

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari from Richland County
Jocelyn J. Newman, Circuit Court Judge

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S.C. SUPREME COURT

Robin Gray Reese,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appellate Case No. 2019-000141

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENT OF ISSUES ON APPEAL

I. Respondent does not take a position on the timeliness of Petitioner's Rule 59(e) motion.

II. Because Petitioner's restraints were only visible when Petitioner walked to the witness stand and evidence was overwhelming because Petitioner and codefendant killed the victim in broad daylight with multiple eyewitnesses, probative evidence supports the PCR court's finding that Petitioner did not prove ineffective assistance of counsel.

III. Because the PCR court properly determined the investigator's testimony was not bolstering, probative evidence supports the PCR court's finding that counsel was not ineffective.

IV. Probative evidence supports the PCR court's finding that counsel was not ineffective for not objecting to the officer's answer explaining why one of the individuals involved was not charged after being interviewed by the officer.

STATEMENT OF THE CASE

The jury convicted Petitioner Reese and her brother for lynching in the first degree and murder following trial on February 28 to March 2, 2012. The Honorable Thomas G. Cooper sentenced Petitioner to concurrent sentences of thirty years' imprisonment. The Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion on July 30, 2014. Petitioner subsequently filed a PCR application on September 14, 2014. The Honorable Jocelyn J. Newman denied the application by order dated November 14, 2016. Petitioner's Rule 59(e), SCRCF motion was denied and Petitioner appealed. Petitioner filed a petition for writ of certiorari raising several issues, including a complaint the order did not meet the requirements of S.C. Code § 17-27-80. The State moved to remand to remedy Petitioner's complaint about the order not complying with

section 17-27-80. This Court issued an order remanding the matter and Judge Newman issued an amended order denying relief, dated November 19, 2018. Petitioner filed a Rule 59 motion, which Judge Newman denied on January 10, 2019, and Petitioner appealed, subsequently filing a petition for writ of certiorari to this Court. This return follows.

STATEMENT OF FACTS

On February 13, 2010, Amber Hardy, the pharmacy manager at the nearby CVS pharmacy, followed a shoplifter in her vehicle while on the phone with the police when she saw four black males and a black female taking turns kicking and punching another black male on McDuffie Street. Although the beating only lasted for about “five minutes,” Hardy testified that “[i]t seemed like forever.” App. pp. 474-78; pp. 480-83; p. 490. The attackers walked away and the victim stood up unsteadily. App. pp. 477-78; pp. 489-90.

Two Columbia Police officers responded to a report of the fight. The fight already broke up, but they were told one person involved in the altercation carried a red backpack or satchel. App. pp. 175; pp. 177-78; pp. 192-96; p. 206. An officer saw someone with a red backpack enter an apartment, they went to the apartment and Valerie Goodwin told them Marcellius Brooks came to her apartment but was no longer there. App. pp. 178-79; p. 182; pp. 189-90; pp. 196-98; pp. 205-07.

The officers then received a second call about a person lying on the ground between two apartment buildings. They found an unconscious man, later identified as Kenneth Mack, lying on the ground. Mack failed to respond to a sternum rub and appeared to suffer a seizure. Mack was transported to the hospital, but pronounced brain dead shortly after arriving. App. pp. 179-81; p. 184; pp. 198-200; pp. 382-88; pp. 678-80; p. 760.

A number of witnesses testified at trial to the attacks that ultimately resulted in Mack's death. As is often the case, these eyewitnesses gave varying accounts of the attacks. The first eyewitness called by the State was Angelo "Ricky" Boyd. Boyd was sixteen years old at the time of the incident and lives on McDuffie St. On February 13, 2010, Boyd and his friend, Marcellius Brooks, headed towards Cousins Mini Mart, on Forrest Dr., a short distance from where the victim was later found. App. pp. 242-45; p. 254; pp. 523-25. They saw a man grab Lucy, Petitioner's thirteen year old daughter. When the man threw Lucy to the ground, Boyd intervened because he was friends with Lucy and her brother. Brooks tackled and held the man down. Boyd kicked the man with his boots, and at their insistence, Lucy hit him "a couple" of times. App. pp. 245-48; pp. 254-55; pp. 260-63.

