground[,] stomping [him], kicking him, doing everything and beating him with an iron chair," and the victim "wasn't moving at all." [8] She testified that she was unable to recall who used the chair, but she had indicated in her statement to police that both defendants did. Reese was wearing a pair of boots. ***Tr. 347-53; 361; 367-68; 379-80.***

As Reese was attacking Mr. Mack, Ms. Anderson heard Reese say, "[M]otherfucker, why [did] you approach my 13-year-old?" This attack "[l]asted for a while" and was so intense that Ms. Anderson momentarily turned away from it and eventually had to leave. She was concerned that Reese and Gray were going to kill the man. After Reese and Gray stopped their attack, they walked to their father's apartment. ***Tr. 353-56; 361; 368.***

In February 2010, Kara Chase was homeless but her best friend, Synovia Thompson, lived in the apartment complex where the beatings occurred.[9] On the afternoon of February 13th, she and Ms. Thompson were outside with one of the children of Ms. Thompson's cousin. Ms. Chase remembered seeing a man whom she did not know walking down the street that runs through the complex. This man had a "disagreement" with "Six," *i.e.*, Gray, over something the man had said. Gray grabbed the man and told him, "'you['re] gonna talk to me." ***Tr. 393-99.***

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[7] She knew them through their father and recognized both. She identified Gray as "Six." ***Tr. 349.***

[8] She did not know the victim but knew that he worked at a Forest Drive barber shop. ***Tr. 351.***

[9] She was blind and on dialysis by the time of trial. ***Tr. 401, lines 22-23.***

The grab "wasn't forceful but it looked like Mr. Mack didn't want to go with him either." Something else was said and Gray hit Mr. Mack hard enough to take Mr. Mack's feet out from under him. Mr. Mack fell to the ground and did not get up. ***Tr. 399-401; 403.***[10]

"That's where it kind of gets blurry to me because I don't remember exactly what happened from right there while the man was lying on that particular area. ... I know when the man hit the ground that [Gray] walked off." Ms. Chase remembered Mr. Mack saying, "I'm not going anywhere;" Reese saying, "'That's him;'" and Reese hitting Mr. Mack. She also remembered telling police that it looked like Mack hit his head when he fell to the ground and was "out cold" after this point. And she remembered telling police that "the other man continued to kick and stomp the man in his face once the female stopped." However, she claimed that did not remember Reese striking Mr. Mack with a chair or even picking up a chair. ***Tr. 401-07; 410; 412-13; 422-24.***

During the attack, Gray hit Mr. Mack with the chair. Also, Gray was wearing construction boots in the attack. Once the attack ended, Mr. Mack just lay on the ground. "Either he was faking it, so that way nothing else would happen to him, or he was seriously hurt." ***Tr. 407-08; 412-13.***

Because of the inconsistencies between Ms. Chase's testimony and what she told police, the State was allowed to introduce and publish her February 16, 2010 statement to police, as State's Exhibit 88. In her statement, she stated that:

> I saw the victim in between ... [two] buildings of [the apartment complex] having a conversation with another man. The other man grabbed the victim and went to walk him down the sidewalk. The victim snatched back and the other man swept the victim from [off] his feet causing the victim to hit his head on the pavement ... . A few seconds later a female runs up the street saying "That's him." She begins

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[10] Ms. Chase's daughter is the best friend of Reese's daughter (***Tr. 402***) and, unfortunately because of that friendship, her physical limitations or because Reese, Gray and Lucy S. are all affiliated with the Bloods (***Tr. 765; 799-800; 827; 830***), Ms. Chase's trial testimony deviated wildly from her statements to police, beginning at this point forward. *See also* ***Tr. 421, lines 22-24***) (admitting that she would like to do what she could to help the defendants).

kicking the man repeatedly, picking up an old metal chair, throwing it on top of the victim. The other man continued to kick and stomp the man in his face. Once the female stopped, the victim laid on the ground the whole time this was occurring."

Tr. 750, lines 1-16.[11]

Ms. Chase did not know the victim but she identified the male attacker as "Six" and the female attacker as his sister. Likewise, she had heard Mr. Mack say, "I am not going anywhere. Just do what you're doing to do to me here." Further, she indicated that Mr. Mack "did not have a chance to fight back or flee" and that "Six" was wearing construction boots. ***Tr. 750-52.***

On February 13, 2010, Amber Hardy was the pharmacy manager at the CVS pharmacy located on Forest Drive near the apartment complex. While she was in her car following a shoplifter and on the phone with police that afternoon, she saw four black males and a black female taking turns kicking and punching another black male on McDuffie St. The victim was trying to defend himself. The beating only lasted for about "five minutes," but Ms. Hardy testified that "[i]t seemed like forever." ***Tr. 474-78; 480-83; 490.***

After this "brutal" attack ended, the attackers walked away from the victim and to the open air market. The victim could stand after the attack. However, he was very unsteady on his feet. Ms. Hardy returned to CVS. ***Tr. 477-78; 489-90.***

Marcellius Brooks, a/k/a "Bloom," testified that he had been charged with murder in this case, but that he cooperated with law enforcement and was testifying because he was innocent of killing Mr. Mack. ***Tr. 572-73; 575; 578-79; 592.*** Brooks used to live in the apartment complex where the beatings occurred and he was familiar "with the open air market ... on Forest Drive,"

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[11] When interviewed by an investigator with the Fifth Circuit Solicitor's Office on the day before the trial started, Ms. Chase confirmed that her February 16th statement was correct. ***Tr. 732-36; 745.***

Cousins. He was friends with Reese and used to be her next door neighbor. He also knew that she had a thirteen year old daughter named Lucy. He "knew of" Gray, to whom he referred as "Six." ***Tr. 552-56; 580.***

As Brooks was walking down McDuffie St. on the afternoon of February 13, 2010, he saw Lucy involved in an altercation with a man that he had never seen. At first, she and the man were talking, but she soon slapped him. After that, the man picked up Lucy and slammed her on the ground. In response, Brooks decided to help Lucy. ***Tr. 556-58; 582.***

Brooks "bum rushed" the man, or "tackl[ed] him off of her." Brooks admitted that he hit the man twice "[w]ith a closed fist" while he held the man down. He denied anyone else kicked the man except for Lucy, whom Brooks persuaded to kick the man several times. However, Brooks was on top of the man and she could not kick him cleanly. As they were on the ground, a crowd started to gather. ***Tr. 558-61.***

At some point, Boyd pulled Brooks off of the man. The man ran away from Brooks and "towards the bottom of [the complex]." The man had a busted lip. ***Tr. 562; 569; 583; 590-91.*** Brooks and Boyd then walked Lucy to the open air market because Reese was there playing video poker and he wanted to tell Reese about what happened. The crowd followed them. When Brooks told Reese what had happened, she was "upset." She asked who the man was, and both Brooks and Lucy said that they did not know. ***Tr. 562-65; 597.***

Reese and Lucy soon left the store. Although she called someone on her cell phone as she was leaving, Brooks did not know whom she had called. Reese was mad when she and Lucy left the store, and she walked down Forest Drive. Brooks did not accompany them. Instead, he walked down McDuffie St. and went to Valerie Goodwin's apartment, as he had previously planned to do.

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There, he got some money to give to her incarcerated son. Brooks' mother then picked him up and took him to her home. ***Tr. 565-70.***

The police called Brooks' phone the following day and he turned himself in on February 15th. The charges against him were still pending at the time of trial and he had not received any promises or consideration on his charges, in exchange for his testimony. ***Tr. 570-76; 578-79.***

Sanovia Thompson testified that she lived in the apartment complex where the beatings occurred. On the afternoon of February 13, 2010, Ms. Thompson was babysitting her cousin and five children. The children were running around playing outside, but Ms. Thompson "was back and forth" because Ms. Chase was staying with her at the time. As Ms. Thompson was sweeping her stairs outside, she saw a man whom she did not know walking on the sidewalk on Forest Drive, "with his hand over his head. He appeared to be intoxicated ...." ***Tr. 635-38.***

Although the man could talk, he "had a knot on his head and it obviously was bleeding. He was kind of like staggering." After the man spoke to someone else, Gray looked at him and asked, "'[w]hat happened to you?'" Gray then started to go "on about his business." The man "said something about some young b-i-t-c-h up the street." Just then, Gray's telephone rang and he went into his father's apartment to answer it. ***Tr. 637-41.***

As soon as Gray came back outside, his demeanor had changed. He said, "'you put your hand on my niece.' He grabbed [the man] on the collar. He said, 'we're going to talk to my sister.'"[12] Ms. Thompson followed the men, and when she saw them again, the man was on the ground. Reese was walking up the sidewalk and "looked like she was upset, maybe crying." ***Tr. 642-45; 653.***

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[12] Thompson had known Reese for roughly five years at the time. ***Tr. 642.***

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Because Ms. Thompson was unsure about what would happen next, she took the children inside. When she came back out, she saw Reese ask the man, "'Why did you put your hand on my baby' or something like that. She kicked him on the leg one or two times." Then, Reese and Gray walked away from the man, who had never defended himself and did not get up. Ms. Thompson called 911 and Ms. Chase reported that the man was lying on the ground. ***Tr. 645-47; 650.***[13]

Issac Weathers testified that he lived in the same apartment complex in February 2010, and that he witnessed a fight on February 13th. "A young lady and a guy [were] arguing." At first, Mr. Weathers thought that they were playing. They got "tangled up and they fell." Then, "a bunch of guys just went and jumped on him." Brooks or "Bloom" was the first person to hit the man. The girl also hit him at Brooks' invitation for her to "'get your licks in.'" ***Tr. 656-58; 662; 664.***

The man who was being beaten tried to convince his attackers that he and Lucy had been playing. Also, he tried to defend himself. When the attackers stopped beating him, the man "jumped up and ran." The attackers went to the store. Mr. Weathers heard Brooks say that he did not get the man good enough. ***Tr. 658-60; 665; 670-71.***

Dr. Bradley Marcus testified that he is a forensic pathologist and he works as the chief medical examiner for Richland County. ***Tr. 672-73; 677.*** On February 16, 2010, Dr. Marcus performed an autopsy on Kenneth Mack.[14] Dr. Marcus detailed the injuries that he found on autopsy through diagrams (State's Exhibit 86-87) and photographs (State's Exhibits 51-57 and 80-83). There was a contusion caused by blunt force trauma on the right portion of the face (State's Exhibit 52); a laceration over the left eye (State's Exhibit 53); a laceration to the side of the left

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[13] At some point, Ms. Thompson noticed that a neighbor's chair was in the grass instead of where it was normally kept. ***Tr. 646.***

[14] Although Mr. Mack was declared brain dead shortly after arriving at the hospital on February 13th, he was kept on life support until his organs could be harvested. ***Tr. 679-80.***

eyebrow (State's Exhibit 53); sclera hemorrhaging in whites of the eyes (State's Exhibit 54); an injury to his inner lip that had hemorrhaged (State's Exhibit 55); hemorrhaging along the scalp on the right side; hemorrhaging in the scalp on the back of the head; and hemorrhaging in the skin underneath the blunt force trauma contusion. ***Tr. 681-89; 696-98.***

Dr. Marcus' internal examination focused on the head area and he concluded that the cause of death was a closed head injury due to blunt force trauma to the head. When he removed the skull cap and looked at the victim's brain, Dr. Marcus found "a significant injury and the ultimate cause of his death. ... There was a massive amount of subdural hemorrhage, a massive area of blood around the left area of the head." On the right, Dr. Marcus likewise found a subarachnoid hemorrhage and "cerebral contusions, which is actually hemorrhage in the brain itself." This is usually caused by blunt force trauma and required a "significant amount of trauma." ***Tr. 698-703; 706; 710-11; 716-17.*** *See also* State's Exhibits 80-83.