Afterwards, Brooks and Boyd took Lucy to Cousins Mini Mart and told Petitioner what happened. They let her know "it was already good." Boyd and Brooks then both left the store as Petitioner appeared to be wrapping up her game. App. pp. 248-54; pp. 256-57. Malik Akbar, the store's co-owner, confirmed Applicant often played video poker at the store. App. pp. 523-25; pp. 530-31. He saw Applicant playing video poker that afternoon when a group, including Lucy and Brooks, entered to speak with Applicant while dancing around. Lucy and Applicant left a short time later. App. pp. 532-39; pp. 541-42. Police also reviewed a video of a nearby fish market corroborating Brooks went to the store and Reese used her phone as she left the store. However, technical problems prevented further use of the video. App. pp. 771-73.

Issac Weathers witnessed the first fight on February 13. "A young lady and a guy [were] arguing." They got "tangled up and they fell." Then, "a bunch of guys just went and jumped on him." Brooks was the first person to hit the man. The girl also hit him at Brooks' invitation. App. pp. 655-

57; p. 661; p. 663. After being beaten, the man “jumped up and ran.” The attackers went to the store. App. pp. 657-59; p. 664; pp. 669-70.

Donnetti Perry lived at the apartment complex, across the hall from Gray’s father. Her friend, Sanovia Thompson, came to her door about mid-afternoon on February 13, 2010, and told her something was happening outside. Perry looked outside to see Mack conversing with Gray. App. pp. 274-79. Gray, presumably unaware of the previous difficulty, asked Mack what happened to him because Mack looked like he was in a fight. When Gray received a phone call, he promptly kicked out Mack’s feet. Mack fell to the ground striking his head. App. pp. 279-81. Gray repeatedly kicked Mack while cussing, asking him what he did to Gray’s niece. Applicant joined the fracas and confirmed, “‘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.” Mack never got up or put up a fight. Nevertheless, Applicant retrieved a metal chair and both she and Gray hit Mack with the chair “two or three times.” App. pp. 281-87; p. 301; pp. 303-06. Perry could see Mack was injured “all over,” and observed blood coming from his mouth. Thompson called the police. App. pp. 287-90.

Subsequently, police seized the chair and swabbed it for DNA testing. App. pp. 444-46; pp. 448-49. Subsequent presumptive testing indicated the presence of blood on several swabs. More importantly, a partial DNA profile was developed from the bottom seat of the chair and this partial profile was a one in approximately twenty-five million match with Mack’s DNA profile. App. pp. 605-12.

Mary Anderson testified she visited her sister at the apartment complex that afternoon. She knew both Petitioner and Gray, and as she left, she saw Petitioner and Gray “beating the boy down

[on] the ground[,] stomping [him], kicking him, doing everything and beating him with an iron chair” while the victim “wasn’t moving at all.” At trial she failed to recall who used the chair, but in her statement to police, she indicated both defendants used the chair. App. pp. 347-53; p. 361; pp. 367-68; pp. 379-80. As Petitioner attacked Mack, Anderson heard Petitioner say, “motherfucker, why [did] you approach my 13-year-old?” Anderson momentarily turned away. She was concerned Petitioner and Gray were going to kill the man. Once finished with Mack, Petitioner and Gray walked off to their father’s apartment. App. pp. 353-56; p. 361; p. 368.

Kara Chase visited Synovia Thompson at the apartment complex that afternoon and were outside. Chase saw Mack, who she did not know, walking through a street in the complex. The man had a “disagreement” with Gray, who grabbed the man and told him, “you[’re] gonna talk to me.” App. pp. 393-99. Something else was said before Gray hit Mack hard enough to take Mack’s feet out from under him. Mack fell to the ground and did not get up. App. pp. 399-401; p. 403.

Chase admitted her daughter became best friends with Petitioner’s daughter by the time of trial. App. p. 402. This seems to factor in Chase’s trial testimony that deviated significantly from her statements to police. See also App. p. 421, lines 22-24 (admitting that she would like to do what she could to help the defendants). Chase claimed, “That’s where it kind of gets blurry to me because I don’t remember exactly what happened ... I know when the man hit the ground that [Gray] walked off.” Chase remembered Mack protesting, “I’m not going anywhere.” Petitioner declared, “That’s him;” and struck Mack. She also remembered telling police it looked like Mack hit his head when he fell to the ground and was “out cold” after, while “the other man continued to kick and stomp the

man in his face once the female stopped.” However, she claimed not to remember Petitioner striking Mack with a chair or even picking up a chair. App. pp. 401-07; p. 410; pp. 412-13; pp. 422-24.

During the attack, Gray hit Mack with the chair. Afterwards, Mack just lay on the ground. App. pp. 407-08; pp. 412-13. Because of the inconsistencies between Chase’s testimony and her statement to the police, the State published her February 16, 2010 statement, as follows:

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 under his feet causing the victim to hit his head on the pavement A few seconds later a female runs up the street saying "That's him." She begins kicking the man repeatedly, picking up an old metal chair, throwing it on top of the victim. The other man continued to kick and stomp the man in his face. Once the female stopped, the victim laid on the ground the whole time this was occurring.

App. p. 748, lines 1-16. She did not know the victim but identified the male attacker as “Six,” Gray’s nickname, and the female attacker as his sister. Likewise, she heard Mack say, “I am not going anywhere. Just do what you're doing to do to me here.” Further, she indicated Mack “did not have a chance to fight back or flee.” App. pp. 748-50.

Marcellius Brooks, a/k/a “Bloom,” admitted he was charged with murder, but explained he cooperated with law enforcement and testified because he was innocent of killing Mack. App. p. 572, line 1 – p. 573, line 9; p. 575, lines 3-14; p. 578, lines 16 – p. 579, line 1; p. 592, lines 14-24. Brooks lived in the apartment complex when the beatings occurred and was familiar “with the open air market ... on Forest Drive.” He was friends with Petitioner and used to be her next door neighbor. He also knew Petitioner had a daughter named Lucy. He “knew of” Gray, to whom he referred as “Six.” App. pp. 552-56; p. 580. As Brooks walked down McDuffie Street, he saw Lucy involved in an altercation with a man. They spoke and she slapped the man who picked Lucy up and

slammed her to the ground. App. pp. 556-58; p. 582. Brooks tackled the man and hit him twice, then held the man down. Brooks persuaded Lucy to kick the man several times, although Brooks was on top of the man and she could not kick him cleanly. App. pp. 558-61. Eventually, Boyd pulled Brooks off of the man who ran away from Brooks and “towards the bottom of [the complex].” The man’s lip was busted. App. pp. 562; 569; p. 583; pp. 590-91.

Brooks and Boyd walked Lucy to the open air market where Petitioner played video poker. The crowd followed them. When Brooks told Petitioner what happened, she was “upset” and asked who the man was. App. pp. 562-65; p. 597. Petitioner called someone on her cell phone as she left with Lucy, Brooks did not know who. Petitioner was mad. Brooks went to another apartment, and his mother picked him up and took him home. App. pp. 565-70. The following day, Brooks turned himself in after police called him. His charges remained pending at the time of trial and he testified he did not receive any promises or consideration for his testimony. App. pp. 570-76; pp. 578-79.

Sanovia Thompson knew Applicant for five years. App. p. 641. She testified that afternoon, she babysat her cousin and five children. The children played outside, but Thompson “was back and forth” because Chase was staying with her. Thompson was outside sweeping when she saw a man walking “with his hand over his head. He appeared to be intoxicated” App. pp. 634-37.

The man could talk, but staggered and his head bled. Gray looked at him and asked, “[w]hat happened to you?” The man “said something about some young b-i-t-c-h up the street.” Gray answered a telephone call in his father’s apartment. App. pp. 636-40. Returning, Gray’s demeanor changed, and he protested “‘you put your hand on my niece.’ He grabbed [the man] on the collar. He said, ‘we’re going to talk to my sister.’” Thompson followed the men, and found the man on the

ground. Petitioner approached, upset. App. pp. 641-44; p. 652. Thompson took the children inside and returned to see Petitioner 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.” Petitioner and Gray left the man, who never defended himself or get up. Thompson called 911. App. pp. 644-46; p. 649. At some point, Thompson noticed a neighbor’s chair in the grass instead of its usual place. App. p. 645.

Dr. Bradley Marcus, a forensic pathologist, performed an autopsy on Kenneth Mack. Dr. Marcus concluded the cause of death was a closed head injury due to blunt force trauma. 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.” App. pp. 697-702; p. 705; pp. 709-10; pp. 715-16. Dr. Marcus explained a person can live with trauma on the scalp, but a person cannot live with the hemorrhage on the brain, itself. App. pp. 702-04.

Dr. Marcus found the injuries were consistent with the “posturing observed by the EMT.” Dr. Marcus opined, “The 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 sustained in the second attack. App. pp. 705-08; p. 711; p. 718. A toxicology screen of the victim’s blood reflected marijuana and .125 mg. of Lorazepam, or Ativan in his system, which was a therapeutic level of the medication and did not contribute to the cause of death. Lorazepam is anti-anxiety medication used to relax people. App. pp. 710-13; p.725.