Dr. Marcus explained that a person can live with trauma on the scalp but a person cannot live with the hemorrhage on the brain, itself. Dr. Marcus opined that the victim could have possibly lived if there had only been a subdural hemorrhage. **Tr. 703-05**. Dr. Marcus also found a skull fracture "in the right parietal area," or "[t]owards the back of the head" and in the same area where he found the cerebral contusion and the hemorrhaging. Such an injury would require a "[s]ignificant amount of force" and it was "[a]bsolutely" consistent with a person having his feet swept out from under him and landing on his head. ***Tr. 699-700; 704-05; 710-11; 712.***

The injuries that Dr. Marcus found on autopsy were also consistent with the "posturing" observed by the EMT. He opined that "[t]he second assault certainly contributed to [the victim's] death in this case," but he could not distinguish which injuries were sustained in the first attack from those injuries that were sustained in the second attack. ***Tr. 706-09; 712; 719.***

On cross-examination, it was established that a toxicology screen on the victim's blood reflected that he had marijuana and .125 mg. of Lorazepam, or Ativan in his system. Lorazepam is an anti-anxiety medication that is used to relax people. This level of Lorazepam was "in the midrange of therapeutic" and would not have contributed to the victim's death. ***Tr. 712-15; 727.***

Dr. Clay Nichols, a forensic pathologist, testified that he was the chief medical examiner for Richland County when the autopsy was performed. In that role, he had reviewed the autopsy procedures followed by Dr. Marcus and concluded that it was correctly performed. ***Tr. 1008-11.*** Dr. Nichols had also reviewed Dr. Marcus' findings and the history that had been provided. He explained that "[t]he timeline and injuries indicate that it would have been a second assault where the deceased fell and hit the concrete, resulting in closed head injury. The first assault, the evidence isn't there for a head injury. The second assault, there is real good evidence for a head injury." ***Tr. 1012.*** Dr. Nichols had discussed his opinion with both the Coroner's Office and police and he adhered to that opinion. ***Tr. 1012.***

Sgt. William Pegram testified that he is the supervisor of the City of Columbia Police Department's violent crimes unit and that he was the lead investigator in this case. The victim was already brain dead by the time Sgt. Pegram reached the hospital on February 13, 2010. ***Tr. 758-60.*** As part of the investigation, a search warrant was issued and the records obtained for Brooks' Nextel cell phone. ***Tr. 771***; *see also* State's Exhibit 75 (portions of Brooks' records). Also, investigators spoke to many of the witnesses, including Brooks, Reese, and her daughter, Lucy.[15]

[15] Lucy was interviewed on February 14th and provided information about Brooks. A warrant was obtained for Brooks' arrest on the 15th. ***Tr. 769-70.*** Reese had not mentioned being involved in an incident involving a chair and police were focusing on Brooks because they did not know that there had been a second attack. ***Tr. 1036-40.***

Police were unaware of the second attack when Reese and her daughter were questioned. ***Tr. 769-71; 775-81.***

Because Reese's calls from her cell phone became important, Sgt. Pegram testified that a search warrant was likewise issued and the records obtained for her Nextel cell phone. ***Tr. 786-87***; *see also* State's Exhibit 76 (portions of Reese's records). He explained that there was a phone call from Reese to Brooks at 3:11 p.m. on the 13th and other calls between them that day. This showed deception in that Brooks and Reese knew each other, whereas they had tried to distance themselves from each other when interviewed. There was also a call from Reese to her father's telephone at 3:07 p.m. on the 13th, which police believed corroborated information that Gray had received a call before his attack on the victim. ***Tr. 788-91.***

Among the witnesses presented in reply, the State presented SLED toxicologist Quintas Young, who testified that he had analyzed blood samples of the victim. There was "a negative blood alcohol." However, the drug screen was "positive for [benzodiazepines] and tetrahydrocannabinols[,] which we found later to be Lorazepam and a [metabolite] of marijuana/THC." Mr. Young indicated that the carboxyl THC that was present was "inactive" or non-interfering. This just meant that there was marijuana use in the past, and that it could possibly have been a week earlier, depending on the frequency of use. ***Tr. 1015-16; 1018-20.***

Mr. Young further explained that Lorazepam, or Ativan, is in a class of drugs called "benzodiazepines." Benzodiazepines are commonly used to treat anxiety. However, "Lorazepam is normally administered in hospitals for head injuries ... [because] it [slows] the brain activity to prevent brain swelling." Ativan is "a very simple central nervous system depressant similar to that of alcohol" and the amount of Ativan found in Mr. Mack's system fell within the therapeutic range.

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Even combined with Ativan, the THC found in Mr. Mack's system "would not play a role in impairment" because it was inactive. ***Tr. 1020-22.***

2. Gray's evidence.

Gray's first witness was Dr. Adel Shaker, a forensic pathologist. While Dr. Shaker was critical of the manner in which the autopsy had been performed, he agreed that the cause of death was blunt force trauma to the head and that he could not determine which attack led to the death. However, Dr. Shaker opined that the fatal blow could have been struck in the attack McDuffie St. and that the victim could have experienced a lucid interval before herniation due to bleeding of the brain. Dr. Shaker further opined that, during the lucid interval, the victim could have walked to the location where the second attack occurred and then collapsed. ***Tr. 844; 849-51; 854-60; 866-67; 892-93; 895.***

Dr. Shaker opined that the injuries he observed were not consistent with being beaten with a metal chair. Also, he hypothesized that the level of benzodiazepine in the victim's system, when combined with marijuana could have made the victim so unsteady on his feet that he fell. However, the drugs were unrelated to the cause of death and he conceded that hospital personnel had given the victim Ativan when he was admitted. ***Tr. 852-53; 857; 863; 883; 889; 900.***

Ms. Kiki Burns testified that she had witnessed an incident on February 13, 2010, and that she had given a statement to police. She was working at a BP gas station immediately across Forest Drive from McDuffie St. As she was waiting on customers, she saw "four or five people running up the street." One man was in front of the others, and the others wore black hoods. ***Tr. 993-96.***

The man in front ran to his left and he "must have tripped over a chain or something and he fell." The people who had chased him then beat him. Ms. Burns also saw a black female involved in the beating. After the attackers had walked away, the man tried to stand. However, "he

stumbled back down." Ms. Burns "went to turn around and look and he was gone." ***Tr. 996-97; 1002-04.***

3. Reese's evidence.

Dr. Sandra Conradi, Reese's forensic pathologist, testified that she had reviewed the autopsy report, the coroner's report, the investigative reports from the City of Columbia Police Department, the laboratory report and the photographs in this case. ***Tr. 912-13.*** Based upon Dr. Conradi's review of this evidence, she opined that the cause of death was brain injury, as the result of blunt force trauma to the head. ***Tr. 915-16.***

She further opined that:

> Mr. Mack was fatally injured in the second fight and in my opinion, he struck, his head on a hard surface, fractured his skull, suffered very severe head injuries including bleeding between the scalp and his skull, bleeding under the skull, between the skull and the brain and he had bruising or contusions of his brain along with the other fractures and associated abrasions and contusions of his face and mouth, which were not fatal. The fatal injury was the brain injury. He suffered that from falling and being propelled onto a hard surface on the back of his head.

Tr. 914, lines 8-20. See also Tr. 918, line 24 –919, line 6.

She explained that it takes "quite a severe" force to fracture a skull, and this could not be caused by simply falling to the ground. Rather, "you have to be propelled very hard to fracture the skull as this Mr. Mack did on the right side of his head and causing the degree of brain bruising and bleeding that he had." ***Tr. 916, lines 17-25.***

Melquanna "Lucy" S. testified that she was thirteen years old in February 2010. She had planned to get her nails done, at a salon on Forest Drive, on the afternoon of February 13th. However, the store was locked and a lady told her that it would not be open until Thursday.[16] As

[16] A review of a 2010 calendar reflects that February 13, 2010, was a Saturday.

she was standing there, a man approached her and said that she could come in his house. Although she did not know the man at the time, she later learned that this man was Mr. Mack. ***Tr. 921-26.***

Lucy went into the open air market and told her mother that she could not get her nails done that day and she bought some potato chips. As she was walking home, Mr. Mack approached her again and asked her if he could have some chips. Lucy told him to leave her alone because she was "trying to avoid having a conversation with him." However, he stopped her in her tracks and was "jerking" her around. ***Tr. 926-27.***

He also threw a snowball at her. When she told him that she was going to get her mother, he grabbed her with his right hand. In response, Lucy hit him with her right hand. Mr. Mack then picked her up, threw her between two bushes and they began "tussling." At that point, Brooks came over, "got [Mr. Mack] off of me, hit him a couple of times and then some dudes came and jumped on him." ***Tr. 927.***

Lucy also got in "some licks," meaning that she hit him "a couple of times" because she was upset and thought that Mr. Mack had "harassed" her.[17] After the fight, Brooks took her to the open air market, and the other participants in the beating followed. They told her mother what had occurred, and Reese took Lucy home. Lucy was crying when they got home and she told her mother that the man had attacked her. Reese was also upset, but they did not call the police. ***Tr. 927-29; 933-34.***

The remaining defense witness was Robin Reese. She testified that she went to the open air market on February 13th to play a video game. Lucy "was on punishment" that day because of

[17] She admitted on cross-examination that she had told police that she had also kicked him "a time or two. ***Tr. 932, lines 4-7.***

her grades but Reese allowed her to go to the nail salon because it was close to Valentine's Day. When Lucy came back and told her the salon was closed, Reese told her to go home. Lucy left after buying a bag of potato chips with money that Reese had given to her. Reese stayed and continued playing the video game. ***Tr. 936-38.***

Between twenty and twenty-five minutes later, Lucy came back, accompanied by Brooks and another man. At first, Reese was mad because she thought that Lucy had disobeyed her. However, Brooks, who had been Reese's neighbor, told her that he had just pulled a man off of Lucy. Lucy was crying and wet. Upset by what she had heard, Reese "wanted to know what happened and what do you mean 'pulled off?'" ***Tr. 938-40; 955-56; 959; 962-63.***[18]

Reese got the tickets for her video game, took them to the counter and cashed them in. She and Lucy then left the open air market. She tried to call her brother but her father answered the phone. Reese hung up because he was too intoxicated to speak. ***Tr. 941-42; 955; 964.***

> I still wasn't satisfied. The only thing I know at this time was a grown man on top of my daughter. So I called [Brooks] and asked him what happened. He said that he really didn't know, that he'd just seen that the guy was tugging at her. He knew that was Lucy but he didn't know that grown man.
>
> So after he seen it, they told me that it happened like two or three times that he had pulled on her coat. She'd turned around and hit him. He scooped her up and was on top of her and that's when [Brooks] came to her.
>
> I was never a part of this. This is what came back to me.

Tr. 942, line 18 – 943, line 6.[19]

Following this conversation, Reese walked Lucy back home. After talking to Lucy to make sure that she had not been touched sexually, Reese "told her that I was going back to the store."

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[18] She did not think to call the police. ***Tr. 963; 969-70.***

[19] Reese also unsuccessfully attempted to call her then-husband, Lucy's stepfather. ***Tr. 943.***

Reese left the apartment. Instead of going back to the store, however, she went to an area where she was told the man had gone and where a crowd had gathered because she wanted to know who had been on top of Lucy. ***Tr. 943-44.***

Gray was on his way back from the Lizard's Thicket at that point. By the time Reese first saw the man, he was "[lying] on the ground and he had his hands ...covering his face." The man was "all bloodied up," but Reese did not see how he got that way. Also, she never saw the man's face but his clothes matched the description that Lucy had given her. ***Tr. 944-46; 976-78.***

> So I was raising hell, excuse me, excuse me, and I just wanted to know ... 'Why [were] you on top of her? Why would you even be hav[ing] a conversation or anything with a thirteen year old.' But he was just [lying] there. When I ran up, I tried to kick him but I slipped and fell because ... [of] the ice and stuff.
>
> So instead of getting back up, I just reached over and I slapped him across his face and told him 'you stay away from my kid, you need to round grown women, there's grown people out here that you can be around.'

Tr. 946, lines 8-19.

According to Reese, this is when Gray first appeared at the scene and he helped her back to her feet. While she was still upset, he told her to let the police handle the matter. Reese saw the metal chair in front of an apartment and she slung it onto the grass. It did not, however, make contact with Mr. Mack's body. The man was not moving when Reese walked back to her apartment. ***Tr. 946-47; 977-78.***

B. Ineffective Assistance of Trial Counsel

In a PCR action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must make a twofold showing. First, he must demonstrate that his attorneys' "representation fell below an objective standard of

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reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (Citation omitted).[20]

Even if an inmate proves deficient performance, he must also prove that he was prejudiced by his attorneys' ineffectiveness because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had

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[20] As the Court in *Harrington v. Richter*, 562 U.S. 86, 105 (2011), explained,

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

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no effect on the judgment." *Strickland*, 466 U.S. at 691. To show prejudice, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Instead, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 687).

Applying this standard to the claims raised by Gray, the Court finds that he has not met his burden of proof.

1. **Counsel's failure to adequately prepare for trial with Gray (Ground a).**

The Court finds that Gray has not met his burden of proving that trial counsel was ineffective for failing to properly and adequately prepare for trial with him.

Gray testified at the PCR hearing that he was arrested in February of 2010 on charges of murder and lynching in the first degree. He made bond roughly a week later and remained on bond until he was arrested on unrelated charges in July of 2011. Although a different attorney represented him at his bond hearing, Mr. Chaplin represented him after that point and at the February 28 - March 2, 2012, trial. Counsel met with him three or four times prior to trial. ***PCR Tr. 7-9.***

They first met in counsel's office for roughly an hour after Gray made bond. Gray claimed that they had a disagreement about whether Gray would testify at trial. Gray wanted to testify and tell his version of the incident, but counsel allegedly was opposed to this strategy. Their next meeting was in November of 2011, after Gray was incarcerated at the Alvin S. Glenn Detention Center. They met for about thirty minutes and again had a disagreement about whether or not he

would testify at trial. Counsel supposedly never explained why counsel did not want him to testify. ***PCR Tr. 9-12; 21-22; 26-28; 30-31.***

Gray claimed that he was so unhappy about their disagreement that he filed a motion to have Mr. Chaplin relieved as counsel and have someone else appointed to represent him. However, he changed his mind before the court acted upon this request. ***PCR Tr. 12-13; 28.*** He claimed that he did not testify at trial because he followed counsel's advice. According to Gray, he wanted to testify that it was "a freak accident." ***PCR Tr. 22.***

He explained the "accident" as follows:

> Mr. Mack was talking to another fellow ... when I rolled out the front door [of my father's apartment]. ... I'm looking at him. He all bust up, head knot and stuff on his head, bleeding.
>
> So I said, "Oh, what happened to you?"
>
> You know, he said, "Just beat."
>
> So I ain't pay it no more attention. I walked back into my daddy house. Phone rang. My sister. She told me my niece was attacked. Dude slam her was on top of her. ....
>
> So I asked her, "What ... he got on?"
>
> She said, "This and that."
>
> So I said, "Well, he around here." So I hung up the phone.
>
> So I walked back off the porch. And I asked him, like, "Yo, what you did to my niece?"
>
> So by then, I grabbed him from the -- by, like, back of [his] shirt on around the collar. And we ... proceeded to walk down the sidewalk. We were going to meet my sister and my niece. He snatch away; startle me. I clipped him up. .... [L]ike I say, when he turn around and jump around, I clipped his feet from under [him]. ....
>
> So ... after that ... he hit the ground. He was laying on t e ground with his hand over his face. I walked to the edge of building to see -- if I could see my sister and my niece coming.

So they came around and ... say that was him. And ... we roughed him up a little bit. And then we went on about our way.

PCR Tr. 23-24.

Gray testified that he did not intend to kill the victim. Rather, the victim startled him by "snatching away" as they were walking on the sidewalk looking for Reese. So, Gray "clipped him up. And he hit the ground." ***PCR Tr. 24-25.*** He acknowledged that counsel presented testimony from a doctor that the first fight, in which Gray clearly was not involved, "had a part in Mr. Mack's injuries," and that his sister had testified. However, he thought that his testimony would have supported a jury instruction on a lesser-included offense. ***PCR Tr. 25.***

Despite his disagreement with counsel over whether or not he should testify, he admitted that counsel had "scanned through" the discovery with him, counsel had given him a copy of the discovery, counsel had discussed the charges against him and what the State would have to prove, and they had discussed the possibility of submitting the lesser-included offense of involuntary manslaughter. Gray admitted that he had understood those discussions. Also, he understood the benefits and risks for pleading guilty as opposed to going to trial, and he had rejected an offer to plead guilty to lynching in the first degree with a sentence of between two and twenty years. Gray understood that counsel was "shooting for" an involuntary manslaughter conviction. ***PCR Tr. 10; 13-15; 29-30; 32-33.***

Trial counsel, Mr. Chaplin, testified that he was appointed to represent Gray because the Richland County Public Defender's Office had a conflict of interest. Mr. Chaplin's "practice is to meet with clients immediately after [being appointed]," and he was "pretty sure we met fairly quickly after I got the letter of appointment," which was after Gray had been released on bond. In total, he met with Gray "between eight to ten times" because "we covered a lot of ground." ***PCR***

Tr. 35-36.

Counsel explained that:

> We needed to develop all of the possible witnesses that we could identify. I had to get an investigator. I think my investigator spoke with Mr. Gray at least once or twice. We had to arrange times to go over to Gonzales Gardens and meet with all of these different witnesses and ... find out what their versions of it was.
>
> Mr. Gray and I also talked extensively about me hiring [an] expert witness to come in and talk about the actual cause of death. Now, I will admit that a lot of these meetings after that were with me and these other parties. ... [S]o I know I spent a great deal of time on the case.
>
> But I know that I spent a sufficient amount of time with Mr. Gray to apprise him of what I was doing, how I was doing it, and getting his input.

PCR Tr. 36.

To counsel's knowledge, the State had fully complied with discovery, and counsel both reviewed the discovery with Gray and gave him a copy of it. Also, counsel had discussed the charges Gray faced and the elements of both offenses with him. Unlike Gray, counsel's recollection was that their meetings were "somewhat pleasant." ***PCR Tr. 36-37.***

Counsel obtained the services of a private investigator, and the investigator went to the apartment complex where the crime occurred and interviewed the potential witnesses whom Gray had identified. Counsel also personally went to the apartment complex to "look at the scene and look at the area so that when we started talking ... about the case ... and looking at some aerial photos that the state provided, that we would have our bearings." ***PCR Tr. 39-40.*** Counsel explained that after several of counsel's meetings with Gray, "it dawned on me that I think that there was an issue with the actual cause of death" because the victim had "received a vigorous beating by a group of people prior to him seeing Mr. Gray." ***PCR Tr. 40.***

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Based on this evidence of the previous beating, counsel was able to obtain funding for a forensic pathologist to testify as to the cause of death, Dr. Shaker. Counsel had several telephone conversations with Dr. Shaker and he met with Dr. Shaker once before Dr. Shaker's testimony. In this meeting, counsel reviewed the file with Dr. Shaker, and Dr. Shaker provided his opinion, which counsel then presented at trial. ***PCR Tr. 40-41.***

As discussed, Dr. Shaker opined that the fatal blow could have been struck in the attack McDuffie St., that the injuries he saw were inconsistent with beating with a metal chair, and that the victim could have experienced a lucid interval after the initial beating and before herniation due to bleeding of the brain. Dr. Shaker further opined that, during the lucid interval, the victim could have walked to the location where the second attack occurred and then collapsed. **Tr. 844; 849-51; 854-60; 866-67; 892-93; 895.**

Counsel expressly denied advising Gray not to testify. To the contrary, counsel's defense – including obtaining Dr. Shaker's opinion - was based upon Gray's desire to testify at trial. ***PCR Tr. 38-39.*** Counsel testified that the State had offered a "very generous" plea to lynching that would have disposed of the charges, with a sentence of "somewhere between seven and ten" years. However, Gray rejected the plea because he was adamant that "he hadn't done anything wrong" and he wanted to tell his version of what happened.[21] Yet, when the opportunity to testify at trial arrived, he decided that he no longer wanted to do so. He did not explain why he changed his mind. ***PCR Tr. 38-39; 44-46.***

The Court finds that Gray has not proven either deficient performance or prejudice under *Strickland.* In *Strickland*, the United States Supreme Court gave the following explanation of the

[21] The version that he told counsel was consistent with his PCR testimony. The State placed rejection of plea offer on record. *See* ***Tr. 30.***

deference reviewing courts owe to counsel's strategic judgments in terms of the adequacy of the investigations supporting those judgments:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.*

Strickland, 466 U.S. at 690-91. (Emphasis added). The Court further explained that:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. *Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.* .... In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. at 691. (Emphasis added). *See also Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

The Court finds that counsel's testimony on the allegations before it credible and gives it great weight. Based upon his credible testimony, the Court finds that counsel's investigation was more than constitutionally adequate under *Strickland*. Specifically, the Court finds that: (1) counsel met with Gray between eight and ten times;[22] (2) counsel filed discovery motions and reviewed the discovery responses with Gray; (3) counsel provided a copy of the discovery to Gray; (4)

[22] While the Court rejects Gray's claim that counsel only met with him three or four times as not credible, the Court notes that even if it had accepted this testimony as credible, he would not be entitled to relief because "there is no established 'minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.'" *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005) (citing *United States v. Olson*, 846 F.2d 1103 (7th Cir. 1988)).

counsel had no reason to believe that the State had not fully complied with discovery; (5) counsel obtained the services of both a private investigator and a forensic pathologist, Dr. Shaker; (6) the private investigator interviewed the potential witnesses that Gray had given to counsel; (7) counsel inferably had those witnesses' statements available to him; (8) counsel and the private investigator had visited the crime scene; and (9) counsel had Dr. Shafer's opinion, which contested the prosecution's theory of proximate causation and which he presented to the jury. The Court further finds that counsel kept Gray apprised of the results of the investigation and that Gray understood his conversations with counsel.