Dr. Clay Nichols testified he was the chief medical examiner for Richland County when the autopsy was performed. App. pp. 1006-09. Dr. Nichols reviewed Dr. Marcus' findings and the history provided. He explained "[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." App. p. 1010, lines 8-15. Dr. Nichols discussed his opinion with both the coroner's office and police, and he adhered to that opinion. App. p. 1010, lines 16-25.

Sergeant William Pegram, the lead investigator, testified Mack was already brain dead by the time he reached the hospital. App. pp. 756-58. Sergeant Pegram explained police were unaware of the second assault when Petitioner and her daughter were questioned. App. pp. 767-69; pp. 773-79. Phone records indicated a phone call from Petitioner to Brooks at 3:11 p.m. on the 13th and other calls between them that day. The State contended this showed deception because Brooks and Petitioner knew each other, whereas they tried to distance themselves from each other when interviewed. Police believed a call from Petitioner to her father's telephone at 3:07 p.m. on the 13th, corroborated information that Gray received a call before his attack on the victim. App. pp. 786-89.

For his defense, Gray presented Dr. Adel Shaker, a forensic pathologist. Dr. Shaker criticized the manner of the autopsy, but agreed the cause of death was blunt force trauma to the head and he could not determine which attack led to the death. However, Dr. Shaker opined the fatal blow could have been struck in the first attack and 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 still walk to the location where the second attack occurred prior to collapsing. App. pp.

842; pp. 847-49; pp. 852-58; pp. 864-65; pp. 890-91; p. 893. Dr. Shaker further opined the injuries he observed were not consistent with being beaten with a metal chair. Also, he hypothesized 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. App. pp. 850-51; p. 855; p. 861; p. 881; p. 887; p. 898.

Kiki Burns claimed she witnessed the first assault. App. pp. 991-94. She saw several men in hoods and a black female was also involved in the beating. After the attackers walked away, the man tried to stand. However, "he stumbled back down." Burns "went to turn around and look and he was gone." App. pp. 994-95; pp. 1000-02.

Trial counsel presented Dr. Sandra Conradi, a forensic pathologist, who opined the cause of death was a brain injury resulting from blunt force trauma to the head. App. pp. 913-14. She further opined the fatal injury was the brain injury Mack suffered from falling and being propelled onto a hard surface on the back of his head. App. p. 914, lines 8-20.

Lucy testified she went to the salon to get her nails done; but the salon was closed. A man, Mack she later learned, approached her and invited her into his house. App. pp. 917-22. Lucy went to the market to tell her mother the salon was closed. As she walked home, Mack approached her again and Lucy told him to leave her alone; however, he stopped her and started "jerking" her around. App. pp. 922-23. He also threw a snowball at her. When he grabbed her, Lucy hit him. Mack picked her up, threw her between two bushes, and they tussled. At that point, Brooks "got [Mack] off of me, hit him a couple of times and then some dudes came and jumped on him." App. p. 925. Lucy also hit him a couple of times. After the fight, Brooks took her back to the market and

they told her mother what occurred. When Petitioner and Lucy got home, Lucy cried and told her mother the man attacked her. Petitioner was also upset. App. pp. 925-27; pp. 931-32.

Petitioner testified she played a video game when Lucy returned from the nail salon. Petitioner sent Lucy home and continued playing her video game. App. pp. 934-36. Between twenty and twenty-five minutes later, Lucy came back, accompanied by Brooks and another man. Brooks told her he just pulled a man off of Lucy. Lucy was crying and wet. App. pp. 936-38; pp. 953-54; 957; pp. 960-61. Petitioner cashed her video game tickets and left with Lucy. Petitioner claimed her father answered the phone when she tried to call her brother. App. pp. 939-40; p. 953; p. 962. She called Brooks to find out what happened. App. p. 940, line 18 – p. 941, line 6.

Petitioner walked Lucy home and then looked for Lucy's attacker. Petitioner claimed that by the time she found him, he was already "[lying] on the ground and he had his hands ... covering his face." The man was "all bloodied up." She never saw the man's face but his clothes matched the description Lucy gave her. App. pp. 942-44; pp. 974-76. Petitioner claimed she slipped on ice when she tried to kick Mack. She slapped him across the face instead and told Mack to stay away from Lucy. App. p. 946, lines 8-19. According to Petitioner, this is when Gray first appeared and he helped her back to her feet. He told her to let the police handle the matter. Petitioner slung the metal chair in front of an apartment onto the grass. However, she claimed it did not hit Mack. Mack was not moving when Petitioner walked back to her apartment. App. pp. 944-45; pp. 975-76.

STANDARD OF REVIEW

Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-

81, 810 S.E.2d 836, 839-40 (2018); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40.

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel, the applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. The attorney’s performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Respondent does not take a position on the timeliness of Petitioner’s motion under Rule 59(e), SCRPC.

The Respondent does not take a position on this issue. Respondent's records indicate it received its copy of the order by mail on November 26, 2018.

II. Because Petitioner's restraints were only visible when Petitioner walked to the witness stand and evidence was overwhelming because Petitioner and codefendant killed the victim in broad daylight with multiple eyewitnesses, probative evidence supports the PCR court's finding that Petitioner did not prove ineffective assistance of counsel.

Petitioner alleges counsel was ineffective for failing to object to the trial court requiring Petitioner to wear restraints throughout trial. The PCR court made a factual finding that the shackles were visible to the jury only when Petitioner walked to the stand to testify. This exposure of restraints to the jury seems inadvertent. Petitioner complains trial counsel should have requested the trial court to make specific on-the-record findings as required by Deck v. Missouri, 544 U.S. 622 (2005). However, Deck prohibits the practice of routine use of visible shackles during the duration of the trial, and is not applicable to the inadvertent exposure in the present case. Further, Petitioner was not prejudiced by the deficiency because even if counsel objected to the brief exposure of Petitioner's restraints to the jury, it was not reasonably likely to affect the outcome of trial due to the abundant evidence of guilt and the limited exposure of the restraints to the jury.

PCR hearing

Petitioner was out on bond prior to trial. Once the trial began, Judge Cooper ordered Petitioner to be taken into custody and Petitioner wore ankle and wrist restraints but remained in street clothes. App. p. 1312. Petitioner testified as follows concerning the restraints:

Q: Okay. Ms. Reese, was there ever a time when you were – had to get up from the table in front of the jury?

A: Yes.

Q: How were you dressed at that point?

A: I was dressed in regular clothes with – I had shackles on.

Q: Okay. What type of shackles? Like you are wearing today?

A: Yes.

Q: Okay. And you had to go in front of the jury like that?

A: Yeah, I took the stand.

Q: Was the jury seated and you walked in front of them or were they outside and you were already on the stand?

A: They were seated and I walked from that side to this side.

App. p. 1297, lines 7-24. On cross-examination:

Q: Okay. And you said that you were wearing street clothes during the trial; is that correct?

A: Correct.

Q: Regular clothes

A: Yes.

Q: But you do recall walking in front of the jury wearing shackles

A: Yes, ma'am.

App p. 1301, lines 13-20. Petitioner did not present any testimony or evidence that her restraints were visible during any other part of the trial.

Gray's counsel referred to the restraints during opening argument as part of an obvious trial strategy. Gray's counsel rhetorically asked the jury, "Do any of you have any idea what the end of

the world sounds like?” before answering his own question, “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.” App. p. 162, lines 17-18; p. 162, line 24 – p. 163, line 7. Then, advising the jury of the State’s burden, Gray’s counsel argued, “[T]hat’s why this is so sad; because you see, the State is not going to be able to [prove guilt beyond a reasonable doubt].” App p. 163, lines 8-13.

Petitioner’s trial counsel confirmed both Petitioner and Gray wore restraints during the whole trial. He explained that once Judge Cooper decided to take the defendants into custody during trial, he also ruled they would be shackled. Counsel admitted, “So it wasn’t my preference.” App. p. 1312, lines 23-25. He suggested he was probably not paying close attention to opening argument when Gray’s counsel mentioned the restraints. App. p. 1313. Counsel agreed Reese wore restraints when she walked to the witness stand in front of the jury and he did not object. App. pp. 1322-23. Counsel never testified the restraints were visible to the jury during any other part of the trial.

PCR court’s findings

The PCR court observed that both Petitioner and counsel agreed the jury observed her in shackles when Petitioner walked to the witness stand, however, the PCR court found no evidence the shackles were visible to the jury at any other time during trial and noted the common practice in General Sessions to ensure shackles are not visible. App. p. 1480. The PCR court concluded as follows:

In this case, any prejudice to Applicant was minimal because the jury’s view of her restraints was extremely limited. Applicant was in

the courtroom with jurors and potential jurors for five days. Even in the largest of courtrooms in the Richland County Judicial Center, the distance between a defendant's chair and the witness stand takes mere seconds to travel. There is no evidence that the jury's quick view of the shackles resulted in prejudice. Further, any potential prejudice was limited by Trial Counsel's depiction of Applicant and was outweighed by the abundance of evidence against her (eyewitness testimony, Applicant's statement, etc.). While Trial Counsel erred in his failure to object, an objection was unlikely to affect the outcome of the trial; and the error was harmless beyond a reasonable doubt. Therefore, this portion of the PCR Application is denied.