The Court rejects as incredible Gray's testimony that counsel opposed his decision to testify, or that counsel in any way discouraged him from testifying. Rather, the credible evidence is that counsel had reasonably based his defense of Gray, in large part, upon Gray's adamant desire to testify at trial and tell the above version of what had occurred. *See* Ground g. The Court further finds that Gray's ultimate decision to not to testify at trial – despite consistently leading counsel to believe that he would testify did not render counsel's pretrial investigation and preparation with Gray deficient under *Strickland. See United States v. Pellerito*, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so .... That is not the sort of 'ineffectiveness' for which relief can be granted").

The Court further finds that Gray has failed to prove that he was prejudiced by counsel's allegedly inadequate investigation or preparation with him for trial because he has failed to demonstrate any potential witness or defense that counsel's investigation supposedly overlooked Accordingly, the Court is left to speculate as to what, if anything, further investigation may have yielded and he cannot show prejudice from counsel's alleged error. See *Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by

counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence") (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). *See also Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result"). Finally, the Court finds that the prosecution presented overwhelming evidence of Gray's and Reese's guilt, both individually and under a theory of accomplice liability, as set forth in detail above. "The Prosecution's Case," *supra*. In light of this evidence of guilt, Gray cannot prove that he was prejudiced by counsel's alleged errors. *See Strickland*, 466 U.S. at 696 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

2. Counsel's failure to object to Gray being visibly shackled during the trial. (Ground b).

Gray's second allegation is that counsel was ineffective for not objecting to Gray being visibly shackled during the trial. In *Strickland*, the Supreme Court emphasized that "[t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. This Court finds that is unnecessary to address *Strickland*'s deficiency prong on Ground b because Gray was not prejudiced by counsel's deficient performance. *Id.*

The trial transcript does not reflect that either defendant was shackled at trial, much less that the shackles were visible. However, trial counsel made the following comments in his opening statement:

> Do any of you have any idea what the end of the world sounds like? .... If you were to ask my client that question, he would tell you it sounds like being wrongfully accused. It sounds like being arrested. It sounds like being incarcerated. It sounds like being taken away from your family. It sounds like being forced to sit in a courtroom, shackled. It sounds like pure and utter despair.

Tr. 162, line 17 – 163, line 7.[23]

Gray testified before this Court that both he and Reese wore shackles, which were visible to the jury; that his legs and wrists were restrained; that jurors clearly saw him in shackles when he stood; and that they clearly saw Reese in shackles when she walked to the stand to testify in their presence. Relying on *Deck v. Missouri*, 544 U.S. 622 (2005), he asserted that counsel was ineffective for not objecting to the trial judge requiring them to be tried while wearing these visible restraints without making a finding that they were necessary. ***PCR Tr. 15-17; 26-27; 55-56.***

When questioned about this issue, trial counsel testified it was obvious to jurors that his client was in shackles. ***PCR Tr. 47.*** He explained that both he and counsel for Reese objected to their clients being shackled in front of the jury during in chambers hearing because it was prejudicial. However, the trial judge ruled "that ... was required in this particular matter." So, counsel felt that "there was nothing that I was able to accomplish with regards to having them removed." ***PCR Tr. 43.*** He did not place his objection on the record. ***PCR Tr. 47.*** Counsel made

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[23] Counsel's remaining comments suggested that the State could not prove its case against Gray because a third defendant, Marcellius Brooks, was actually responsible for the victim's death. However, he was not being tried and the State did not mention him. Counsel suggested that "Brooks and his thugs beat the life out of the deceased" and then did "a celebratory dance acknowledging that." ***Tr. 164.*** Counsel agreed with the State that others were involved in the victim's murder but not Gray, who was innocent of the charges against him. ***Tr. 163-67.***

the reference to Gray's shackling in opening statement "to try to soften the blow a little bit." ***PCR Tr. 44; PCR Tr. 47.***

In *Deck*, the United States Supreme Court held that visible restraints may be used if "justified by an essential state interest" such as security. *Deck*, 544 U.S. at 624 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)). However, relying on precedent concerning the guilt phase of trials, the Court concluded that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial judge's determination, in the exercise of his discretion, that they are justified by a state interest specific to a particular trial" including "potential security problems and the risk of escape at trial." *Id.* at 629. *See also id.* at 632 ("But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case"). Even if exceptional circumstances warrant the use of visible restraints, the trial judge must make on-the-record findings as to the circumstances that compel their use. *Id.* at 633 (emphasizing that the determination "should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial").

Gray's reliance upon *Deck* is misplaced. *Deck* did not involve an ineffective assistance of counsel claim relating to his shackling on collateral review but instead involved a direct appeal where trial counsel objected to shackling before the jury. Thus, while *Deck* may not require a defendant to demonstrate actual prejudice to make out a due process violation where the issue is raised at trial and on direct appeal, Gray has asserted an ineffective assistance of counsel claim under *Strickland* based on the failure to object to him being forced to wear visible shackles. The Court finds that he must establish prejudice to be entitled to relief on a *Strickland* claim of ineffective assistance of counsel.

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This Court finds that the absence of an objection to the trial judge's failure to place his findings as to why visible shackling was required in Gray's case constituted deficient performance under *Strickland*. However, the Court finds that he cannot show resulting prejudice from this error. First, counsel's testimony that the trial judge made a finding that shackling "was required in this particular matter" is unrefuted. Thus, an objection would have simply required the trial judge to place his previously-found his reasons for requiring shackling in this case on the record and thereby preserve the issue for appellate review. *See State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal"). *See also State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge"). Also, this Court finds that the record contains sufficient facts that support the trial judge's decision requiring Gray to be shackled during his trial.[24]

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[24] For instance, Gray has a prior criminal record dating back to a 1989 armed robbery conviction, for which he received a YOA sentence. Additionally, that YOA sentence was revoked in 1994 and he had a 1998 conviction for possession with intent to distribute (PWID) cocaine, first offense; convictions for two counts of criminal domestic violence in 2000; a 2005 conviction for PWID cocaine, third offense; and then-pending charges of trafficking in marijuana and trafficking in cocaine, which were made after the murder. ***Tr. 1184-85.***

Also and the possible gang affiliation of Gray and Reese aside, most of the prosecution's witnesses were neighbors, friends and/or acquaintances of Gray and Reese. These individuals had witnessed the viciously brutal and savage manner in which the two defendants had murdered the victim. Courtroom security for potential witnesses, courtroom personnel, and the jury, is unquestionably a legitimate concern under these circumstances. *Accord United States v. Samuel,* 431 F.2d 610, 615 (4th Cir. 1970) ("the right to the *indicia* of innocence is a relative one. The judge presiding at the trial, the jurors, courtroom personnel and spectators are entitled to security in the performance of their functions or in observing the trial. The members of the public out of the courtroom are entitled to security in the pursuit of their daily activities. The public also has an interest in the expeditious trial of persons accused of crime, and an interest in preventing the guilty from being at large and committing other offenses. Thus, in appropriate circumstances, the accused's right to

Moreover, to prove prejudice under *Strickland*, Gray is required to prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Court finds that he cannot meet this burden in light of the overwhelming evidence of this brutally malicious crime, which occurred in broad daylight and in complete disregard of the presence of numerous. *Id.* at 696 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). *See also* "The Prosecution's Case," *supra*.

In *People v. Clyde*, 961 N.E.2d 634 (N.Y. Ct. App. 2011), the appellant represented himself *pro se* in leg irons that were visible to the jury. The New York Court of Appeals found that the use of the visible restraints violated due process under *Deck*. The Court then considered whether harmless error could apply to this error, explaining that:

> Because we find that the trial court committed error as a matter of federal constitutional law, we apply Supreme Court precedent in deciding whether the error is of a type that may be harmless . . . In *Deck*, the Supreme Court declared that the burden is on the State to prove beyond a reasonable doubt that a shackling error "did not contribute to the verdict obtained" (544 U.S. 622, 635, 125 S.Ct. 2007 [internal quotation marks omitted], quoting *Chapman*, 386 U.S. at 24, 87 S.Ct. 824). By quoting language from *Chapman*, a case that holds, as a matter of federal law, that federal "constitutional errors can be harmless" . . . the *Deck* Court made it clear that harmless error analysis applies to shackling errors.

Clyde, 961 N.E.2d at 639.

The Court of Appeals noted the overwhelming evidence in that case and found that "A jury, faced with a defendant accused of assaulting and/or attempting to rape a civilian while incarcerated, is more likely to conclude that the defendant was shackled as a precaution, because

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the *indicia* of innocence before the jury must bow to the competing rights of participants in the courtroom").

of the nature of the crimes charged, than to conclude that the defendant was shackled because he was independently known to be dangerous." *Id.*

This Court notes that several other courts have concluded either that any due process violation under *Deck* was harmless beyond a reasonable doubt on direct review or that the inmate could not establish prejudice under *Strickland* on his shackling ineffective assistance claim in light of the overwhelming evidence of guilt. *See, e.g., Marquard v. Secretary for Dept. of Corrections*, 429 F.3d 1278, 1313 (11th Cir. 2005) ("Under the circumstances of this case—a brutal, premeditated murder, a unanimous jury recommendation of a death sentence, and a sentencing judge's finding of four aggravating and no statutory mitigating evidence—we cannot say that the Florida Supreme Court's decision on the prejudice prong of Marquard's IAC-shackling claim is contrary to or involves an unreasonable application of federal law or involves an unreasonable determination of facts"); *Lakin v. Stine*, 431 F.3d 959, 966 (6th Cir. 2005) ("Despite the substantial risk of prejudice that shackles pose, we are compelled to conclude that the error was harmless in this case due to the overwhelming evidence against Lakin"); *Jones v. Secretary Florida Department of Corrections*, 834 F.3d 1299 (11th Cir. 2016) (finding that defendant was not prejudiced by counsel's failure to object to his alleged shackling in front of jury venire during voir dire for capital murder trial, where there was no reasonable probability that if jury had not seen defendant in shackles it would have acquitted him or would not have returned an advisory verdict recommending a death sentence in light of overwhelming evidence of defendant's guilt and aggravated nature of murder he committed); *Keys v. Booker*, No. 14-1274, 2015 WL 4926693, *11 (6th Cir., Aug. 19, 2015) (appellate counsel was not deficient for failing to investigate issue regarding shackling of petitioner before jury at voir dire stage, since petitioner was not prejudiced as a result of jury seeing him in shackles, and even if had been so prejudiced, the outcome of the

trial would remain unchanged due to the overwhelming evidence of Petitioner's guilt); *Evans v. Voorhies*, 2007 WL 2891003, at *26-*27 (S.D. Ohio Sept. 28, 2007) (unpublished) ("upon review of the entire trial transcript, the Court is convinced beyond a reasonable doubt that the trial court's error in ordering the shackling and handcuffing of petitioner at trial without specific and sufficient justification was harmless as it did not contribute to the verdict obtained" in light of overwhelming evidence of petitioner's guilt); *Antoine v. Mackie*, No. 14-14933, 2015 WL 6671570, at *8 (E.D. Mich., Nov. 2, 2015). ("because of the overwhelming evidence against him in this case, Petitioner likewise cannot establish that he was prejudiced by appellate counsel's failure to raise a claim on direct appeal that trial counsel was ineffective for failing to object to Petitioner's shackling").