App. pp. 1481-82.

The PCR court also addressed Petitioner's allegation counsel should have objected to Gray's opening argument finding Gray's counsel made the statement to engender sympathy for Gray. This sympathy would naturally extend to Petitioner. The PCR court noted Gray's opening statement was consistent with counsel's strategy of depicting Petitioner as a concerned mother and emphasizing the incident resulted from the victim assaulting Petitioner's child. App. p. 1487. Therefore, the PCR court concluded Petitioner did not meet her burden of proving that allegation. App. p. 1488.

Deck prohibits routine use of visible shackles

In Deck v. Missouri, 544 U.S. 622 (2005), the United States Supreme Court held routine use of visible restraints violates due process, and found visible restraints may be used only 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)). Relying on precedent concerning the guilt phase of trials, the Court concluded "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. Due to the prejudicial effect of visible shackles, “due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.” Id. at 632. 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”).

Deck emphasizes its holding is limited to the use of **visible** shackles: “Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation.” Id. at 634; see also Cole v. Roper, 623 F.3d 1183, 1193 (8th Cir. 2010) (finding defendant’s restraints did not violate due process because the defendant was not subject to visible restraints).

Harmless error analysis and the prejudice prong of Strickland still applies to the present case.

While Deck does not require a defendant to show actual prejudice to establish a due process violation, the conviction is still subject to harmless error analysis. And in the context of an ineffective assistance claim for failure to object to shackles, the PCR applicant still carries the burden of proving prejudice in accordance with Strickland.

In People v. Clyde, 961 N.E.2d 634 (N.Y. Ct. App. 2011), the New York Court of Appeals found the use of the visible restraints in that case violated due process pursuant to Deck, but found harmless error analysis should apply to the error, explaining the following:

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 New York Court of Appeals noted the overwhelming evidence in that case and then further noted, “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 of the nature of the crimes charged, than to conclude that the defendant was shackled because he was independently known to be dangerous.” Id.

State v. Mata, 668 N.W.2d 448 (Neb. 2003) bears factual similarity to this case. In Mata, the defendant wore leg shackles, which were not visible to the jury except when Mata was brought into the courtroom during jury selection. Mata needed to walk 15 to 20 feet through the courtroom and the shackles were visible to the jury, although the shackles would not have impeded his gait. Mata was otherwise unrestrained and wore plain clothes. The Nebraska Supreme Court found given the evidence in the case, “it is difficult to imagine how seeing Mata in leg restraints would have led the jury to believe Mata likely to be guilty.” The Nebraska Supreme Court found given the nature of the charges and the evidence in that case, the jury would not be surprised by the shackles and the defendant’s restraints merely called “the jury’s attention to what the jury already knew, defendant was charged with a serious crime.” Id. at 472. The Nebraska Supreme Court concluded under the totality of the record, “[I]t is evident that Mata was not additionally stigmatized by the use of leg restraints and was not prejudiced by those restraints in a way that deprived him of a fair trial.” Id.

In the instant case, Petitioner and Gray wore street clothes. Based on the PCR court's factual findings, Petitioner's restraints were only visible when she walked to the stand. No evidence was presented as to whether the restraints interfered with her gait. The PCR court noted the short distance to the witness stand at the courthouse and found the shackles would have been noticeable to the jury for mere seconds. Petitioner and Gray were both charged with murder from a brutal beating inflicted on the victim. To the extent any jurors noticed the restraints, the jury was more likely to believe the shackles were standard for any murder defendant and would not believe it was more likely Petitioner was guilty because of the shackles.