Like the Eleventh Circuit in *Marquard* and *Jones*, and the Sixth Circuit in *Keys*, this Court finds that any error by counsel in failing to object did not did not contribute to the jury's verdict and thus was not prejudicial under *Strickland* in light of the overwhelming evidence of Gray's and Reese's guilt, both individually and under principles of accomplice liability, as discussed above. *See also Clyde*, 961 N.E.2d at 639.

3. Counsel's failure to object to the same jury pool being used after the trial judge granted the State's *Batson* motion. (Ground c).

Gray also alleges that counsel was ineffective because he did not object to the same jury pool being used after the trial judge granted the State's *Batson v. Kentucky*, 476 U.S. 79 (1986), motion. He asserts that the failure to object was prejudicial because several jurors who were improperly struck were seated on the petit jury that tried him and his sister. The Court finds that he has failed to prove deficient performance or resulting prejudice.

The record reflects that the State made a *Batson* motion after the original jury was selected because it contended that eighteen of nineteen jurors and all three alternate jurors struck by the

defendants were white. ***Tr. 88-89.***[25] Following a hearing on the State's motion in which each defense attorney offered his reason for the strikes (***Tr. 89-99***), the trial judge granted the motion as follows:

> THE COURT: The vast majority of your strikes were white. That in and of itself is not reason enough to grant the State's Motion. However, ... I've counted, one, two, three, four, five, six, seven, eight, nine, ten, eleven of [your] strikes, combined, for which you have been unable to give a race neutral reason for your strikes. That, to me, is evidence that your strike were pretextual and gives rise to the implication that they are race-based.
>
> Twenty-one out of twenty-two strikes ... [w]ere strikes of white. Overwhelmingly strikes of whites for which I find you cannot give satisfactory answers for the strikes. I am going to grant the State's Motion.
>
> *****
>
> I do find that one, two, three, four, five, six, seven of your strikes -- [the] reasons given -- are not pretextual, that they have some basis in my mind for the strikes.
>
> The penalty, so to speak, for using strikes in a pretextual manner is that on the second draw you would not be allowed to use those strikes again. Do you understand?
>
> MR. CHAPLIN: So what is that number?
>
> THE COURT: You can use the seven and I will give you the names.
>
> MS. CAMPBELL: Of who you can't strike.
>
> THE COURT: You cannot strike.

Tr. 99, line 10-101, line 2.

The trial judge then ruled that the defendants could not strike jurors #11, #16, #33, #53, #112, #114, #120, #155, #159, #164, #176, #222, #226, #233, and #241, when seating the new

[25] The State did not challenge trial counsel's strike of a white male juror who was a chaplain in the military and whose daughter worked for the Richland County Sheriff's Department. ***Tr. 88.***

jury. Counsel stated that he understood the trial judge's ruling. ***Tr. 101, line 2 – 102, line 1***. When the jury was re-drawn the next day, jurors #11, #164, #16, #114, #155, and #153 were seated on the jury. ***Tr. 114-29***. This Court finds that the trial judge's finding of pretext in the defendants' use of their peremptory challenges is supported by the record.

Counsel recalled that the State made a *Batson* motion but did not recall the specifics of it. ***PCR Tr. 42-43; 47-48***. Gray contended at the PCR hearing that counsel was "ineffective for not having reasons to strike those particular ... jurors" and that he was ineffective for not objecting when jurors who had been struck during the original jury selection were allowed to be seated on the second jury that was selected. ***PCR Tr. 17-18; 56-57***.

The Court finds that Gray is not entitled to relief for either of the reasons asserted by him. First, counsel was not ineffective for failing to object to the seating of jurors on the petit jury whom the defense attorneys had offered pretextual reasons for striking from the original jury because any such objection would have been frivolous. In *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357 (1995), the South Carolina Supreme Court found that the trial judge did not abuse his discretion by seating a juror who had previously been improperly excluded by defense counsel in violation of *Batson*. In rejecting the appellant's claim of error, the Court explained that:

> The majority of jurisdictions addressing the question of whether the trial judge may seat a juror improperly excluded in violation of *Batson* have found no error in seating such a juror. The rationale for allowing the trial judge the discretion to seat the improper juror is sound. As noted in *People v. Moten,* 159 Misc.2d 269, 603 N.Y.S.2d 940 (1993):
>
> > To hold otherwise would inadvisably reward a party for his own improper conduct, as would the declaration of a mistrial, which, in my view is an inappropriate remedy where the court is confronted with a valid *Batson* ... challenge. The declaration of a mistrial, as an alternative to a difficult decision involving a remedy for a *Batson* ... violation, merely avoids the critical issue and is inappropriate since such a declaration would *give the offending party exactly what he wanted, namely, a different jury panel.* Thus,

> it would reward him for the very discrimination which *Batson* ... [was] designed to prevent. [emphasis added].
>
> *Id.*, 603 N.Y.S.2d at 947.

> Nor do we believe the defendant's constitutional right to a fair and impartial jury is in any way violated by this procedure. "It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S.Ct. 2348, 2358, 120 L.Ed.2d 33, 50 (1992). "Peremptory challenges are not constitutionally protected fundamental rights." *Id.* Franklin was not denied his peremptory challenge. Rather, he was simply prohibited from exercising it in a racially discriminatory manner. We hold once a new venire has been selected in compliance with *Jones, supra,* "that it is within the trial judge's discretion to fashion the appropriate remedy under the particular facts of each case and, as long as neither party's constitutional rights are infringed, that remedy may include the seating of an improperly challenged juror." [*Jefferson v. State*, 595 So.2d 38, 41 (Fla.1992)].

Franklin, 318 S.C. at 52-53, 456 S.E.2d at 360 (footnote omitted).

In *State v. Lewis*, 363 S.C. 37, 609 S.E.2d 515 (2005), the Supreme Court relied on *Franklin* and *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998) (discriminatory explanation vitiates entire selection process regardless of genuineness of other explanations for the strike), in finding that the Court of Appeals erroneously reversed the trial judge's decision not to allow the respondent to strike a juror who had previously been stricken in violation of *Batson*. *Lewis*, 363 S.C. at 45-46, 609 S.E.2d at 519-20. The Court in *Lewis* explained that:

> To allow a striking party to challenge the reseated juror a second time would require the trial court to ignore its prior determination and the prior explanations and conduct each successive evaluation of a newly proffered rationale as if on a blank slate. *Coleman v. Hogan, supra.* Such a process improperly restricts the ability of the trial court to make the required evaluation. *Id.*
>
> We conclude that once a juror has been unconstitutionally stricken, the jury selection process relative to that juror is tainted. If the trial court chooses to reseat the improperly stricken juror, the striking party may not use a peremptory strike to remove that juror from the panel a second time.

Lewis, 363 S.C. at 46, 609 S.E.2d at 520.

Strickland does not require trial counsel to make a frivolous objection or motion. *See Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986) (trial counsel is not required to make frivolous objections to avoid a charge of ineffective representation); *Hough v. Anderson*, 272 F.3d 878, 897 (7th Cir. 2001). Thus, counsel was not deficient in failing to object to the seating of the previously stricken jurors on the ground urged by Gray.[26]

Likewise, the Court finds that Gray's claim that counsel was "ineffective for not having reasons to strike those particular ... jurors" is without merit. It is unclear as to whether his claim is that counsel should have given alternative reasons for striking these jurors from the jury that was seated or from the first jury. Regardless, neither claim entitles him to relief. Obviously, he could not advance reasons for the strikes exercised by his co-defendant, and those jurors would have still been seated under *Lewis* and *Franklin*. Moreover, the Court finds that any alternative reason given by counsel for exercising his strikes of white jurors would not uphold his strike of the those jurors because the alternative reasons would be pretext and the South Carolina Supreme Court has already rejected application of the dual motivation doctrine in the context of *Batson* motions in *Payton*:

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[26] Counsel's inability to recall why he did not object does not overcome the "strong presumption" of constitutionally adequate performance under *Strickland*. *See Burt v. Titlow*, 571 U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance' ") (citing *Strickland*, 466 U.S. at 689)). *See also Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001) (trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance); *Fretwell v. Norris*, 133 F.3d 621, 623-24 (8th Cir. 1998) (reversing the district court's grant of the writ based in part on counsel's inability to recall because this is contrary to the presumption of correctness); *Williams v. Head*, 185 F.3d 1223, 1227-28 (11th Cir. 1999) (where the record is unclear about what counsel did because of inability to recall due to the passage of time, the presumption that counsel did what should have been done and exercised reasonable judgment prevails).

> In our opinion, it is inappropriate to apply the dual motivation doctrine in the *Batson* context. Once a discriminatory reason has been uncovered—either inherent or pretextual—this reason taints the entire jury selection procedure. By adopting dual motivation, this Court would be approving a party's consideration of discriminatory factors so long as sufficient nondiscriminatory factors were also part of the decision to strike a juror and the discriminatory factor was not the substantial or motivating factor. However, any consideration of discriminatory factors in this decision is in direct contravention of the purpose of *Batson* which is to ensure peremptory strikes are executed in a nondiscriminatory manner.

Payton, 329 S.C. at 59-60, 495 S.E.2d at 210 (footnote omitted). Therefore, Gray is not entitled to relief on his Ground c.

4. Counsel's failure to object to testimony that prosecution witness Donetti Perry was scared to testify. (Ground d).

Gray claims counsel was ineffective because he did not object to prosecution witness Donetti Perry's testimony that she was scared to testify. The Court finds that Gray has failed to prove either deficient performance or prejudice under *Strickland* and that the current allegation is based on a misunderstanding of the record.

Gray's claim is based on the following exchange that occurred on direct examination:

Q And you're under subpoena here today, aren't you?

A Yes, ma'am.

Q You don't want to be here?

A Don't want to be here.

Q And you are a little upset or scared?

A Yes.

Tr. 278, lines 17-23.

The record, however, makes clear that the witness was upset, rather than scared or afraid. Counsel for Reese had problems hearing her testimony early on direct examination. ***Tr. 279, lines***

17-19. She subsequently became emotional when describing what she had seen on February 13, 2010, and her testimony was paused so that she could have a tissue and some water. ***Tr. 287, lines 20-23***. At one point on cross-examination by Reese's counsel, she gave a series of non-verbal responses before her testimony had to be paused, again, so that she could regain her composure. ***Tr. 302, line 23 – 303, line 10***. And, trial counsel asked Ms. Perry whether she needed "water or something" before beginning his examination of her, but she declined his offer. ***Tr. 306, lines 13-15***. Also, Ms. Perry testified that Gray's father lived in the apartment building across from her. ***Tr. 277, lines19-23***.

The Court finds that it is understandable that a witness might become emotional when testifying about the brutally malicious attack carried out by her neighbor's son and his sister. *Cf. Foster v. State*, 294 Ga. 383, 384, 754 S.E.2d 33, 35 (2014) (finding that crying could be "reasonably expected by one who is a close friend of a murder victim"). Moreover, even though the witness cried, there is no evidence that she became hysterical, made any prejudicial comments, or had an emotional outburst, such as that in *State v. Anderson*, 322 S.C. 89, 90-94, 470 S.E.2d 103, 104-06 (1996) (affirming trial judge's denial of mistrial where victim's sister had emotional outburst directed toward the defendant after identifying him) or *State v. Wagstaff*, 202 S.C. 443, 25 S.E.2d 484 (1943) (at the conclusion of her testimony, the mother of a rape victim rushed toward the defendant screaming "I could tear your eyes out." Although issue was not preserved for appellate review, the Court found mistrial would have been inappropriate).

Further, while the trial judge had to pause her testimony twice in order to allow her to regain her composure, a recess was unnecessary. Also, "[t]he conduct of a trial s left largely to the sound discretion of the trial judge." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). Here, the trial judge apparently did not view the witness' emotional state to be such that further

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action was necessary. Under these circumstances, the Court finds that counsel's failure to object did not amount to deficient performance under *Strickland*. See *Paige v. State*, 277 Ga. App. 687, 690-91, 627 S.E.2d 370, 374 (2006) (finding no prejudice from counsel's failure to move for a mistrial after the victim in an aggravated assault with intent to rape case began crying on the witness stand, requiring a recess, where there was no evidence that the victim became hysterical or made any prejudicial comments; thus, defendant failed to show that if his counsel had moved for mistrial, it would have been abuse of discretion for trial court to deny it). *See also Meade v. State*, 779 S.W.2d 659, 660 (Mo. App.Ct.1989) (defense counsel not ineffective for failure to move for mistrial after eleven year old witness-victim "began crying and became hysterical"); *State v. Johnson*, 672 S.W.2d 160, 163 (Mo.App.Ct.1984) (denial of mistrial where witness "became hysterical" was not an abuse of discretion).[27]

The Court further finds that Gray has not shown any prejudice from counsel's failure to object. First, counsel established in camera that Ms. Perry denied being afraid of what gang members might do to her for testifying. ***Tr. 323***. Second, the trial judge instructed jurors that they could "consider the appearance and the manner of the witness while on the witness stand" in assessing a witness' credibility. ***Tr. 1142***. He likewise instructed jurors that"[y]our verdict cannot be based on sympathy, passion, prejudice, emotion or any other consideration not in evidence in this case." ***Tr. 1156***. Because jurors are presumed to follow jury instructions, the Court finds that these instructions insured that jurors would only consider Ms. Perry's demonstrations of emotion

[27] Counsel did not clearly recall the witness ***PCR Tr. 49-50***. As discussed, counsel's inability to recall why he did not object does not preclude this Court from finding that his performance was objectively reasonable under *Strickland*. *See Burt*, 571 U.S. at 23 ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'") (citing *Strickland*, 466 U.S. at 689).

as they bore on her credibility and not on the question of whether either defendant was guilty of the crimes charged. *See United States v. Olano*, 507 U.S. 725, 740 (1993) ("[It is] the almost invariable assumption of the law that jurors follow their instructions") (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)); *see also Strickland*, 466 U.S. at 694 ("a court should presume ... that the judge or jury acted according to law"); *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985) ("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them").

Third, counsel developed favorable testimony on cross-examination of Ms. Perry and pointed out in closing that she had testified that Gray swept the victim's legs out from under him and the victim fell in a grassy area. On the other hand, the State's expert testimony was that the victim hit his head on concrete (not grass) when he fell and that this caused the closed head injury. ***Tr. 1102-03***. Fourth, "there is no federal constitutional violation in allowing a witness to continue testifying after witness becomes emotional." *Nelson v. Ballard*, No. 2:14-CV-86, 2016 WL 259326, at *5 (N.D.W. Va. Jan. 21, 2016*), appeal dismissed*, 654 F. App'x 633 (4th Cir. 2016).

Fifth and finally, Ms. Perry was only one of a number of prosecution witnesses who testified to the brutally malicious attack that occurred in broad daylight and with a complete disregard for human life and the presence of witnesses. The Court finds that there could not be any Sixth Amendment prejudice in light of this overwhelming evidence of guilt, as discussed, *supra*. *See Strickland*, 466 U.S. at 696 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

Accordingly, the Court finds that Gray has not shown either deficient performance or prejudice under *Strickland* based on counsel's failure to object.

5. Counsel's failure to object to testimony about gangs being introduced and/or opening the door to such testimony. (Ground e).

Gray further alleges that counsel was ineffective because he did not object testimony about gangs being introduced and for "opening the door" to such testimony. The Court finds that Gray has not proven either deficient performance or prejudice resulting from counsel's conscious and reasonably strategic decision to "open the door" to evidence of gang membership.

While not entirely clear from the trial transcript, apparently the defense moved pretrial to bar the introduction of evidence of gang affiliation, and the prosecution agreed not to do so unless the defense opened the door to its admission. *See* ***Tr. 108, lines 10-16.*** In counsel's opening statement, he stated that there should be a third defendant being tried for the murder, Marcellius Brooks, but that the State had not mentioned him. ***Tr. 163-64.*** Counsel suggested that "Brooks and his thugs beat the life out of the deceased" and then did "a celebratory dance acknowledging that." ***Tr. 164.*** Counsel therefore agreed with the State that others were involved in the victim's murder but not Gray, who was innocent of the charges against him. ***Tr. 164-67.***

Counsel did not mention either gang affiliation or the Bloods in opening statement and no such mention was made during the parties' examination of the first four prosecution witnesses, including Angelo Boyd, one of the individuals involved in the first attack on the victim. Likewise, there was no mention of gangs in the State's direct examination or Reese's cross-examination of Ms. Perry. ***Tr. 274-303.*** However, Reese did elicit that Ms. Perry was friends with Marcellius Brooks' brother. ***Tr. 305-06.*** Trial counsel elicited that Ms. Perry learned later on the day of the murder that Brooks was one of the persons who had been involved in the earlier attack on the victim. ***Tr. 313.*** When counsel thereafter questioned Ms. Perry as to whether she had given a statement that she had seen Brooks' brother Lamar, a/k/a Big Baby, wearing a t-shirt with pictures

of Reese and Gray on the front and the word "Innocent" on the back of it, the trial judge excused the jury and heard further testimony in camera. ***Tr. 318.***

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

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

The trial judge inquired as to how counsel could impeach her with hearsay, and counsel noted that she had admitted being a "person of interest as far as affiliating with gang members and

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that the Gang Task Force has been to her house." Also, counsel that stated the Bloods occupy the apartment complex where the murder occurred and that he believed that was the reason she had testified as she did. ***Tr. 325***. Ms. Perry then responded "No" to whether she was afraid of the Bloods. The State again warned that counsel was opening the door to evidence of prior bad acts by Gray and why Ms. Perry "would be scared of him." ***Tr. 326***.

After the jury returned to the courtroom, counsel elicited that Ms. Perry had been questioned by the City of Columbia Police Department's Gang Task Force, but she denied that she was affiliated with or a member of a gang. Although she admitted that she knew Brooks' brother and that she had later learned that Brooks was involved in the initial attack, she denied knowing whether he was a Blood and she denied that she was testifying "out of fear of reprisal when you get back to [the apartment complex]." ***Tr. 327-30***.

The State thereafter presented testimony from Sgt. William Pegram. He is the supervisor for the City of Columbia Police Department's Violent Crimes Unit and was the chief investigating officer in this the case. ***Tr. 758-64***. ***See also Tr. 766-99***. He testified that it was not unusual for no one to come forward with information about an assault in the apartment complex where the murder occurred. He explained that he had been assigned to the FBI in 2006 and he was responsible for investigating the Killer Gangster Bloods. The FBI identified the apartment complex where the murder occurred "as a hot spot for the Bloods street gang. People in that neighborhood generally will not talk to the police, because ... [if they do], there is a very good likelihood that you will be killed." So, residents there "are not going to be seen talking to the police." ***Tr. 764-66***. He later testified that Lucy S. was affiliated with the Killer Gangster Bloods. Counsel did not object to this testimony. ***Tr. 799-800***.

Following trial counsel's cross-examination of Sgt. Pegram, in which counsel elicited that Sgt. Pegram had seen a video of one of the men doing the Bloods bounce and that he was aware of the Bloods forcing people to make statements (***Tr. 826-27***),[28] the State elicited that Reese and Gray are members of the Bloods. The State also elicited that if a witness was afraid of anyone in the case, it would be Gray and Reese the witness feared. ***Tr. 827.***

In response to the State's redirect examination, Reese elicited a concession from Sgt. Pegram that it was possible witnesses could fear reprisal whether or not she and Gray were gang affiliated. However, he added, "it's a different scenario when you have people there on scene in view of everyone else giving a statement as opposed to someone who comes secretly to a police department days later, voluntarily, and provides information." Still, he agreed that people in this apartment complex "don't really like to speak with the police." ***Tr. 829.*** Trial counsel established that the only evidence Sgt. Pegram had that Gray was a member of the Bloods was "hearsay information." ***Tr. 803.***

Gray testified before this Court that there was a pretrial motion to bar mention of gangs at trial to avoid prejudice to him and his co-defendant sister. Although Gray denied ever being in a gang, he agreed with PCR counsel's characterization that the apartment complex where his father lived was "gang-related." Subsequent to the trial judge's original ruling, there was testimony presented relating to gangs and, when counsel objected, the trial judge ruled that counsel had

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[28] Earlier, counsel had elicited that Brooks was the first person charged with the victim's murder and that Sgt. Pegram felt that Brooks had minimized his involvement in the case, and that some of what he told police was not accurate. ***Tr. 816-17. See also Tr. 824-25.*** Counsel also established that Pegram's investigation "assaulted the victim. I don't know how many [times] he struck [the victim." ***Tr. 826.***

opened the door to admitting this testimony. Gray thought counsel was ineffective in this regard. ***PCR Tr. 19-20; 31-32.***

When asked whether there was pretrial discussion regarding gang affiliation, counsel testified as follows:

> I guess the transcript would have to speak for itself. But the theory of our case was that the beating that he received at the top of the hill was delivered by ... gang members. And ... that's how we presented it, is that it was uncalled for; ... it was a very brutal beating; and they just jumped on him and beat the brakes off the guy, to be blunt.

PCR Tr. 41, lines 19-25.

Counsel did not recall whether or not Gray was a gang member, but he did not think that the evidence of gang involvement was harmful. ***PCR Tr. 42.*** He further explained that:

> I think that what we were trying to do is paint a picture in the jury's mind that this wasn't just a couple of random passerbys that interfered and ... beat the victim, but this was a brutal beating by the hands of gang members and that the cause of death was directly related to that brutal beating. .... I think it was beneficial.

PCR Tr. 42, lines 5-15.