Further, Deck did not involve an ineffective assistance of counsel claim and the issue of the use of restraints in Deck did not arise from a collateral review of Deck's sentencing hearing, but was reviewed as a direct appeal after counsel objected to shackling. 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, Petitioner asserted an ineffective assistance of counsel claim under Strickland based on the failure to object to him being forced to wear visible shackles. Here, Petitioner carried the burden to prove prejudice to be entitled to relief on a Strickland claim of ineffective assistance of counsel. Therefore, the PCR court did not err in finding Petitioner failed to prove prejudice. Petitioner was required to prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Eleventh Circuit observed Deck applies to a direct appeal setting in which a showing of

routine shackling without a specific needs inquiry shifts the burden to the State to show the resultant due process violation was harmless beyond a reasonable doubt. But, Marquard observed Deck did not alter the burden of a claimant to prove prejudice for an ineffective assistance claim. Marquard v. Secretary for the Department of Corrections, 429 F.3d 1278, 1313 (11th Cir. 2005). In deciding Marquard's ineffective assistance claim regarding his shackles being visible during the penalty phase of his trial, the Eleventh Circuit determined, "After Deck, Marquard still has the burden in his IAC-shackling claim to establish a reasonable probability that, but for his trial counsel's failure to object to shackling, the result of his sentencing would have been different." Id.

Therefore, in this appeal from Petitioner's collateral attack on her conviction and sentence, Reese was required to prove that her counsel's unprofessional errors resulted in prejudice under Strickland. She failed to meet her burden of proof so the PCR court did not err.

Probative evidence supports the finding that Petitioner failed to meet her burden of proving the inadvertent and brief exposure of Petitioner's restraints to the jury was reasonably likely to affect the outcome of trial.

Additionally, Deck involved the routine use of restraints that were visible during the duration of the trial. Therefore, the present case differs from Deck because the jury's view of the shackles was inadvertent and brief. It lacked the "constant reminder of the accused's condition" present in Deck. See Estelle v. Williams, 425 U.S. 501, 504-05 (1976) (finding the practice of requiring a defendant to appear for trial in prison garb failed to serve any state interest and was unconstitutional, it was a constant reminder of the accused's condition).

This distinction was aptly made in Overstreet v. State, 877 N.E.2d 144 (Ind. 2007). In that case, the evidence indicated any observation by the jury of Overstreet in handcuffs while he was

being transported to the courtroom “was brief and inadvertent and not something the court allowed to happen on a regular basis during the trial.” Id. at 162. The Indiana Supreme Court then opined:

Deck forbids the use of visible restraints only during the guilt and penalty phases of courtroom proceedings. The Supreme Court has not addressed the use of restraints when a criminal defendant in police custody is being moved about the courthouse. Indeed throughout both the majority and dissenting opinions in Deck there is a consistent use of language clearly indicating that being shackled during the entire proceeding, as opposed to being briefly and inadvertently seen entering the courtroom in shackles, is what the constitution forbids. This Court has long determined that a defendant is not automatically entitled to relief based on jurors momentarily seeing a defendant in restraints while being transported about the courthouse.

Id. at 162.

In State v. Moore, 257 S.C. 147, 184 S.E.2d 546 (1971), the defendants were seen by jurors in shackles as they were being prepared to return to the county jail. The trial court denied the defendants’ objection, noting jurors know some defendants are in custody during trial and would need to be transported back and forth from the county jail to the courthouse. The Supreme Court upheld the trial court’s ruling, observing, “It is within the sound discretion of an officer charged with the custody of a prisoner to place handcuffs or shackles on him while being taken back and forth between the courthouse and jail.” Id.

As the PCR court noted, Reese’s shackles were visible to the jury for less than a minute of a five day trial. Counsel’s objection might have led to a curative instruction, but even absent a curative instruction, it is highly unlikely viewing Victim in shackles for seconds contributed to the jury’s verdict. Instead, there was overwhelming evidence of Petitioner’s guilt because the brutal murder occurred in broad daylight and in complete disregard of the presence of numerous

eyewitnesses. Strickland, 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”). Therefore, the PCR court correctly concluded that Petitioner failed to prove that but for counsel’s deficient performance, there was a reasonable probability of a different result.

III. Because the PCR court properly determined the investigator’s testimony was not bolstering, probative evidence supports the PCR court’s finding that counsel was not ineffective.

Petitioner alleges counsel was ineffective for not objecting to testimony elicited during the re-cross examination of the Solicitor’s investigator, Campbell Streeter. At trial, Chase deviated from the substance of her statement, including her denial she saw Petitioner throw the metal chair at Victim. She was impeached with her statement to police. Streeter testified several days before trial, he interviewed Chase and she confirmed the information in her statements was correct.

On recross-examination, counsel asked Streeter, “[W]hen you asked [Chase] those questions regarding the statements, do you think she was – did she appear nervous to you?” Streeter answered, “No, she was not nervous when she talked to me. I felt like she was being forthcoming.” App. p. 745, lines 9-13. Counsel followed up by asking if Streeter sensed Chase might have been uncomfortable. Streeter answered he did not sense that at all. App. p. 745.