When Gray's PCR attorney asked trial counsel about his objection to testimony that Lucy S. was a gang member, counsel replied, "I think that my concern with regards to associating the person named Lucy with a gang member is that ... I don't think I ever received any information in discovery or anything that would have linked her to that group." So, his objection was not to evidence of her gang affiliation *per se*. Rather, the objection was based on the State's failure to comply with discovery because counsel was unaware of the basis for the testimony. ***PCR Tr. 50-51.***

The Court finds that counsel made a reasonable strategic decision to question Ms. Perry about whether she had been questioned by the City of Columbia Police Department's Gang Task

Force, whether she was aware that Marcellius Brooks was a Blood, and whether she was testifying "out of fear of reprisal when you get back to [the apartment complex]." The Court finds that this was an objectively reasonable effort to impeach her credibility and support counsel's defense that the first attack on the victim, which was carried out by Brooks[29] and others, actually caused the victim's death. Several jurisdictions have found that activities associated with street gangs can be probative on the issues of identity, motive, bias and impeachment. *See Nguyen v. Hickman*, 475 F. App'x. 180, 181 (9th Cir. 2012) ("Evidence of gang affiliation may be used ... to impeach witnesses") (citing *United States v. Abel*, 469 U.S. 45, 51-53 (1984) (holding gang evidence admissible to demonstrate racial bias); *United States v. Ozuna*, 674 F.3d 677, 681 (7th Cir. 2012) ("evidence of gang affiliation was admissible, from the beginning, to show bias, interest, or motive"); *Clark v. O'Leary*, 852 F.2d 999, 1006 (7th Cir. 1988) (Confrontation Clause case where Court overturned district court's exclusion of evidence that victims were members of a gang that was a rival of the defendants' gang, because this inter-gang animosity provided evidence that the victims lied about the identity of their assailants). *State v. Vickers*, 159 Ariz. 532, 768 P.2d 1177, 1182 (1989) (evidence of membership in prison gang probative of bias); *People v. James*, 117 P.3d 91, 94 (Colo.App. 2004) (Evidence regarding gang culture and evidence of gang retaliation may be admissible to explain a witness' change in statement or reluctance to testify); *People v. Skinner*, 53 P.3d 720, 724 (Colo.App. 2002) (finding no error after evidence admitted establishing "code of silence" between inmates in DOC; testimony of witnesses regarding fear of retaliation for being a "snitch" was relevant to explain why the victim and other witnesses had given conflicting statements); *People v. Sanchez*, 58 Cal.App.4th 1435, 69 Cal.Rptr.2d 16, 24 (1997) (evidence that

[29] As discussed, Ms. Perry admitted that she knew Brooks' brother, Lamar, but denied knowing Brooks or "Bloom."

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witness is afraid to testify and fearful of gang retaliation relevant to credibility of witness; not necessary to show threats against witness were made by defendant personally); *People v. Maldonado*, 240 Ill.App.3d 470, 181 Ill.Dec. 426, 608 N.E.2d 499, 504 (1992) (same); *United States v. Santiago*, 46 F.3d 885, 890 (9th Cir. 1995) (same and noting that evidence of witness's fear of retaliation, without specifying any particular acts of intimidation, does not qualify as Fed.R.Evid. 404(b) evidence); *Diaz v. Lizarraga*, No. CV 11-7888 RGK AJW, 2015 WL 134269, at *15 (C.D. Cal., Jan. 9, 2015) ("In petitioner's case, gang membership was relevant to the credibility of petitioner and his defense witnesses because it permitted an inference that they were biased in petitioner's favor"). The Court likewise finds that trial counsel's cross-examination of Sgt. Pegram, in which counsel elicited that had seen a video of one of the men doing the Bloods bounce and that he was aware of the Bloods forcing people to make statement, was an objectively reasonable strategy for this same reason and because it was a reasonable effort to present evidence relevant to impeaching other eyewitness testimony. *Id.*

The Court further finds that Gray has failed to prove that he was prejudiced by counsel's performance. The South Carolina Supreme Court has recently explained that:

> A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction. *State v. Young*, 364 S.C. 476, 486-87, 613 S.E.2d 386, 391-92 (Ct. App. 2005). However, we are wary of a "thinly-veiled attempt to show propensity" by way of the open-door doctrine. *State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 390 (2008). Testimony in response must be "proportional and confined to the topics to which counsel had opened the door." *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018).

State v. Heyward, Op. No. 27887, 2019 WL 2121677, at *3 (S.C. May 15, 2019).

The Court finds that the State's response to trial counsel's cross-examination of Ms. Perry and Sgt. Pegram was "proportional and confined to the topics to which counsel had opened the

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door." *Id.* Although the State did present evidence that Gray and Reese were gang members and that Lucy S. was affiliated with the Bloods, neither Lucy S. (***Tr. 921-35***) nor Reese (***Tr. 936-88***) was asked any questions regarding her possible gang involvement, and the parties did not make any reference to the Bloods or gangs in closing argument. *See* ***Tr. 1051-83; 1112-35*** (the State); ***1083-94*** (Reese); ***1094-1112*** (Gray). Indeed, the prosecution's evidence - and the thrust of its closing argument – was that Reese and Gray acted in concert with one another to exact revenge on the victim as the result of his perceived mistreatment of thirteen year old Lucy S., who is Reese's daughter and Gray's niece. *See* "The Prosecution's Case," *supra*. In other words, the State's theory of the crimes was that they sought revenge as family members, as opposed to having a gang-related motive. *See* ***Tr. 1071-83; 1112-35***.

Further, while trial counsel did not mention the Bloods or gangs in his closing argument, he vigorously assailed the State's case by arguing that in the two years between the incident and the trial, the State had not found "Juve, Trigger, Genesis and whoever else, all those little hooded people that were beating the brakes off of this man at the top and they don't know where they are." Counsel also urged jurors that the State had failed to establish proximate cause and that the trial evidence actually proved that the victim was killed by the administered by Brooks and these other individuals. He likewise argued that the testimony of other witnesses demonstrated that Brooks was a liar whose testimony could not be trusted. ***Tr. 1099-1102; 1105-12***.

Further, counsel argued that many of the prosecution witnesses lied on Brooks' behalf when they gave statements to police implicating Gray because they were Brooks' witnesses:

> Now, Brooks testified, and he said these were his witnesses. You know, I'm sitting here and I've been looking at this file for like the last four months. I'm convinced at this point the only person that really investigated this case is Marcellius Brooks. Marcellius Brooks is the one that came to the police and said, *'Oh, no, no, no. There was another attack.'*

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Oh, really? Well, we're looking kind of foolish right now. Tell me about that.

See, it happened that the bottom.

Tell me about that.

Well, do you got any witnesses?

Then he sends his witnesses in to tell the police about the attack that he told them about. Who are his witnesses? Mary Anderson Donetti Perry, Kara Chase. Now, when they came in, and all of them came in on the 16th of February, 2010. None of them were under oath. Now, I don't know why they all showed up together, and I'm not trying to say anything bad about these ladies. All I'm telling you is they all got in the car or whatever the case may be. They all ended up in the police department at the same time. They all gave statements.

But let me tell you, when Donetti Perry and Kara Chase got here to the courtroom this week, their stories were different. And you know why, because they had to look that the man and raise their hand and they had to go under oath. They said, *'no way I'm going to get hit with a zero-to-five perjury charge for trying to help somebody like Marcellius Brooks, who in all counts is going to walk. I am not going to do that.*

They got on that stand and what did they do? They told the truth. That's the only time that these people were under oath. The other times I'm not sure why they did what they did or how they did it or if they were influenced or whatever. ... All I'm telling you is that something happened. I do know that when they got in here, they had a great deal to say and it was inconsistent and they were under oath.

Now, it's up to you to determine how reliable those statements are, and that's your job. You're going to take in the back with you ... a statement from Kara Chase[,] a couple of them. I just want you to keep in mind that in none of those statements was Kara Chase under oath. The only time that Kara Chase swore on the Bible -- and you heard what Marcellius Brooks said, he said, *'Yeah, I was lying but not on the Bible.'* The only time Kara Chase was under oath was when she sat on that stand and she told you all what she remembered occurring occurred on the 13th of February on that day.

Tr. 1102, line 18 – 1105, line 3 (emphasis in original).

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Earlier, Reese's counsel argued her defense of innocence and that she had only acted in defense of her thirteen year old daughter, whom the victim assaulted. As pertains to the present allegation, her attorney argued in pertinent part, that

> [Sgt. Pegram] wants it both ways. He wants to have you understand that there's a lot of problems in [the apartment complex]. It's difficult to get statements out of the [apartment complex], it's hard to believe anyone in [the apartment complex], but that everyone in this case is believable and every statement in this case is credible. It's just ordinarily they're not, but 'we have everything in this case.' I think you can certainly question that.

Tr. 1086, line 20 – 1087, line 1.

Reese's counsel also assailed the credibility of prosecution witnesses Donetti Perry and Mary Anderson:

> I'd also like to bring up two of the witnesses that did say they see the incident at F and G building, Donetti Perry. You can certainly judge the credibility of Miss Perry. She was here on the witness stand. [She] came to say what she was going to say, but once she had said what she observed she couldn't elaborate. She couldn't give you any more details. When pressed, she was unsure of how far away, what her angle of vision was, what exactly the distance. I think that credibility in itself could be called into question.
>
> Mary Anderson, another witness. She came to testify as to what she saw. Also could not tell you how far away she was, and that at one point she said she was twenty-five feet away, at another point she said she was one foot away. She also testified that the entire time she was wearing reading glasses, which I think would be very difficult to see something that's happening twenty-five feet away. If she were only one foot away, I think it would be even more difficult.

Tr. 1087, line 22 – 1088, line 19.

Thus, counsel was able to argue Brooks' control over key prosecution witnesses who lived in the apartment complex and thoroughly attack their credibility, without further mention of gang involvement. Further, the absence of prejudice is underscored by the presence of overwhelming evidence of Gray's guilt, as discussed. See *Strickland*, 466 U.S. at 696. For the foregoing reasons,

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the Court finds that Gray cannot show either deficient performance under *Strickland* or that he was prejudiced by counsel's alleged error.

6. Counsel's failure to object to the State's closing argument as burden-shifting. (Ground f).

The Court also finds that Gray has failed to prove either deficient performance or resulting prejudice based upon counsel's failure to object to the State's closing argument as burden-shifting.

Specifically, he claims that the following comments by the Assistant Solicitor shifted the burden of proof to him to disprove his guilt:

> Now, I'm almost done. I want to talk to you a little bit about being a juror. We all get instructions on how to be lawyers. We go to law schools. Y'all are professionals, you have instructions on how to do your jobs. Nobody gives instructions on how to be jurors. We put you twelve strangers in here and say go figure it out. So I do want to give you instructions, look at the evidence, listen to what you heard, remember what you heard. Go back there and discuss it because at the end of the day, there is absolutely no evidence that supports Robin Reese and Henry Gray of being innocent.

Tr. 1133, lines 6-18.

Gray testified at the PCR hearing that he thought that counsel should have objected to the prosecution's closing argument, but counsel did not object. ***PCR Tr. 21; 33.*** Counsel did not recall whether he had objected to the State's closing argument. ***PCR Tr. 53-54.***

The United States Supreme Court has made clear that "...it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988). Therefore, a criminal defendant is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). *See also Humphries v. State,* 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("Improper comments do not automatically require reversal if

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they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument"); *State v. Brisbon*, 323 S.C. 324, 474 S.E.2d 433 (1996) (The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial).

The standard in *Donnelly* is a very high standard for a defendant to meet. "'[I]t is not enough that the remarks were undesirable or even universally condemned.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). *See also Parker v. Matthews*, 567 U.S. 37, 45 (2012); *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). "In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." *United States v. Young*, 470 U.S. 1, 12 (1985).[30]

Applying this standard to the challenged comments, the Court finds that Gray cannot show either deficient performance or prejudice under *Strickland* because he has not proven that the challenged remarks were so prejudicial that they deprived him of a fair trial under *Donnelly*. *See* 416 U.S. at 637; *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. The Court rejects Gray's contention that the challenged portion of the State's closing argument improperly shifted the burden of proof to him. In doing so, the Court is mindful that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting

[30] As the Court explained in *Robinson*: "In *United States v. Young* and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor's personal opinion as to the defendant's guilt were improper, but we held that, in context, those statements did not necessitate reversal." Rather, in both cases, the Court held that the accused must prove that the remarks deprived him of due process. *Robinson*, 485 U.S. at 33 n. 55.

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through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U.S. at 647.

Additionally, the challenged remarks were confined to the record and its reasonable inferences and they did not involve either a direct or indirect comment on Gray's exercise of his right not to testify. Rather, a fair reading of Assistant Solicitor Sampson's comments reflects that she was urging jurors that neither the expert evidence presented by both defendants nor the other evidence presented by Reese created a reasonable doubt as to the guilt of either defendant. This construction of the comments is supported by Deputy Solicitor Campbell's acknowledgement, while opening on the law, that "the burden of proof is on the State of South Carolina to prove this defendant's guilt beyond a reasonable doubt, and I submit, ladies and gentlemen, in this case, ... perhaps more than any other[,] that is a burden the State welcomes based on this evidence. Proof beyond a reasonable doubt." ***Tr. 1056, lines 14-20***. And, the State never suggested that the burden of proof was on anyone but the State. ***Tr. 1051-83; 1112-35***.

This Court's interpretation of the challenged remarks is further supported by the fact Assistant Solicitor Sampson expressly addressed the expert testimony presented by both defendants and pointed out that their expert testimony did not create a dispute as to the cause of death. ***Tr. 1131-32***. The Court further finds that the challenged comments were a fair response to the closing arguments of both Reese and trial counsel. *See Young*, 470 U.S. at 12. Counsel for Reese argued that the State had not met its burden of proof, that her testimony was credible, and that rather than seeking revenge against the victim, she was merely a mother trying to protect her daughter. Reese's counsel further argued that she had fallen when she tried to kick him and had merely flung the iron chair. *See* ***Tr. 1084; 1091-92***.

Gray's counsel likewise argued that the State had not met its burden of proof. *See* ***Tr. 1095; 1110***. Counsel also argued that the State had conveniently ignored the presence of both Ativan and marijuana in the victim's system and suggested that these drugs impacted the victim's state of mind and actions. Counsel noted the absence of blood on the chair with which the State alleged the defendants beat the victim, and counsel pointed out that Ms. Perry testified that Gray swept the victim's legs out from under him and the victim fell in a grassy area. On the other hand, the State's expert testimony was that the victim hit his head on *concrete* (not grass) when he fell and that this caused the closed head injury. ***Tr. 1102-03***.

The Court finds that it was clearly appropriate for the Assistant Solicitor to address the arguments of opposing counsel suggesting that the State had failed to meet its burden of proof. *Id.* *See also State v. Durden*, 264 S.C. 86, 212 S.E.2d 587, 590 (1975) (" 'So long as he stays within the record and its reasonable inferences, the prosecuting attorney ... argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider' "); *State v. Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999) (the State is entitled to call into question the credibility of a defense).

Again, counsel's inability to recall why he did not object does not preclude this Court from finding that his performance was objectively reasonable under *Strickland*. *See Burt*, 571 U.S. at 23 ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'") (citing *Strickland*, 466 U.S. at 689)); *Romine*, 253 F.3d at 1357 (trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance).

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Moreover, the Court finds there could not be any conceivable prejudice to Gray resulting from the challenged comments. In addition to the previously-stated reasons, the Court finds that there was overwhelming evidence of his guilt, as discussed. Also, the trial judge's opening comments informed jurors "what the attorneys tell you in their opening statements, is not evidence in this case." Rather, he charged the jury that "[t]he evidence in this case will be presented to you by testimony, by sworn witnesses from this witness stand and any other exhibits that may be introduced during the course of the trial." ***Tr. 12-21.*** The judge subsequently charged jurors on the presumption of innocence, the State's burden of proof to prove each defendant's guilt on each charge beyond a reasonable doubt and he defined reasonable doubt as "the kind of doubt that would cause a reasonable person to hesitate to do something, and in this case, to convict." *See State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001) (holding a jury instruction explaining that "[a] reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act" was "a correct statement of South Carolina law"). ***Tr. 1138-39.*** He also defined reasonable doubt as "proof that leaves you firmly convinced of the defendant's guilt." ***Tr. 1139-40.*** *See Victor v. Nebraska*, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring in part and in judgment) ("This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly"); *State v. Darby*, 324 S.C. 114, 115-16, 477 S.E.2d 710, 710-11 (1996) (approving of this definition of reasonable doubt).

Again, because the Court must presume that "jurors follow their instructions," *Richardson*, 481 U.S. at 206; *see also Strickland*, 466 U.S. at 694 ("a court should presume ... that the judge or jury acted according to law"); *Francis*, 471 U.S. at 324 n. 9, the Court finds that the jury (1) did not consider the State's closing argument as burden-shifting and (2) did not consider Gray's failure

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to testify in reaching its verdict. Therefore, the Court finds that Gray has failed to meet his burden of proof on the current allegation.

7. Counsel "forcing" Gray to not testify at trial. (Ground g).

The Court likewise rejects Gray's allegation that counsel was ineffective because counsel "forced" him to not testify in his defense at trial. The Court finds that this claim is not supported by any credible evidence.

The record reflects that the trial judge conducted an on-the-record waiver of Gray concerning his right to testify at trial. *Accord State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991) (requiring trial judges to conduct on-the-record inquiry of whether an accused will testify). In pertinent part, the trial judge informed Gray that he had the right to testify, and that he had a Fifth Amendment right not to testify. The trial judge explained that this was a personal right, that no one could compel him to testify, and that if he chose to testify, he could be cross-examined like other witnesses on any relevant issue in the case. His credibility could be impeached with "any convictions involving dishonesty or false statement or crimes punishable by imprisonment for more than one year and this court determines that the probative value of admitting this evidence outweighs the prejudicial effect to you." The trial judge further explained that the decision to testify "must be freely, voluntarily, [and] intelligent[ly] made with knowledge of the protections given to you by the Fifth Amendment to the Constitution and the consequences of your decision to testify." ***Tr. 840-41.***

The trial judge also explained that if Gray decided not to testify, the judge would charge jurors that "they cannot give the fact that you do not testify any consideration whatsoever. That there is to be absolutely no prejudice to you because you did not testify." Of particular importance to this allegation, the trial judge explained that:

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> *It's left entirely up to you* whether or not you wish to testify. You may talk with your attorney, your family and friends, or anyone else but *the final decision will be left entirely up to you.*

Tr. 841, line 24 – 842, line 3 (emphasis added).

Gray stated that he understood the trial judge's explanation, that he did not have any questions, and that he had spoken with his lawyer about this. ***Tr. 842.*** Gray did not subsequently testify, and the trial judge instructed jurors that:

> I instruct you and emphasize the fact that the defendant Henry Gray did not testify I this case is not a factor to be considered by you in any way in your deliberations and your consideration on the question of the guilt or innocence of Henry Gray. It must not be considered by you in any manner whatsoever.
>
> A defendant has the Constitutional right to remain silent and the assertion of this right must not be considered by you in your deliberations. I repeat, under your oath, you are to draw no conclusion whatsoever from the fact that the defendant Henry Gray in this case did not testify. The fact that this defendant did not testify should not even be discussed in the jury room.
>
> [The] [b]urden of proof, as I have stated to you, ... is on the State to prove his guilt. The defendant is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt.

Tr. 1153, line 11 – 1154, line 9.

As discussed, Gray testified before this Court that he wanted to testify but that he did not because counsel was opposed to his decision. He further claimed this was the source of such disagreement that he had initially asked that counsel be relieved and another attorney appointed. However, he thereafter withdrew his request. On the other hand, trial counsel testified that the discussions he and Gray had were "somewhat pleasant," and he expressly denied advising Gray not to testify.

To the contrary, counsel testified that his defense of Gray – including obtaining Dr. Shaker's opinion - was based upon Gray's desire to testify at trial and tell his version of what

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happened. However, even though Gray repeatedly said that he wanted to tell his version of what happened, he decided that he no longer wanted to testify at trial when actually given the opportunity to do so. And, he did not tell counsel why he changed his mind.

The Court again finds that the credible evidence is counsel's testimony and that Gray's contrary testimony is not credible. Based upon the counsel's testimony and the trial judge's colloquy with Gray, the Court finds that Gray had led counsel to believe that he would testify at trial and that counsel, quite reasonably, based his defense of Gray on Gray's representations that he would testify. *See Strickland*, 466 U.S. at 691 ("inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions").

The Court further finds that Gray's responses to the trial judge were truthful and that he understood the trial judge's correct explanation that the decision of whether or not to testify was personal to him and that while he could and did receive advice from counsel about his decision, he, alone, had to make the decision. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("... the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (same, citing *Jones*); *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1 (1977) (Burger, C. J., concurring); *State v. Gunter*, 286 S.C. 556, 559, 335 S.E.2d 542, 543 (1985) ("The Fifth Amendment does not prevent a defendant from making a voluntary choice to testify, but it prohibits compelled testimony"). The Court further finds that aware of the personal nature of his rights, Gray departed from what he had previously told counsel he would do and made a voluntary, knowing, and intelligent decision not to testify for reasons he has not yet explained. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

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Additionally, the Court finds that he was not prejudiced by his exercise of his right to not testify. As noted, the trial judge's jury instructions made clear to jurors that his decision to not testify was his constitutional right and that it could not be considered in any way in their deliberations on the question of Gray's guilt or innocence. "[It is] the almost invariable assumption of the law that jurors follow their instructions." *Olano*, 507 U.S. at 740 (citing *Richardson*, 481 U.S. at 206); *see also Strickland*, 466 U.S. at 694. Accordingly, the Court finds that the jury did not consider Gray's failure to testify or offer evidence in reaching its verdict.

8. Counsel's failure to obtain a ruling on the record regarding a lesser-included charge on lynching. (Ground h).

Gray's final claim is that counsel was ineffective for not obtaining a ruling on the record regarding a lesser-included instruction to the charge of lynching in the first degree. The State moved for a directed verdict on this claim at the conclusion of the evidentiary hearing because Gray did not present any evidence in support of it. Gray's counsel did not object to the State's motion. ***PCR Tr. 55***. The Court finds that Gray, through his PCR counsel, made a voluntary, knowing and intelligent decision to abandon this allegation. *See Zerbst*, 304 U.S. at 464.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Gray has not established any constitutional violations or deprivations that would require this Court to grant his Application. Therefore, the Court denies and dismisses his PCR Application with prejudice.

The Court notes that Gray must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), he has a right to appellate counsel's assistance in seeking review of the denial of post-

conviction relief. Rule 71.1(g), SCRCP, provides that if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on his behalf. Gray is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 25th day of June, 2019.

PAUL M. BURCH
Presiding Circuit Court Judge

Chesterfield, South Carolina