Applicant alleges counsel should have objected to the answer that she was forthcoming as unresponsive and bolstering. The PCR court disagreed, finding Streeter’s answers responsive and further finding:

Viewed in the context of Trial Counsel’s insinuation that Chase may have been hesitant to confirm the content of her written statement, it is clear that Streeter’s use of the word “forthcoming” was intended to indicate that Chase had been cooperative with him. There is no

evidence that this testimony was intended to bolster Chase's testimony.

App. p. 1485.

When PCR counsel asked trial counsel if he saw any reason to object to Streeter's response, trial counsel said no. When trial counsel asked PCR counsel to explain why the answer was objectionable, PCR counsel failed to provide any explanation to trial counsel. App. p. 1315, lines 5-15. Undoubtedly, trial counsel made the same interpretation of the meaning of "forthcoming" as the PCR court.

The American Heritage Dictionary defines "forthcoming" in relevant part as: "2. a. Available when required or as promised." and "Affable and outgoing: . . . An act or instance of coming forth." American Heritage Dictionary (Houghton-Mifflin 2d College ed. 1985). The online Merriam-Webster definition of "forthcoming" in relevant part is: "2a: responsive, outgoing" and "b: characterized by openness, candidness and forthrightness." See www.merriam-webster.com/dictionary/forthcoming (visited August 28, 2019). The PCR court, trial counsel, and the jury, in the context offered, could reasonably interpret the use of forthcoming as intending to mean Chase was affable or responsive, in other words, cooperative rather than hesitant as suggested by Gray's counsel.

IV. Probative evidence supports the PCR court's finding counsel was not ineffective for not objecting to the officer's answer explaining why one of the individuals involved was not charged after being interviewed by the officer.

Petitioner complains testimony from Sergeant Pegram was bolstering and improper opinion evidence. Sergeant Pegram testified about several people he interviewed. He interviewed Brooks about his role in the first assault and the information he knew about the second assault. Sergeant

Pegram then explained Brooks identified an individual named “Little Ricky” who law enforcement determined was Angelo “Ricky” Boyd. Boyd was brought to headquarters and he provided a statement, but was not charged. App. p. 776. The prosecution then asked why not. Sergeant Pegram answered:

Because I was still trying to determine what we had and who the principal party was in the case. By law – in my opinion of the law, everybody involved in this case was guilty but I had to determine the principal parties in the case.

App. p. 777, lines 1-6. Sergeant Pegram, confirmed he charged Brooks and only interviewed Boyd.

App. p. 777, lines 7-10.

Put in proper context, the thrust of the answer was an explanation as to why Brooks was charged, and more to the point, Boyd was not. Further, the testimony elicited by the prosecution was responsive to counsel’s cross-examination of Boyd. Counsel elicited testimony that Boyd kicked Mack a couple of times during the first assault and he was not charged with anything, including lynching. He was investigated by the police and gave a statement, but was not charged with any crime. App. p. 255, line 13 – p. 256, line 2. Therefore, it was not improper for Sergeant Pegram to explain why he did not charge Boyd. See State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012) (“When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.”).

The PCR court correctly found counsel was not ineffective. The PCR court found, “Viewed in context, it is clear that the legal opinion given by Sgt. Pegram was purely in describing his interactions with Boyd and to explain why he didn’t arrest Boyd at that time; it was not a direct

commentary on Applicant's guilt and was not improper." At its core, the testimony was meant to answer why Boyd was not charged. Further, the PCR court noted that a jury was unlikely to be surprised that police officers believe in the guilt of the people they arrest, it was simply not prejudicial. The jury undoubtedly made its determination of guilt from the evidence and the consideration of the elements of the offense as provided by the trial court in its instructions. Petitioner was not prejudiced by the testimony and any objection was not reasonably likely to change the result of trial, especially in light of the evidence presented.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, the State would respectfully request permission to more fully brief the issues herein.

Respectfully submitted,

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September 4, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

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SEP 04 2019
S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
Jocelyn J. Newman, Circuit Court Judge

Appellate Case No. 2019-000141

ROBIN GRAY REESE,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

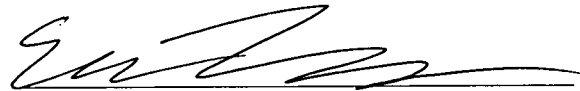
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies addressed to:

Taylor Davis Gilliam
PO Box 11589
Columbia, SC 29201

This 4th day of September, 2019.



Erik Marcusson
Legal Assistant for Respondent